

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

FILED

FEB 27 1997



Phil Lombardi, Clerk  
U.S. DISTRICT COURT

BRENDA RICHARDS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DR. JAMES SMALL, and SAINT JOHN )  
 MEDICAL CENTER, ex rel., WORKMED )  
 OCCUPATIONAL HEALTH NETWORK, )  
 )  
 Defendants. )

No. 96-C-67-B ✓

ENTERED ON DOCKET  
DATE FEB 28 1997

**ORDER**

Before the Court is the Motion for Summary Judgment filed by defendant St. John Medical Center ("St. John") (Docket No. 54). In this action, plaintiff Brenda Richards ("Richards") brings Title VII claims against St. John and Dr. James W. Small ("Small") for hostile work environment, intentional infliction of emotional distress claims against St. John and Small, and a battery claim against Small.

**A. Factual Summary**

Richards was employed by St. John as an administrative secretary in St. John's WorkMed Occupational Health Network department ("WorkMed") from August 16, 1988 until she submitted her resignation on January 27, 1995. WorkMed is a wholly owned subsidiary of St. John. From October 1, 1991 until the present, Small has been the Medical Director of WorkMed, and from October 1, 1991 until January 27, 1995, Small was Richards' supervisor. From 1991 to 1994, Small wrote several sexually explicit letters to Richards. Richards contends that these

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letters were unwelcome and offensive. On November 4, 1994, having received a memorandum from Richards which Small perceived as a threat to make public his letters to her, Small informed his supervisor, Wes Birch, Vice-President of Utica Services, Inc., about the letters he had written Richards. On November 8, 1994, Wes Birch requested Jan Slater ("Slater"), St. John's In-House Counsel, to conduct an investigation into the conduct of Small and Richards.

Slater began her investigation on November 8, 1994, first obtaining background material on Small and Richards, then interviewing and discussing the problem with them. Richards contends that Slater's investigation was a sham as Slater formed the opinion that Richards was guilty of "quid pro quo sexual harassment and blackmail" prior to interviewing her, found complicity by Richards, and was more concerned with accommodating Small, the perpetrator, than her. Richards also alleges that St. John failed to control Small even during the investigation when he made inappropriate comments to her about a tight fitting dress or her bra showing.

At the completion of the investigation, Slater drafted a Report of Investigation setting forth the following findings:

Richards is an Administrative Secretary for WorkMed and from March, 1994 to December, 1994, reported directly to Small. Prior to March, 1994, Richards reported directly to Tom Sexton, Dr. Hake and Marcy Smith. Since December, 1994, Richards has reported directly to Jan Manke.

During the period August, 1991 through the middle of 1993, Small wrote several letters to Richards of a personal and intimate nature.

Small reported that Richards had threatened to make the letters public whenever Richards was unhappy with policies or decisions administered by Small, which created acrimony between Small and Richards.

As a result of these threats Small brought the existence of the letters to the attention of his administrator in October, 1994. Subsequently an investigation ensued.

The investigation revealed that Richards initially accepted the letters without offense, but subsequently became offended by them. In mid 1993, Richards communicated her dissatisfaction concerning the letters to Small and Small stopped any further communications of a similar nature at that time. Small

has further acknowledged that no such further communications with Richards will occur.

Richards reported during the course of the investigation that her ability to work was disrupted by the letters. There is no other record or evidence of Richards having made such a report prior to this investigation.

The investigation revealed that Small has not denied Richards any privilege, benefit or condition of her employment as a result of her insistence that he cease any further communications of a personal nature.

In light of the acrimony between Richards, Small and St. John, WorkMed has offered several options to take similar or equivalent positions so as to separate the parties, all of which Richards has refused. Richards stated her preference to remain in her present position as Administrative Secretary for WorkMed.

Consequently, in December 1994, the parties were asked to reconcile their differences and attempt to work together. This they did for at least a month. However, Small is aware that Richards is having difficulties with other employees over matters unrelated to this investigation and that he may be called upon to discipline her in the future. He is concerned that any adverse employment decision affecting Richards, in which he is involved, will be viewed by Richards as somehow connected with the subject of this investigation. In light of these circumstances and, for the reasons Small brought this matter to the attention of his administrator in the first place, Small feels it is not acceptable that he and Richards remain together.

The Report then sets out the following obligations of the parties:

Small agrees as follows:

1. To cease sending or communicating to Richards, in any way, about any matter except those issues which may expressly require written or verbal communication of a business nature.
2. There shall be no further references to any of the prior communications of a non-business nature.
3. To make a diligent and good faith effort to create an amicable working environment between the parties.
4. Any and all employment decisions as relates to Richards shall be reviewed by Small's superiors.

Richards agrees as follows:

1. To cease any communication with Small other than that related to business.
2. To refrain from any reference to past communications of a personal nature and to hold such communications whether oral or in writing, in confidence.
3. To report immediately, to the appropriate WorkMed officers any conduct of Small found by Richards to be of an offensive nature.
4. To make a diligent and good faith effort to work out personal differences between herself and other WorkMed employees.

The Report concludes that, in consideration of the above promises, WorkMed shall take the following action:

1. There will be no disciplinary action taken against the parties absent a breach of the covenants set forth in this Agreement or other terms and conditions of employment as set forth in WorkMed's employee handbook.
2. WorkMed will monitor the parties' compliance with the terms and conditions of this Agreement, and as otherwise set forth in its general policies and procedures.
3. WorkMed reserves the right in its sole judgment to determine whether acts or omissions on the part of its employees constitute a violation. Should any violation be found, WorkMed reserves the right to determine what course of action is in its best interests up to and including such actions as separating the parties, involuntarily and/or the termination of one or both parties, whichever is appropriate.

Small and Richards both refused to sign the Report of Investigation as drafted. Richards claims that the Report was incorrect and one-sided, evidencing St. John's desire to protect itself and Small, and to blame her for the problem. Richards also objected to the Report's conclusion that no disciplinary action be taken against Small.

In October 1993, September 1994 and on January 27, 1995, the day Richards submitted her resignation, St. John offered Richards other employment positions outside WorkMed. Richards contends that the grade and salary of the offered transfers were lower than her existing grade of classification and salary, and therefore, the offers were not acceptable. No transfer offer or reprimand was given to Small.

St. John has a written policy prohibiting sexual harassment in the workplace which is set forth in the St. John Employee Handbook:

WHEREAS, it has been and is the policy of St. John Medical Center, Inc., that sexual harassment of or by employees, patients, medical staff appointees and others has no place and will not be tolerated in St. John Medical Center; and  
WHEREAS, the federal Equal Employee Opportunity Commission has declared

that sexual harassment constitutes illegal discrimination under Title VII of the Civil Rights Act of 1964;

NOW, THEREFORE, The Board restates its policy that sexual harassment not be tolerated and hereby directs the Chief Executive Officer to see that this policy is communicated to all affected persons working within the medical center and that adequate grievance procedures are in effect to facilitate prompt reporting of specific acts of sexual harassment that may occur in St. John Medical Center, Inc.

The Employee Handbook also provides in ¶ 21, entitled Reporting Obligation Requirement, that “All employees are obligated to report . . . incidents of harassment . . . involving patients, personnel, students, doctors, visitors or anyone, to your supervisor or other authority immediately.”

Paragraph 28 of the Employee Handbook, entitled Fair Treatment Policy, outlines a formal grievance procedure, listing the steps to be taken to report a grievance: the employee first reports to his/her immediate supervisor; if there is no satisfaction, then the employee reports to the department head; if there is still a dispute, the employee reports to Human Resources; and finally, if Human Resources cannot solve the problem, the employee has the right to take the complaint to the administrator over his/her department.

There is also a specific provision for reporting violations of hospital policy in ¶ 27 of the Employee Handbook which states the following:

Your immediate supervisor is your first line of communication to the hospital. You should note, however, that should you believe that your supervisor is violating hospital policy with respect to equal opportunity laws, sexual harassment, etc., you may feel free to report that supervisor’s conduct to the Human Resources office pursuant to the fair treatment policy outlined [above]. Part of the supervisor’s job is to instruct, counsel and guide you in your duties. Authorization for your regular paycheck, vacation, sick leave and holiday pay begins with your supervisor.

Based on the above policy and procedures, St. John asserts that Richards had an obligation and failed to report Small’s sexual harassment. Richards contends that she met her

obligation by reporting the harassment to Small who was her supervisor. Richards further claims that St. John never trained Small concerning sexual harassment or required that he attend orientation on its sexual harassment policy.

### **B. Summary Judgment Standard**

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342, 345 (10th Cir. 1986). In *Celotex*, the Supreme Court stated:

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

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts sufficient to raise a "genuine issue of material fact." *Anderson*, 477 U.S. at 247-48.

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

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

In essence, the inquiry for the Court is "whether the evidence presents a sufficient

disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson*, 477 U.S. at 250. In its review, the Court must construe the evidence and inferences therefrom in a light most favorable to the nonmoving party. *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992).

### C. Analysis

St. John argues that it is entitled to summary judgment on the following grounds: (1) any liability for the sexual harassment of Richards by Small cannot be imputed to St. John; (2) Richards cannot establish constructive discharge; and (3) Richards cannot establish that St. John’s conduct was extreme and outrageous to support a claim for intentional infliction of emotional distress. After reviewing the briefs and hearing the oral argument of the parties, the Court grants St. John’s motion as to Richards’s intentional infliction of emotional distress claim but denies the motion as to her Title VII - hostile work environment claim.

The United States Supreme Court has declined “to issue a definitive rule on employer liability” for hostile work environment, but has determined “that Congress wanted courts to look to agency principles for guidance in this area.” *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986). Following this directive, the Tenth Circuit looked to §219 of the Restatement (Second) of Agency for guidance in determining employer liability for hostile work environment claims. *See Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1417-18 (10th Cir. 1987); *Hirshfeld v. New Mexico Corrections Dep’t*, 916 F.2d 572, 576 (10th Cir. 1990). Adopting these agency principles, the Tenth Circuit concluded that liability for hostile work environment can be imputed to the employer on three alternative bases:

An employer is liable for: (1) any tort committed by an employee acting within the scope of his or her employment; (2) any tort committed by an employee in which

the employer was negligent or reckless; or (3) any tort in which the employee purported to act or speak on behalf of the employer and there was reliance upon apparent authority, or the employee was aided in accomplishing the tort by the existence of agency relation.

*Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777, 783 (10th Cir. 1995) (citing Restatement (Second) of Agency §219). As noted by the Tenth Circuit, the first agency basis - acting within the scope of employment - is inapposite in sexual harassment cases because "sexual harassment simply is not within the job description of any supervisor or any other worker in any reputable business."<sup>1</sup> *Hicks*, 833 F.2d at 1417-18. The second agency basis - the employer's negligence or recklessness - is defined as "failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known." *Hirshfeld*, 916 F.2d at 577. And the third agency basis - supervisory authority - applies when the perpetrator of the hostile work environment has "any supervisory authority over plaintiff's position" and has "invoked that authority in order to facilitate his harassment of plaintiff." *Id.* at 579.

In moving for summary judgment on Richards' Title VII claim, St. John centers its argument on negating the second agency basis for employer liability (employer negligence), and particularly relies on St. John's lack of notice of Small's sexual harassment of Richards and its prompt response to remedy the situation once it was made aware. St. John gives short shrift to the first and third agency bases of liability. As noted above, that is all that is really required regarding the first agency basis of liability because Small was not acting within the scope of

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<sup>1</sup> "Confining liability . . . to situations in which a supervisor acted within the scope of his authority conceivably could lead to the ludicrous result that employers would become accountable only if they explicitly require or consciously allow their supervisors to molest women employees." *Hicks*, 833 F.2d at 1418 (quoting *Vinson v. Taylor*, 753 F.2d 141, 151 (D.C.Cir. 1985))

employment when he sexually harassed Richards. However, St. John misconstrues the third agency basis of liability - supervisory authority - by equating it with the first (scope of employment) basis and essentially adopting the same analysis St. John applied in negating the first: *i.e.*, Small could not be acting with apparent authority in sexually harassing Richards because such conduct was contrary to St. John's policy and Richards knew that Small's conduct was inappropriate. Such a reading would not only render the third agency basis of liability superfluous, but it in effect (given the inefficacy of the first basis) would limit the relevant inquiry regarding employer liability to whether management-level employees knew or should have known of the hostile work environment (a negligence-based theory).<sup>2</sup> Contrary to St. John's analysis, the Tenth Circuit has clearly held that liability can be imputed to an employer if the perpetrator is in a supervisory position over the plaintiff and uses that authority to facilitate his harassment of the plaintiff - regardless of issues of notice to [other] management-level employees or prompt remedial response. *Hirshfeld*, 916 F.2d at 579; *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993).

This third agency basis for employer liability logically dovetails with Tenth Circuit cases on agent liability under Title VII. *Haynes v. Williams*, 88 F.3d 898 (10th Cir. 1996); *Lankford v. City of Hobart*, 27 F.3d 477 (10th Cir. 1994); and *Sauers v. Salt Lake County*, 1 F.3d 1122 (10th Cir. 1993). The Tenth Circuit, and majority, view is that Title VII liability is appropriately borne by employers, not individual supervisors. *Haynes*, 88 F.2d at 901. Thus, Title VII suits against individuals must proceed in the individual's official capacity, suing the employer, "either

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<sup>2</sup>Such an analysis would erase the legal distinction between sexual harassment perpetrated by supervisors or management-level employees, and that perpetrated by lower-level coworkers. More fundamentally, it overlooks the basic legal premise that a corporation, in this case, St. John, can only act through its agents or employees.

by naming the supervisory employees as agents of the employer or by naming the employer directly.” *Id.* at 899. The rationale for this view is that Title VII prohibits discriminatory employment practices by **employers**. 42 U.S.C. §2000e-2(a). Section 2000e(b) defines “employer” as

a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar years, **and any agent of such person. . . .**

42 U.S.C. §2000e(b) (emphasis added). Interpreting the statute, the Tenth Circuit has concluded that

an individual qualifies as an “employer” under Title VII [solely for purposes of imputing liability to the true employer] **if he or she serves in a supervisory position and exercises significant control over the plaintiff’s hiring, firing, or conditions of employment.** In such a situation, the individual operates as the alter ego of the employer, and the employer is liable for the unlawful employment practices of the individual **without regard to whether the employer knew of the individual’s conduct.**

*Haynes*, 88 F.3d at 899 (emphasis added) (quoting *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993)). Thus, in the Tenth Circuit, Title VII liability is imputed to the employer under both employer liability and agent liability cases if the perpetrator is in a supervisory position over the plaintiff and “exercises significant control over the plaintiff’s hiring, firing, or conditions of employment.” *Id.*<sup>3</sup>

This third agency basis for employer liability was not correctly addressed by St. John or Richards in the summary judgment briefs or argument, but given the partial record before it, the Court can conclude that St. John is not entitled to summary judgment on the supervisory authority

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<sup>3</sup> If the tests of imputed liability were not the same in Title VII “supervisor as perpetrator” cases, a court could reach the anomalous result of finding the employer not liable, yet the supervisor liable in his/her official capacity.

basis for employer liability under Title VII. Although a much closer call, the Court also finds factual questions regarding St. John's negligence, the second and alternative agency basis for employer liability. Finally, the Court concludes that factual issues remain regarding whether Richards was constructively discharged. Accordingly, the Court denies St. John's motion for summary judgment on Richards' Title VII hostile work environment claim.

The Court, however, finds that summary judgment in favor of St. John is proper on Richards' intentional infliction of emotional distress claim. Under Oklahoma law, liability for this tort extends only to conduct that is "beyond all possible bounds of decency" or "utterly intolerable in a civilized community." *Eddy v. Brown*, 712 P.2d 74, 77 (Okla. 1986). Nothing short of "[e]xtraordinary transgressions of the bounds of civility" will meet the extreme and outrageous conduct element of the tort. *Merrick v. Northern Natural Gas Co.*, 911 F.2d 426, 432 (10th Cir. 1990) (applying Oklahoma law). Given this high standard, the Court should determine as a threshold matter whether the alleged conduct is sufficient as a matter of law. *Daemi v. Church's Fried Chicken, Inc.*, 931 F.2d 1379, 1388 (10th Cir. 1991) (citing *Breeden v. League Services Corp.*, 575 P.2d 1374, 1376-78 (Okla. 1978)).

It is unclear from Richards' response to St. John's summary judgment motion ("Response") whether Richards is asserting an intentional infliction claim against St. John for its conduct separate from that of Small or on a respondeat superior theory based on Small's conduct, or both. In the First Amended Complaint, Richards alleges that St. John's "inaction and inappropriate response" to the sexual harassment and "St. John's knowledge of the situation and failure to remedy the actions of Dr. Small" constitute extreme and outrageous conduct. The Court finds that such clearly does not meet the extreme and outrageous standard as a matter of

law. However, in Richards' Response, to the extent there is a response, it is unclear what conduct Richards alleges is extreme and outrageous. There is no analysis or legal argument on the intentional infliction claim against St. John. The only reference to the conduct at issue is in Plaintiff's Disputed "Fact" No. 6. which is more conclusion and argument than fact:

Dr. Small's conduct was extreme and outrageous. His inappropriate and pitiful letter were embarrassing to anyone, and were disgusting to anyone who read them. He did "things" for her at work which he did not do for others. He offered to give her money in his filthy letters and said he was giving her raises because he feared retaliation, and interestingly he (Dr. Small) felt he was doing all he could to be sweet to Brenda, and Dr. Small asked Brenda if his conduct was sexual harassment, and Richards told Dr. Small his behavior was wrong. St. John felt that Dr. Small could give a great big apology and come hat in hand when they met with Brenda together. Dr. Small was out of control and continued to comment about Richards bra and dress even after all this began. Richards rebuffed his advances and never welcomed them, and would try to pull away from him. From St. John's perspective, this was due to Richards being in charge of the relationship and directed [sic] it.

*Plaintiff's Response, Disputed Fact No. 6 (citations to the record omitted).*

If Richards intended thereby to support an intentional infliction of emotional distress claim against St. John based on a respondeat superior theory, she also fails.<sup>4</sup> Unlike the agency theory applicable to her Title VII claim, St. John can be held liable on the basis of respondeat superior for Small's alleged intentional infliction of emotional distress under Oklahoma law only if Small's conduct was within the scope of employment, and "[i]t is the burden of the plaintiff to show that the employee was acting within the scope of his employment." *Rosebush v. Oklahoma Nursing Homes, Ltd.*, 867 P.2d 1241, 1245 (Okla. 1993). Plaintiff clearly has not sustain her burden. Therefore, St. John is entitled to summary judgment on Richards' intentional infliction of

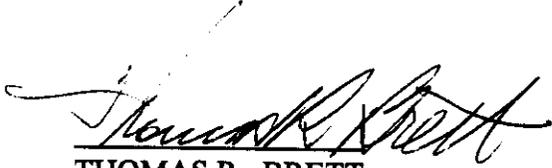
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<sup>4</sup> The Court assumes that if this were Richards' intent, the "filthy letters" would have been made part of the record in Richards' Response.

emotional distress claim against it, whether or not the claim is predicated on a respondeat superior theory of liability.

Accordingly, the Court grants St. John's motion for summary judgment on Richards' intentional infliction of emotional distress claim but denies it as to Richards' Title VII claim. (Docket No. 54). The Court will provide a final trial schedule following ruling on Small's motion for summary judgment.

ORDERED this 27<sup>th</sup> day of February, 1997.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT COURT

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

**FILED**

FEB 27 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
GUSTAVO IZABAL-DURAN, )  
)  
Defendant. )

Case No. 93-CR-97-E  
(96-C-202-E)

ENTERED ON DOCKET  
FEB 28 1997

ORDER

Now before the Court is the Motion to Reduce Sentence (Docket #193) of the Defendant Gustavo Izabal-Duran in the above captioned matter.

Izabal-Duran pled guilty to one count of Conspiracy with Intent to Distribute Marijuana in excess of 1,000 kilograms, and was sentenced to 70 months imprisonment. He did not appeal his sentence, but now argues that his sentence should be reduced because of error in the finding of the quantity of marijuana for which he was held responsible, and because he should have received a downward departure because of coercion and family responsibilities. He also requests a downward departure, asserting that he has been denied certain privileges because of his national origin. The government points out that Izabal-Duran pled guilty to the charges, and that he failed to raise these issues on appeal and is therefore procedurally barred from raising them at this point. In his reply brief, Izabal-Duran raises the issue of ineffective assistance of counsel as a defense to the procedural bar raised by the government.

Because Izabal-Duran uses his allegations of ineffective assistance of counsel in answer to the government's argument that he is barred from raising his other allegations of error, the Court will address the issue of ineffective assistance of counsel first. The ineffective assistance of counsel

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claims must be viewed under the Strickland test: 1) whether defendant's attorney's performance was not reasonably effective and 2) whether defendant's defense was prejudiced thereby. Strickland v. Washington, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Further, the Court must presume that counsel's performance was reasonably effective, and "the burden rests on the accused to demonstrate a constitutional violation." U.S. v. Cronin, 104 S.Ct. 2039, 2046 (1984). Under the Strickland rule the presumption of effective representation is a strong one. Indeed, "[j]udicial scrutiny of counsel's performance must be highly deferential." Strickland, 104 S.Ct. at 2065. The Court must "presume that the challenged action might be considered sound trial strategy." Hatch v. State of Oklahoma, 58 F.3rd 1447, 1459 (10th Cir. 1995). Moreover, the two part Strickland test applies to ineffective assistance of counsel arguments involving guilty pleas. Hill v. Lockhart, 474 U.S. 52 (1985). In the instance of a guilty plea, the prejudice requirement is satisfied if the defendant shows "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59.

Izabal-Duran's claims of ineffective assistance of counsel center around vague assertions that counsel "failed to raise the issues that defendant raised" at sentencing, and that counsel "knew nothing about the case." With respect to his claim of coercion, Izabal-Duran's allegations are conclusory, and without factual support. These allegations are therefore insufficient to support his claim of ineffective assistance of counsel. United States v. Fisher, 38 F.3d 1144, 1147 (10th Cir. 1994). The same is true of his allegations regarding errors in the quantity of marijuana for which he was held responsible. In considering Izabal-Duran's briefs together, and construing his allegations liberally, there is simply no showing that his counsel's performance was not "reasonably effective."

Finding that there is no basis for Izabal-Duran's ineffective assistance of counsel claims, the Court concludes that Izabal-Duran is procedurally barred from raising his allegations of error at this time. United States v. Cook, 997 F.2d 1312, 1320 (10th Cir. 1993).

Izabal-Duran's Motion to Reduce Sentence (Docket #70) is denied.

IT IS SO ORDERED THIS 26<sup>th</sup> DAY OF FEBRUARY, 1997.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 THE HEIRS, PERSONAL )  
 REPRESENTATIVES, EXECUTORS, )  
 ADMINISTRATORS, DEVISEES, )  
 TRUSTEES, SUCCESSORS AND )  
 ASSIGNS, IMMEDIATE AND REMOTE, )  
 KNOWN AND UNKNOWN, OF JAMES )  
 THRESHER aka HARRY JAMES )  
 THRESHER aka HARRY J. THRESHER, )  
 DECEASED, et al., )  
 )  
 Defendants. )

**FILED**

FEB 27 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Civil Case No. 95-C 733E

ENTERED CIVIL CLERK  
FEB 28 1997

ORDER

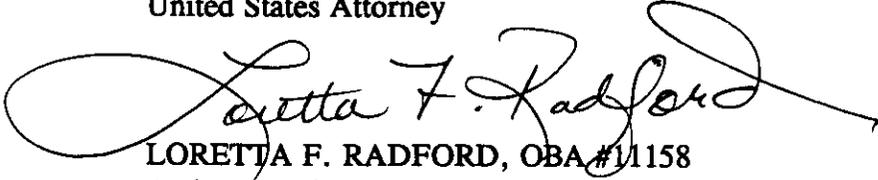
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney,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

Dated this 27<sup>th</sup> day of February, 1997.

  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

A handwritten signature in black ink, reading "Loretta F. Radford". The signature is written in a cursive style with a large, looping initial "L" and a long, sweeping tail that extends to the right.

LORETTA F. RADFORD, OBA #11158  
Assistant United States Attorney  
333 W. 4th St., Ste. 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR/esf

2/21/97

**FILED**

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

FEB 27 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MOVITA PATTERSON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 HILTI, INC., )  
 )  
 Defendant. )

Case No. 95-C-758-E

ENTERED ON DOCKET  
FEB 28 1997

**JUDGMENT**

In accord with the Order filed April 18, 1996 sustaining the Defendant's Motion for Summary Judgment, the Judgment filed April 18, 1996 awarding costs and attorney's fees in favor of the Defendant, Hilti, Inc., and against the Plaintiff, Movita Patterson, and the Declaration of Costs filed May 2, 1996, taxing costs to the Plaintiff in the amount of \$243.96, attached hereto as "Exhibit A" and incorporated herein, the Court hereby awards costs in the amount of \$243.96 to the Defendant, Hilti, Inc., to be paid by the Plaintiff, Movita Patterson.

DATED this 26<sup>th</sup> day of February, 1997.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

J. Daniel Morgan, OBA #10550  
Michelle L. Gibbens, OBA #16654  
Gable Gotwals Mock Schwabe  
2000 Boatmen's Center  
15 W. 6th St.  
Tulsa, Oklahoma 74119  
(918)582-9201

ATTORNEYS FOR DEFENDANT

24

# United States District Court

NORTHERN

DISTRICT OF

OKLAHOMA

**FILED**  
**MAY 2 1996**

MOVITA PATTERSON,  
Plaintiff,

v.

HILTI, INC.,  
Defendant.

**BILL OF COSTS**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case Number: 95-C-758-E

Judgment having been entered in the above entitled action on April 18, 1996 against Movita Patterson, Plaintiff  
Date

the Clerk is requested to tax the following as costs:

Fees of the Clerk .....	\$ _____
Fees for service of summons and subpoena .....	_____
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case .....	\$204.40
Fees and disbursements for printing .....	<del>37.50</del> 39.50
Fees for witnesses (itemize on reverse side) .....	_____
Fees for exemplification and copies of papers necessarily obtained for use in the case .....	_____
Docket fees under 28 U.S.C. 1923 .....	_____
Costs as shown on Mandate of Court of Appeals .....	_____
Compensation of court-appointed experts .....	_____
Compensation of interpreters and costs of special interpretation services under 28 U.S.C. 1828 .....	_____
Other costs (please itemize) .....	_____
<b>TOTAL</b> .....	\$ <del>541.90</del> 243.90

6-12-96 @ 10:00 AM

ALL COSTS MUST BE PAID TO THE CLERK OF COURT WITHIN 30 DAYS OF THE DATE THIS BILL OF COSTS IS ISSUED. FAILURE TO DO SO WILL RESULT IN THE BILL OF COSTS BEING DENIED. PAY IMMEDIATELY UPON RECEIPT.

**SPECIAL NOTE:** Attach to your bill an itemization and documentation for requested costs in all categories.

### DECLARATION

I declare under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this bill was mailed today with postage prepaid to:

Earl W. Wolfe

Signature of Attorney: J. Daniel Morgan

Name of Attorney: J. Daniel Morgan



For: Hilt, Inc., Defendant.

Name of Claiming Party

Date: 05/02/96

Costs are taxed in the amount of \$ 243.90 by agreement of parties and included in the judgment.

Phil Lombardi  
Clerk of Court

By: \_\_\_\_\_  
Deputy Clerk

6-12-96  
Date

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

MOVITA PATTERSON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 95-C-758-E
	)	
HILTI, INC.,	)	
	)	
Defendant.	)	

**ITEMIZATION TO BILL OF COSTS**

**Disbursements Incident to Taking Depositions**

09/11/95	Deposition of Movita Patterson .....	\$204.40
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**Disbursements for Printing/Copies**

10/31/95	Copy of Equal Employment Opportunity Commission File of Movita Patterson, with all Attachments 84 pages x \$1.00/pg. ....	84.00
11/12/95	Copy of Movita Patterson Equal Employment Opportunity Commission Filing with all Attachments 14 pages x \$1.00/pg. ....	14.00
11/19/95	Motion for Summary Judgment and Exhibits to Motion for Summary Judgment 395 pages x .10/pg. ....	39.50

<b>TOTAL DISBURSEMENTS EXPENDED BY DEFENDANT, HILTI, INC. ....</b>	<b>\$341.90</b>
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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

FEB 27 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CHESTER F. YOUNG,  
SS# : 441-34-3444

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of  
Social Security Administration,

Defendant.

No. 95-C-1115-E

ENTERED ON DOCKET

FEB 28 1997

**ORDER**

Plaintiff, Chester F. Young, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.<sup>1/</sup> Plaintiff asserts error because 1) the ALJ's decision is not supported by substantial evidence in the record and the ALJ failed to place the proper weight on the opinions of Young's treating physicians; 2) the ALJ erroneously applied the grids; and 3) the ALJ did not place the correct weight on the Department of Veteran's affairs disability rating. For the reasons discussed below, the Court **affirms** the Commissioner's decision.

**I. PLAINTIFF'S BACKGROUND**

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<sup>1/</sup> Plaintiff filed an application for disability and supplemental security insurance benefits on February 22, 1993. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge Glen E. Michael (hereafter, "ALJ") was held March 7, 1994. [R. at 41 ]. By order dated January 12, 1995, the ALJ determined that Plaintiff was not disabled. [R. at 49 ]. Plaintiff appealed the ALJ's decision to the Appeals Council. On September 8, 1995 the Appeals Council denied Plaintiff's request for review. [R. at 3 ].

Chester F. Young (Young) filed an application for disability benefits on February 22, 1993, alleging disability since January 10, 1992, due to high blood pressure, arthritis in the back, elbows and hands, severe headaches, and nosebleeds. Young was born January 4, 1937, has a high school education and some college. He was in the Air Force, and retired with 20 years service in 1975. He worked as an instrument and electrical repair leadman for fifteen years with Allied Signal. He currently receives a Veteran's Administration disability payment of \$1,879 a month due to a back injury which occurred while he was in the Air Force.

## **II. SOCIAL SECURITY LAW & STANDARD OF REVIEW**

The Commissioner has established a five-step process for the evaluation of social security claims.<sup>2/</sup> See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

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

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<sup>2/</sup> Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

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

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary<sup>3/</sup> as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

### **III. THE ALJ'S DECISION**

In this case, the ALJ determined that Plaintiff met the disability insured status requirements; that he had not engaged in substantial gainful activity since January 10, 1992; that the medical evidence established severe high blood pressure and arthritis, but that plaintiff does not have an impairment or combination of impairments listed in the regulations; that his testimony regarding pain and uncontrollable

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<sup>3/</sup> Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

hypertension is not credible; that he is not capable of performing his past relevant work because he cannot lift in excess of 50 pounds; that he has the residual functional capacity to perform the full range of medium work and is therefore not disabled.

#### IV. REVIEW

Plaintiff first argues that the ALJ ignored the evidence of his treating physicians but does not point to any particular opinion that is ignored. While the records do note Mr. Young's back and elbow condition and high blood pressure, they do not necessarily support plaintiff's position that these are disabling. One issue is the blackouts that Young testifies about, but the medical records, in particular Dr. Lee's report, indicate that this was due to a medication problem that has been resolved. Also, Plaintiff argues that the substantial evidence does not support the ALJ's determination, but the evidence he points to is his own testimony which the ALJ found to be not credible.

Defendant points out that, according to the record, plaintiff's nosebleeds and headaches were responding to treatment; that he was a heavy smoker who had been advised to stop smoking to improve his condition, but hadn't; that he had not reported his blackout spells to his treating physicians; and that there was no indication that his dizzy spells were disabling. Plaintiff also testified that he continued to work in spite of his alleged impairments because "I had to hold out till I was 55 or I'd never receive any type of retirement." In light of this record, the ALJ was correct

in concluding that plaintiff's subjective complaints were neither supported by the medical evidence nor credible.

Next, plaintiff argues that the ALJ erred in finding him not disabled based on the "grids" without the testimony of a vocational expert. He asserts that the "grids" cannot be applied to a claimant who has non-exertional impairments. He claims that he cannot perform medium work (the conclusion of the ALJ) because of his arthritic condition, severe headaches and chronic back pain.

Defendant asserts that the grids can be used even if the plaintiff has non-exertional impairments. Defendant argues that the ALJ considered the plaintiff's non-exertional limitations and properly used the grids. The grids should not be applied conclusively, and are inappropriate when "evaluating non-exertional limitations such as pain and mental impairments." Hargis v. Sullivan, 945 F.2d 1482, 1490 (10th Cir. 1991). The impairments that plaintiff relies on here, are, however, the matters on which the ALJ found plaintiff to not be credible. The Court finds no error in the ALJ's use of the grids.

Lastly plaintiff asserts that the Veteran's Administration allows him to receive disability compensation at a 100% disability rate, with a rating of 70% disability. He argues that the VA disability rating, while not binding on the commissioner, should be given great weight, Hoggard v. Sullivan, 733 F.Supp. 1465, 1469 (M.D. Fla. 1990), and points out that the ALJ made no note of the VA disability rating in his decision. Defendant argues that the determination is not binding, and that the ALJ need only consider the disability rating of another agency. Musgrave v. Sullivan, 966

F.2d 1371, 1375 (10th Cir. 1992). Defendant asserts, and the Court agrees, that the VA's determination was considered because testimony regarding the determination was presented and medical evidence from the VA is part of the record.

Accordingly, the Commissioner's decision is **AFFIRMED**.

Dated this 26<sup>th</sup> day of February 1997.

  
\_\_\_\_\_  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT



UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

FEB 27 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JOANN WIGGINTON,  
SSN: 448-58-3809

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of  
Social Security Administration,

Defendant.

No. 95-C-870-E ✓

ENTERED ON DOCKET

DATE FEB 28 1997

**ORDER**

Plaintiff, JoAnn Wigginton, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.<sup>1/</sup> Plaintiff asserts error because 1) the ALJ did not give appropriate weight to the opinion of the treating physician; 2) the ALJ ignored the fact that Wigginton cannot sustain any work activity; and 3) the ALJ abused his discretion and failed to develop the record. For the reasons discussed below, the Court **reverses** the Commissioner's decision.

**I. PLAINTIFF'S BACKGROUND**

JoAnn Wigginton seeks disability benefits alleging an inability to work since October 1, 1991 due to bipolar disorder, depression, hypertension, shortness of breath, arthritis, and intestine problems. Wigginton is 42 years old, has a G.E.D.

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<sup>1/</sup> Plaintiff filed an application for disability benefits on June 26, 1992. [R. at 20 ]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge James D. Jordan (hereafter, "ALJ") was held January 3, 1994. [R. at 20 ]. By order dated October 20, 1994, the ALJ determined that Plaintiff was not disabled. [R. at 20 ]. Plaintiff appealed the ALJ's decision to the Appeals Council. On August 10, 1995, the Appeals Council denied Plaintiff's request for review. [R. at 6 ].

(18)

education, and has worked as a custodian, yearbook pasteup artist, cashier, motel desk clerk, home care sitter, housekeeper (maid), fork lift operator, and file clerk. Plaintiff's medical history reveals that she was first hospitalized in May of 1991 in a mild psychotic state, and was diagnosed with Psychosis and bi-polar disorder. She has also been treated for psychotic episodes, schizophrenia and personality disorder. She has had a Global Assessment of Functioning (GAF) of below 50, and has a variety of physical complaints.

## II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.<sup>2/</sup> See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

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

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

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<sup>2/</sup> Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

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

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary<sup>3/</sup> as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to

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<sup>3/</sup> Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

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

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

### **III. THE ALJ'S DECISION**

The administrative law judge found that Wigginton met the disability insured status requirements, that she has not engaged in substantial gainful activity since October 1, 1991, that she does not have an impairment or combination of impairments listed in the regulations, that her testimony regarding total inability to work, including pain is not credible, that she was capable of performing work-related activities except for work involving interaction with the general public, and that she could therefore perform her past relevant work.

### **IV. REVIEW**

Plaintiff first argues that none of the opinions of her treating physicians, which found that she could not function in a work setting were rebutted by any competent medical evidence. She asserts that the ALJ's reliance on the opinion of

Dr. Goodman is erroneous because Dr. Goodman is a consulting physician, and because Dr. Goodman had not reviewed many of her medical records.

Plaintiff's also argues is that there is no evidence that she can sustain work activity over a period of time. Her case manager testified that she was not employable. Her only attempt at employment since October, 1991 lasted only a matter of months, and her hospitalization periods have been lengthy (48 days in 1991) so as to interfere with long term employment. Plaintiff asserts that the ALJ made no attempt to analyze her inability to withstand stress, or the impact of her medication on her ability to maintain employment.

The Court agrees that the ALJ improperly ignored the opinions of her treating physician and treatment team. The fact that plaintiff is incapable of maintaining employment is well documented in her medical records. The conclusion that plaintiff is capable of performing her past relevant work is not supported by substantial evidence. Accordingly, the Commissioner's decision is **reversed**.

Dated this 26<sup>th</sup> day of February 1997.

  
James O. Ellison, Senior Judge  
United States District Court

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

FEB 27 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CHESTER F. YOUNG, )  
SS# : 441-34-3444 )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
SHIRLEY S. CHATER, Commissioner of )  
Social Security Administration, )  
 )  
Defendant. )

No. 95-C-1115-E ✓

ENTERED ON CLERK

FEB 28 1997

**ORDER**

Plaintiff, Chester F. Young, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.<sup>1/</sup> Plaintiff asserts error because 1) the ALJ's decision is not supported by substantial evidence in the record and the ALJ failed to place the proper weight on the opinions of Young's treating physicians; 2) the ALJ erroneously applied the grids; and 3) the ALJ did not place the correct weight on the Department of Veteran's affairs disability rating. For the reasons discussed below, the Court **affirms** the Commissioner's decision.

**I. PLAINTIFF'S BACKGROUND**

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<sup>1/</sup> Plaintiff filed an application for disability and supplemental security insurance benefits on February 22, 1993. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge Glen E. Michael (hereafter, "ALJ") was held March 7, 1994. [R. at 41 ]. By order dated January 12, 1995, the ALJ determined that Plaintiff was not disabled. [R. at 49 ]. Plaintiff appealed the ALJ's decision to the Appeals Council. On September 8, 1995 the Appeals Council denied Plaintiff's request for review. [R. at 3 ].

(11)

Chester F. Young (Young) filed an application for disability benefits on February 22, 1993, alleging disability since January 10, 1992, due to high blood pressure, arthritis in the back, elbows and hands, severe headaches, and nosebleeds. Young was born January 4, 1937, has a high school education and some college. He was in the Air Force, and retired with 20 years service in 1975. He worked as an instrument and electrical repair leadman for fifteen years with Allied Signal. He currently receives a Veteran's Administration disability payment of \$1,879 a month due to a back injury which occurred while he was in the Air Force.

## **II. SOCIAL SECURITY LAW & STANDARD OF REVIEW**

The Commissioner has established a five-step process for the evaluation of social security claims.<sup>2/</sup> See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

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

---

<sup>2/</sup> Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

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

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary<sup>3/</sup> as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

### **III. THE ALJ'S DECISION**

In this case, the ALJ determined that Plaintiff met the disability insured status requirements; that he had not engaged in substantial gainful activity since January 10, 1992; that the medical evidence established severe high blood pressure and arthritis, but that plaintiff does not have an impairment or combination of impairments listed in the regulations; that his testimony regarding pain and uncontrollable

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<sup>3/</sup> Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

hypertension is not credible; that he is not capable of performing his past relevant work because he cannot lift in excess of 50 pounds; that he has the residual functional capacity to perform the full range of medium work and is therefore not disabled.

#### IV. REVIEW

Plaintiff first argues that the ALJ ignored the evidence of his treating physicians but does not point to any particular opinion that is ignored. While the records do note Mr. Young's back and elbow condition and high blood pressure, they do not necessarily support plaintiff's position that these are disabling. One issue is the blackouts that Young testifies about, but the medical records, in particular Dr. Lee's report, indicate that this was due to a medication problem that has been resolved. Also, Plaintiff argues that the substantial evidence does not support the ALJ's determination, but the evidence he points to is his own testimony which the ALJ found to be not credible.

Defendant points out that, according to the record, plaintiff's nosebleeds and headaches were responding to treatment; that he was a heavy smoker who had been advised to stop smoking to improve his condition, but hadn't; that he had not reported his blackout spells to his treating physicians; and that there was no indication that his dizzy spells were disabling. Plaintiff also testified that he continued to work in spite of his alleged impairments because "I had to hold out till I was 55 or I'd never receive any type of retirement." In light of this record, the ALJ was correct

in concluding that plaintiff's subjective complaints were neither supported by the medical evidence nor credible.

Next, plaintiff argues that the ALJ erred in finding him not disabled based on the "grids" without the testimony of a vocational expert. He asserts that the "grids" cannot be applied to a claimant who has non-exertional impairments. He claims that he cannot perform medium work (the conclusion of the ALJ) because of his arthritic condition, severe headaches and chronic back pain.

Defendant asserts that the grids can be used even if the plaintiff has non-exertional impairments. Defendant argues that the ALJ considered the plaintiff's non-exertional limitations and properly used the grids. The grids should not be applied conclusively, and are inappropriate when "evaluating non-exertional limitations such as pain and mental impairments." Hargis v. Sullivan, 945 F.2d 1482, 1490 (10th Cir. 1991). The impairments that plaintiff relies on here, are, however, the matters on which the ALJ found plaintiff to not be credible. The Court finds no error in the ALJ's use of the grids.

Lastly plaintiff asserts that the Veteran's Administration allows him to receive disability compensation at a 100% disability rate, with a rating of 70% disability. He argues that the VA disability rating, while not binding on the commissioner, should be given great weight, Hoggard v. Sullivan, 733 F.Supp. 1465, 1469 (M.D. Fla. 1990), and points out that the ALJ made no note of the VA disability rating in his decision. Defendant argues that the determination is not binding, and that the ALJ need only consider the disability rating of another agency. Musgrave v. Sullivan, 966

F.2d 1371, 1375 (10th Cir. 1992). Defendant asserts, and the Court agrees, that the VA's determination was considered because testimony regarding the determination was presented and medical evidence from the VA is part of the record.

Accordingly, the Commissioner's decision is **AFFIRMED**.

Dated this 26<sup>th</sup> day of February 1997.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT



UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA,

**F I L E D**

FEB 27 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ELLEN L. CAMPBELL, )  
SSN: 447-36-4902 )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
SHIRLEY S. CHATER, Commissioner of )  
Social Security Administration, )  
 )  
Defendant. )

No. 95-C-705-E ✓

ENTERED FOR RECORD  
FEB 28 1997

**ORDER**

Plaintiff, Ellen A. Campbell, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.<sup>1/</sup> Plaintiff asserts error because 1) the ALJ found that her impairment does not prevent her from performing her past work, and specifically rejected the report of Campbell's doctor, Michael Foster, M.D., who concluded that she was totally disabled; and 2) substantial evidence shows she can perform only sedentary work and is, therefore, disabled. For the reasons discussed below, the Court affirms the Commissioner's decision.

**I. PLAINTIFF'S BACKGROUND**

Ellen Campbell was born on November 14, 1938, and has received her G.E.D. She worked for Sun Oil Company as a heavy equipment operator from 1976 to August

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<sup>1/</sup> Plaintiff filed an application for disability benefits on April 8, 1993. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge Stephen C. Calvarese (hereafter, "ALJ") was held May 6, 1994. [R. at 11 ]. By order dated February 26, 1993, the ALJ determined that Plaintiff was not disabled. [R. at 11 ]. Plaintiff appealed the ALJ's decision to the Appeals Council. On June 1, 1995 the Appeals Council denied Plaintiff's request for review. [R. at 3 ].

15

27, 1992. In that job she drove trucks, operated heavy machinery, lifted 50 to 100 pounds, and stood for approximately three to three and a half hours a day. She currently receives a long-term disability payment of \$1,900 a month due to a work injury.

## **II. SOCIAL SECURITY LAW & STANDARD OF REVIEW**

The Commissioner has established a five-step process for the evaluation of social security claims.<sup>2/</sup> See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

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

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

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

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<sup>2/</sup> Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary<sup>3/</sup> as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401.

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<sup>3/</sup> Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

### **III. THE ALJ'S DECISION**

In this case, the ALJ determined that Plaintiff met the disability insured status requirements, that she had not engaged in substantial gainful activity since August 27, 1992, that she does not have an impairment or combination of impairments listed in the regulations, that her testimony regarding pain is not credible, and that she was capable of performing her past relevant work.

### **IV. REVIEW**

With respect to her allegations of error, Plaintiff notes that her treating physician, Dr Foster<sup>4/</sup>, found her to have recurrent and chronic low back muscle strain. He made objective findings of lower back paraspinal muscles with spasm/tightness on physical exam, but noted that her MRI was normal. Dr. Foster found limitations in standing, climbing, stooping, bending and lifting, and concluded that she was totally disabled from her regular occupation. Plaintiff argues that the

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<sup>4/</sup> Plaintiff saw Dr. Foster from 9-24-92 to 3-15-93.

ALJ improperly ignored the opinion of her treating physician, Dr. Foster, which is entitled to substantial weight, and can only be disregarded if specific, legitimate reasons are given. Byron v. Heckler, 742 F.2d 1232 (10th Cir. 1984), Frey v. Bowen, 816 F.2d 508 (10th Cir. 1987).

An MRI taken September 2, 1992 revealed only minimal degenerative changes and no herniated nucleus pulposus. Her first treating physician, Dr. Sami Framjee<sup>5/</sup>, described her clinical picture as "a normal organic type," with good range of motion of the lumbar spine, and no radicular symptoms or neurologic deficits. Dr Framjee advised plaintiff she could return to her normal occupational duties with no restrictions. Further, plaintiff complained only of intermittent pain, there was no evidence of sensory loss, reflex change, muscle weakness or muscle atrophy in the extremities, and plaintiff failed to follow the recommendations of her treating physician and declined to be referred to a pain specialist.

The Court finds that while the ALJ does not specifically address the opinion of Dr. Foster, he does address, and give specific reasons for rejecting, the opinion of Dr. Harrison. The opinions of Dr. Foster and Dr. Harrison are substantially similar. Moreover, "subjective complaints . . . must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The ALJ appropriately found that plaintiff's subjective complaints were not accompanied by medical evidence, and were not credible.

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<sup>5/</sup> Plaintiff saw Dr. Framjee from 8-13-92 to 9-4-92.

Accordingly, the Commissioner's decision is **AFFIRMED**.

Dated this 26<sup>th</sup> day of February, 1997.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT



**F I L E D**

FEB 28 1997

*SAZ*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

JOHNNIE RENEE McDANIEL,	)
	)
Plaintiff,	)
	)
v.	)
	)
SHIRLEY S. CHATER,	)
Commissioner of Social Security, <sup>1</sup>	)
	)
Defendant.	)

Case No: 95-C-1096-W ✓

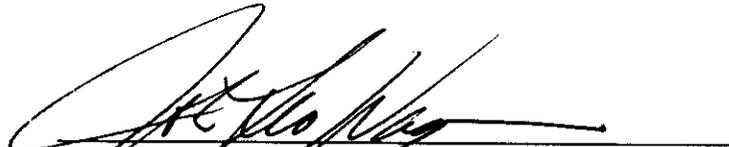
ENTERED ON DOCKET

DATE 2/28/97

**JUDGMENT**

Judgment is entered in favor of the Defendant, Shirley S. Chater, in accordance with this court's Order filed December 30, 1996.

Dated this 28<sup>th</sup> day of February, 1997.



JOHN LEO WAGNER  
UNITE STATES MAGISTRATE JUDGE

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<sup>1</sup>Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. 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.

*124*

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

**FILED**

FEB 26 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ALBERT DWAYNE MILLER, an individual, )  
)  
Plaintiff, )  
vs. )  
)  
UNUM LIFE INSURANCE COMPANY, )  
OF AMERICA, )  
)  
Defendants. )

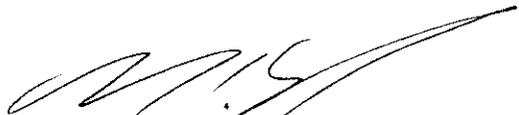
Case No. 96-CV-1187-H ✓

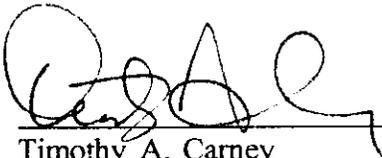
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Albert Dwayne Miller, and Defendant, UNUM Life Insurance Company of America, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby jointly stipulate for the dismissal of this cause with prejudice.

The parties are to bear their own attorney's fees and costs.

DATED: February 26th 1997.

  
\_\_\_\_\_  
Michael E. Yeksavich  
6506 South Lewis, Ste. 220  
Tulsa, Oklahoma 74136

  
\_\_\_\_\_  
Timothy A. Carney  
Gable Gotwals Mock Schwabe  
2000 Boatmen's Center  
15 West 6th Street  
Tulsa, Oklahoma 74119-5447

ATTORNEYS FOR PLAINTIFF

ATTORNEYS FOR DEFENDANT

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

**F I L E D**

FEB 27 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

BILLY JACK JENKINS, )  
 )  
 ) Petitioner, )  
 )  
 )  
 ) vs. )  
 )  
 ) RITA MAXWELL, WARDEN, )  
 )  
 ) Respondent. )

No. 96-CV-1040-B

ENTERED ON DOCKET

DATE FEB 28 1997

ORDER

The Court has for decision the Respondent's motion to dismiss Petitioner's, Billy Jack Jenkins, habeas corpus action commenced pursuant to 28 U.S.C. § 2254. The motion to dismiss asserts Petitioner has failed to exhaust his state remedies and is, therefore, not appropriate for federal court review.

On December 5, 1994, Petitioner pled guilty to the charge of sexually abusing a minor child in the District Court in and for Tulsa County, State of Oklahoma, Case No. CF-94-2484, and received a fifteen-year sentence. Petitioner did not file a direct appeal of his conviction with the Court of Criminal Appeals of the State of Oklahoma. Petitioner later filed an Application for Writ of Mandamus with the Oklahoma Court of Criminal Appeals on July 28, 1995 (Respondent's Exhibit A), and that application was denied on August 16, 1995, by the Oklahoma Court of Criminal Appeals (Respondent's Exhibit F). Petitioner then filed an Application for Post Conviction Relief with the District Court of Tulsa County (Respondent's Exhibit C), and that application was also denied (Respondent's Exhibit D).

Petitioner then filed a Petition in Error with the Court of Criminal Appeals setting out the following six proposition of error (Petition in Error)(Respondent's Exhibit C):

Proposition I: Petitioner was denied the effective assistance of counsel when counsel advised the Petitioner to waive his constitutional right to a preliminary hearing.

Proposition II: Petitioner was denied the effective assistance of counsel when counsel failed to adequately move the court to suppress the statements of the petitioner which had been coerced by Detective Ruth Lund (Attorney Canons 6 and 7).

Proposition III: The Petitioner was denied the effective assistance of counsel when counsel failed to complain or to object to the prosecutor's (Sam Cox) unprofessionalism.

Proposition IV: The Petitioner was denied a fair trial and/or hearing in violation of the Oklahoma Constitution and the United States Constitution (Fifth and Sixth Amendments) when the Honorable Judge Clifford Hopper judicially overreached his duties as trier of fact and joined the prosecution in psychologically coercing the Petitioner into pleading guilty.

Proposition V: The Petitioner was denied due process by the trial court's failure to inquire to determine whether the Petitioner understood the consequences of his plea or to determine whether the Petitioner had actually committed the crime for which he entered a plea of guilty.

Proposition VI: The Petitioner was denied a fair trial which is guaranteed by the Sixth Amendment to the United States Constitution when the prosecutor failed in his duties which were outlined in Allen v. State, Oklahoma Law Review, Volume 44 Number 3 (1991).

The Oklahoma Court of Criminal Appeals entered an order on December 21, 1995, affirming the trial court's denial of Petitioner's request for post conviction relief. (Respondent's Exhibit B).

In his habeas corpus petition, Petitioner sets out eleven grounds of error which are as

follows:

- Ground One: Plaintiff was denied the effective assistance of counsel where counsel ill-informed and ill-advised the Plaintiff to waive his statutory right to a preliminary hearing.
- Ground Two: Plaintiff was denied the effective assistance of counsel where counsel failed to adequately move the court to suppress the statements of the Plaintiff which had been coerced by Detective Ruth Lund, without the benefit of Miranda warnings.
- Ground Three: Plaintiff was denied effective assistance of counsel where counsel failed to complain or object to the prosecutor's unprofessional vindictive attack on the Plaintiff during trial proceedings.
- Ground Four: Plaintiff was denied a fair trial where the Honorable Judge Clifford Hopper, judicially overreached his duties as trier of fact and joined the prosecution in psychologically coercing the Plaintiff into pleading guilty to a crime which he did not commit.
- Ground Five: Plaintiff was not fully advised of the consequences of his plea.
- Ground Six: Plaintiff was denied a fair trial where the prosecutor failed in his obligation to seek justice not simply a conviction.
- Ground Seven: Plaintiff was denied an adequate hearing on his application for post-conviction relief where Judge Clifford Hopper failed to recuse pursuant to Oklahoma state law.
- Ground Eight: Plaintiff was denied the due process of law where the Oklahoma Court of Criminal Appeals dismissed the Plaintiff's motion for court order, ordering Judge Hopper to recuse.
- Ground Nine: Plaintiff was denied the due process to state court proceedings being inadequate in determining collateral challenges.
- Ground Ten: Plaintiff was denied a fair trial because he was subjected to outrageous governmental conduct by Detective Ruth Lund, Prosecutor Sam Cox and Judge Clifford Hopper.
- Ground Eleven: Plaintiff is being unlawfully denied his liberty in violation of the

United States Constitution because he is innocent of the charge.

Giving a liberal reading to Petitioner's assertions of error in his prior application for post-conviction relief, it appears that six, (1), (2), (3), (4), (7), and (10), grounds of error asserted in his Petition for Writ of Habeas Corpus are common or similar to those asserted in his earlier post-conviction relief petition in error. However, it appears that grounds 5, 6, 8, 9, and 11 asserted in his Petition for Writ of Habeas Corpus are new grounds of error not previously asserted by the Petitioner in his previous application for post-conviction relief and petition in error.

Under 28 U.S.C. § 2254, a federal court may not review the substantive merits of an applicant's claim for collateral relief unless "the applicant has exhausted the remedies available in the courts of the state." 28 U.S.C. § 2254(b); see Rose v. Lundy, 455 U.S. 509, 510 (1982); Picard v. Connor, 404 U.S. 270 (1971). This requirement is not a jurisdictional limitation, but is predicated on principles of judicial comity, and is "designed to protect the state courts' role in the enforcement of federal law and [to] prevent [the] disruption of state judicial proceedings." Rose, 455 U.S. at 518.

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S.Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the appropriate state appellate court, i.e., Oklahoma Court of Criminal Appeals. 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).

The Antiterrorism and Effective Death Penalty Act of 1996, Public Law No. 104-132, 110 Stat. 1217 (1996) states in relevant part:

“(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that --

(A) The applicant has exhausted the remedies available in the courts of the state; or

(B)(i) There is an absence of available state corrective process, or

(ii) Circumstances exist that render such process ineffective to protect the right of the applicant.

28 U.S.C. § 2254(b)(1).

The Petitioner has failed to demonstrate that to resort to state remedies would be useless or that there are a lack of available state avenues of redress. Miranda v. Cooper, 967 F.2d 392, 398 (10th Cir. 1992); White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988). As stated above, the Oklahoma Court of Criminal Appeals has not yet had an opportunity to rule on numerous of the alleged grounds of error currently raised by Petitioner.

Accordingly, Respondent's Motion to Dismiss for Failure to Exhaust State Remedies (Docket #5) is granted and this action is hereby dismissed without prejudice to permit Petitioner to return to the state court to exhaust his state remedies.

IT IS HEREBY SO ORDERED this 27<sup>th</sup> day of February, 1997.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

FEB 26 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )

vs. )

FRANCES MAE TIGER; RONALD )  
MATTHEW TIGER; LELAND MOSE )  
TIGER; JEANNIE BLAYLOCK; )  
CHERYL RENEE TIGER; NAOMI RUTH )  
WAMEGO; LAWANNA TIGER; )  
SHAWN DEE TIGER; JEREMY DON )  
TIGER; COUNTY TREASURER, Tulsa )  
County, Oklahoma; BOARD OF COUNTY )  
COMMISSIONERS, Tulsa County, )  
Oklahoma, )

Defendants. )

Civil Case No. 95-C 300B

ENTERED ON DOCKET  
FEB 28 1997  
DATE \_\_\_\_\_

**ORDER OF DISBURSAL**

NOW on the 21st day of February, 1997, there came on for hearing and consideration, the matter of the disbursal of \$5,089.29 received by the United States of America, on behalf of its agency, the U.S. Department of Housing and Urban Development, as funds remaining after the payment of a foreclosure judgment pursuant to the sale by the United States Marshal of certain property described in the Notice of Sale in this case.

The Court finds that due notice of this hearing on disbursement of said monies has been given and appears in the record through proof of publication filed February 13, 1997 and a declaration of mailing filed January 23, 1997.

The Court finds that the said \$5,089.29 should be disbursed as follows:

Frances Mae Tiger 1331 N. 76th E. Ave. Tulsa, OK 74115	\$2,544.65
Leland Mose Tiger 1521 Northaven Ave. Sapulpa, OK 74066	363.52
Cheryl Renee Tiger Bobo 1520 Northaven Ct. Sapulpa, OK 74066	363.52
Ronald Matthew Tiger 1520 Northaven Ct. Sapulpa, OK 74066	363.52
Jeannie Blaylock P.O. Box 398 Inola, OK 74036	363.52
Lawanna Tiger 8403 South 77th East Ave. Apt. 1236 Tulsa, OK 74133-3932	363.52
Naomi Ruth Wamego 3703 Meadowbrook Dr. Muskogee, OK 74401	363.52
Shawn Dee Tiger Rt. 2, Box 410A Sand Springs, OK 74063	181.76
Jeremy Don Tiger Rt. 2, Box 410A Sand Springs, OK 74063	181.76
	<hr/>
	\$ 5,089.29

The Court, after inspection of the record and the introduction of evidence, finds that no one appears to contest the distribution of said monies in the amounts and under the terms set forth by the Court.

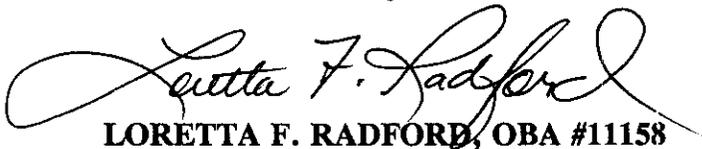
IT IS SO ORDERED.



UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #11158**  
Assistant United States Attorney  
333 W. 4th St., Ste. 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR/esf

ENTERED ON DOCKET  
DATE 2-27-97

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 GARRY DUANE MCCALL, )  
 )  
 Defendant. )

96-CV-417-K ✓  
No. 94-CR-146-K  
**FILED**

FEB 26 1997

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

O R D E R

Before the Court is the objection of the defendant to the Report and Recommendation of the United States Magistrate Judge. Defendant filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. §2255, and the Court referred one aspect to the Magistrate Judge for evidentiary hearing. An indictment was filed October 7, 1994, which charged defendant and others with twenty-three counts involving an alleged scheme to defraud banks and elderly victims through telephone solicitations. On December 8, 1994 defendant entered guilty pleas to Count 8 (wire fraud) and Count 23 (bank fraud). On April 24, 1995, by and through his appointed counsel Richard Couch, defendant filed objections to the Presentence Report (PSI) prepared by the probation officer.

The matter came on for sentencing May 19, 1995. An evidentiary hearing was held regarding defendant's objections. The Court overruled the objections and imposed a total sentence of 71 months. The remaining counts of the indictment were dismissed as to defendant. Defendant filed no appeal.

Defendant filed the present motion, asserting ineffective

5

assistance of counsel on two grounds: (1) failure at sentencing to object and challenge a four-level enhancement for a supervisory role in the offense and (2) failure to file an appeal. By Order filed September 25, 1996 the Court denied the motion as to the sentencing proceeding and referred the second issue to the Magistrate Judge.

The government had placed primary reliance upon "Exhibit F" attached to its response, which bears the title "Notice to Defense Counsel". Above the signatures of defense attorney Couch and defendant McCall, which are dated "5-23-95" (i.e., four days after sentencing) is the following statement:

I, Garry Duane McCall, after having been advised by my attorney, Richard W. Couch, of my right to appeal the judgment and sentence of the United States District Court for the Northern District of Oklahoma rendered on May 19, 1995 to the United States Court of Appeals for the Tenth Circuit, do hereby notify my attorney that:

An "X" has been placed next to the statement "I do not wish to appeal to the United States Court of Appeals for the Tenth Circuit." No mark has been placed next to the statement "I wish to appeal to the United States Court of Appeals for the Tenth Circuit." Defendant admits reading and signing the document.

The government initially argued this "apparent waiver" should foreclose defendant's assertion of ineffective counsel. The government stated "The Defendant has failed to articulate any reason that this 'Notice' should not be recognized by the Court as being representative of his wishes at the time." (Response at 9). However, in his "traverse" to the government's response, defendant

stated:

Because the movant believes, he therefore avers, that when signing this document, he was under the impression that this waiver only applied to the appeal of his conviction and not his sentence. Counsel never informed movant that this waiver applied to his sentencing. Movant had informed counsel that he wanted to appeal his sentence for the four level increase for the role in the offense. . . . Because the movant believes, he therefore avers, that counsel misled [sic] him into signing a waiver of direct appeal, thus this document should not be relied on. (Traverse at 4).

In the Court's view, this allegation created a factual issue, which required an evidentiary hearing.

The hearing was conducted October 28, 1996, and the Magistrate Judge entered his Report and Recommendation on December 13, 1996. The Magistrate Judge recommended denial of the motion. This Court's review is de novo. Gee v. Estes, 829 F.2d 1005, 1008-09 (10th Cir.1987). The Court has carefully reviewed a transcript of the evidentiary hearing, as required. Id. at 1009.

The linchpin of defendant's argument is his asserted belief that, in marking and signing the "notice to defense counsel" document, he was only waiving his right to appeal his conviction and not his right to appeal the sentence imposed. The distinction is untenable, because defendant entered a plea of guilty. There is no general right to appeal from a guilty plea, and the Court and counsel have no duty to advise on the matter. Cf. Laycock v. State of New Mexico, 880 F.2d 1184, 1187-88 (10th Cir.1989). In the case of a defendant who has pleaded guilty, Rule 32(c)(5) F.R.Crim.P.

requires only that he be advised of "any right to appeal the sentence" which may exist. (emphasis added).

The record in this case establishes with great clarity that defendant was advised at every step the nature of the appellate right which was available to him. In the Petition to Enter Plea of Guilty which defendant signed in this case, the following statement appears: "I have been advised and do understand that I have the right of appeal of any sentence imposed by the Court to the 10th Circuit Court of Appeals. Also, that any appeal must be filed no more than 10 days from date of sentence" (emphasis added). At the change of plea hearing in this case, defendant was asked if he had read the Petition to Enter Plea of Guilty, and if the representations were true, correct and complete. Under oath, before signing the document, defendant replied "Yes, sir." (Change of Plea Transcript, p.16).

At the same hearing, the Court asked defendant if he understood that under some circumstances defendant "may have the right to appeal any sentence that I impose" (emphasis added). The defendant responded affirmatively. Id. at p. 11. At the conclusion of the sentencing hearing, the Court advised defendant "you are given notice that you have 10 days in which to appeal this sentence" (emphasis added) (Sentencing Transcript at p. 63). Defendant was asked if he understood his right to appeal the sentence, and he responded affirmatively. Id. at p.64.

At the evidentiary hearing before the Magistrate Judge, the defendant denied under oath having read the reference to his right

to appeal the sentence contained in the Petition to Enter Plea of Guilty (Magistrate hearing at p.12). This contradicts his statement, also under oath, given at the Change of Plea hearing. Upon further questioning by his counsel, defendant stated he did understand he had a right to appeal from the sentence. Id. at p.13. Defendant testified that, immediately after the sentencing proceeding, he advised his counsel at the time, Richard Couch, that defendant wished to appeal the sentence. Id. at 20, 21-22. Couch responded that "We'll talk about it later." Id. at 22.

Defendant and Couch had one subsequent meeting, on May 23, 1995, when Couch brought the "notice to defense counsel" document. Defendant admitted reading the document, Id. at 25, but asserted he believed it to be a waiver of his right to appeal the conviction. This belief existed despite the fact the document plainly states defendant has been advised of his right to appeal the "judgment and sentence" of the Court (emphasis added). Defendant asserted "I really didn't understand what I was reading" Id. at 26. At one point, defendant testified the document accurately reflected his intention as to appealing the sentence, id. at 27, but upon further questioning he reverted to his conviction/sentence dichotomy. Id. at 28.

On cross-examination, defendant admitted he understands the English language, and is able to read and write in it. Id. at 36. Further, that he knew the word "sentence" in the "notice to defense counsel" document meant the sentence defendant had just received. Id. at 39.

On redirect examination, defendant stated Couch never advised him of the specific advantages or disadvantages of an appeal, the specific grounds which might be meritorious, or the probabilities of success on appeal. Id. at 50-51. Further, Couch did not "appear to understand" the distinction between appealing from the conviction and appealing from the sentence. Id. at 51. Couch told him any appeal on the sentencing would just be "spinning your wheels." Id. at 52.

Richard Couch testified that "[i]t's possible" defendant initially indicated a desire to appeal his sentence. Id. at 69. Couch stated the purpose of his "notice to defense counsel" was to obtain in writing what defendant's desires were, id. at 71, and defendant was only asked to sign it "after he advised me he didn't want to appeal his sentence. . ." id. at 73. The defendant's decision, Couch testified, was made after a discussion in which Couch pointed out that an appeal by defendant might prompt the government to cross-appeal on certain other issues. Id. Couch testified he would have had no reservations about pursuing an appeal if defendant had requested, and had left the decision up to defendant. Id. at 75. Couch had no concerns defendant had clearly and knowingly waived his right to appeal. Id. at 76. See also id. at 93 ("There was no doubt.")

In his objection to the Report and Recommendation, the defendant argues that the Magistrate Judge's focus upon "reasonableness" from Couch's point of view was incorrect. On the contrary, in Romero v. Tansy, 46 F.3d 1024, 1031 (10th Cir.), cert.

denied, 115 S.Ct. 2591 (1995), the court stated in reviewing a similar claim "the only issue we must address in resolving appellant's claim is whether [counsel]'s failure to perfect defendant's appeal was objectively unreasonable." The Court agrees with the Magistrate Judge that Couch's actions did not fall below an objective standard of reasonableness, and therefore defendant has failed to establish ineffective assistance of counsel under Strickland v. Washington, 465 U.S. 668 (1984). Couch received no information after May 23, 1995 that defendant wished to appeal his sentence. Defendant notes a call from defendant to Couch on June 5, 1995, which Couch did not return. Defendant notes this was "within the time authorized to perfect an appeal." However, defendant did not testify at the evidentiary hearing that this call related to appeal. From other testimony at the hearing, the inference is strong that the call related to recovery of defendant's bond money.

Defendant asserts he could not have fully appreciated the consequences of executing the notice since he purportedly inquired about his appellate rights immediately after executing the notice. The testimony relied upon is somewhat ambiguous. Id. at 44-45. It is unclear whether defendant was testifying that he stated, after signing the waiver, he still wished to appeal and Couch responded negatively, or whether he was testifying only that, after defendant had signed the waiver, Couch reiterated that an appeal would have only been "spinning our wheels." Under defendant's interpretation, the Court finds the testimony not credible. If defendant had

indicated a desire to pursue an appeal only to have his attorney refuse and leave, the record would reflect an immediate effort by defendant to contact his attorney or the Court. No such evidence has been presented.

Defendant also protests that Couch should have advised defendant the precise date the judgment was filed, triggering the ten-day time limit for appeal. The record reflects numerous occasions upon which defendant was personally advised that his right to appeal the sentence was subject to a ten-day limit, albeit from the date of sentencing. Rule 4(b) of the Federal Rules of Appellate Procedure provides in part that a notice of appeal filed between the time of sentencing and the time the judgment is entered "is treated as filed on the date of and after the entry." In other words, a notice filed prematurely is not invalid. Defendant's contention is without merit.

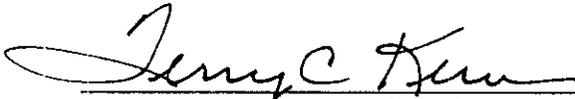
To the extent to which the evidence in this case raises the issue of whether defendant executed a "voluntary, knowing and intelligent" waiver of his right to appeal, the Court again agrees with the Magistrate Judge that defendant did so. The Court is not persuaded that defendant was in any way misled by Couch's advice, as defendant alleged in his "traverse" to the government's response to his motion. Defendant has the ability to read and write English and has thirty-six hours of junior college credit. His testimony, after the fact, that he "didn't understand" what he was reading and signing is not credible, in the absence of any sort of corroboration. While some legal terms are technical and abstruse,

a criminal "sentence" is not one of them.

Defendant has noted a few minor factual errors in the Report and Recommendation, but none which affect the conclusions set forth herein. On February 24, 1997, defendant filed a reply brief in support of his objection, which the Court has also reviewed.

It is the Order of the Court that the objection (#69) of defendant Garry Duane McCall to the Report and Recommendation of the United States Magistrate Judge, as supplemented on January 2, 1997 (#73), is hereby DENIED. The motion of the defendant pursuant to 28 U.S.C. §2255 (#43) is hereby DENIED in its entirety. The motion of the defendant for hearing (#74) is also DENIED. This Order shall constitute a final order in 96-C-417-K, the civil case number assigned to the motion.

ORDERED this 25 day of February, 1997.

  
TERRY C. VERN, Chief  
UNITED STATES DISTRICT JUDGE

ENTERED ON BOOKS  
DATE 2-27-97

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

FILED

FEB 26 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

LOUIS ARECES, Personal Representative )  
of the Estate of MARCELO ARECES, )  
Deceased, )  
) )  
Plaintiff, )  
) )  
vs. )  
) )  
AVCO CORPORATION, d/b/a TEXTRON )  
LYCOMING; GERALD J. HAIL, d/b/a DOBIES )  
HELIPORT; ROBERT E. RICHARDSON, )  
an individual, )  
) )  
Defendants. )

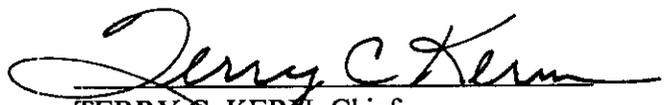
No. 95-C-1222-K ✓

**JUDGMENT**

This matter came before the Court for consideration of the Defendant AVCO Corporation d/b/a Textron Lycoming motion for summary judgment pursuant to *Fed.R.Civ.P.* 56. The issues having been duly considered and a decision having been rendered in accordance with the Order filed on February 24, 1997, the Court finds summary judgment is appropriate in favor of Defendant AVCO Corporation d/b/a Textron Lycoming.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Defendant AVCO Corporation d/b/a Textron Lycoming and against the Plaintiff.

ORDERED this 25 day of February, 1997.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET  
DATE 2-27-97

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

LOUIS ARECES, Personal Representative )  
of the Estate of MARCELO ARECES, )  
Deceased, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
AVCO CORPORATION, d/b/a TEXTRON )  
LYCOMING; GERALD J. HAIL, d/b/a DOBIES )  
HELIPORT; ROBERT E. RICHARDSON, )  
an individual, )  
 )  
Defendants. )

No. 95-C-1222-K ✓

**F I L E D**

FEB 26 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

Now before this Court is the Motion of Defendant AVCO Corporation d/b/a Textron Lycoming ("Lycoming") for summary judgment (docket # 12).

Plaintiff's claims arise out of a helicopter crash that occurred on December 19, 1993 in Argentina. Plaintiff has alleged that Lycoming designed, manufactured, and sold the helicopter's engine, and that the alleged defects in the engine proximately caused the crash. In support of its motion, Lycoming submits that plaintiff's claims against it are barred by the federal statute of repose as stated within the General Aviation Revitalization Act of 1994. This statute bars all property damage, personal injury or wrongful death actions against manufacturers of general aviation aircraft and component parts thereof when the aircraft or the accused component part is more than 18 years old at the time of the accident.

In the case management conference held on November 4, 1996, the Court granted Plaintiff additional time to respond to Lycoming's motion on the ground that the engine in question had not

yet been made available for inspection in the United States. Upon receipt and inspection of the engine components, the Plaintiff has informed the Court that he has no evidence to submit in opposition to Lycoming's Motion for Summary Judgment.

For the foregoing reasons, the assertions in Defendant AVCO Corporation d/b/a Textron Lycoming's Motion for Summary Judgment are deemed confessed, and the motion is GRANTED.

IT IS SO ORDERED THIS 25 DAY OF FEBRUARY, 1997.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE



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

RON LANCASTER, )  
)  
Plaintiff, )  
vs. )  
)  
INDEPENDENT SCHOOL DISTRICT )  
NO. 5 OF TULSA COUNTY, )  
OKLAHOMA, a/k/a JENKS )  
PUBLIC SCHOOLS; KIRBY LEHMAN, )  
individually and in his )  
official capacity as )  
superintendent of the Jenks )  
Public Schools; BILLIE MILLS, )  
TERRI ALMON, MARK SHARP, )  
MIKE BAAB AND BEN MAPLES, )  
individually and in their )  
official capacities as )  
members of the Jenks Public )  
Schools Board of Education, )  
)  
Defendants. )

Case No. 96-C-337-BU ✓

**FILED**

FEB 26 1997

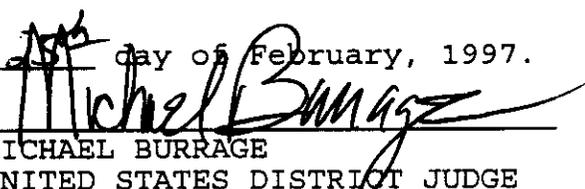
Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
DATE FEB 27 1997

**JUDGMENT**

Having dismissed without prejudice the state law claims asserted in Counts IV, V, VI and VII of Plaintiff's Complaint pursuant to 28 U.S.C. § 1367(c)(3), and having granted Defendants' Motion for Summary Judgment as to the federal law claims asserted in Counts I, II, III and VIII of Plaintiff's Complaint, the Court hereby **ORDERS** and **ADJUDGES** that judgment is entered in favor of Defendants and against Plaintiff as to Counts I, II, III and VIII of Plaintiff's Complaint and that Defendants are entitled to recover their costs of action in regard to Counts I, II, III and VIII of Plaintiff's Complaint.

Dated at Tulsa, Oklahoma, this 27th day of February, 1997.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

**F I L E D**

FEB 26 1997



Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JEANNIE JAMES, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 )  
 GRAND LAKE MENTAL HEALTH CENTER, )  
 INC.; PAULA VELLA; SIOUS GRENINGER; )  
 RONNIE BATT; TRENT HUMPHREY; CITY OF )  
 PRYOR, OKLAHOMA; BAPTIST HEALTHCARE )  
 CORPORATION; AND DR. CHRISTOPHER DELONG, )  
 )  
 Defendants. )

Case No. 96-CV-631-C ✓

ENTERED ON FILE  
FEB 27 1997

ORDER

Before the Court is the motion to dismiss filed by defendant Baptist Healthcare Corporation d/b/a Mayes County Medical Center. For the reasons set forth below the Court finds that defendant's motion to dismiss should be granted.

In her complaint, plaintiff alleges that on July 11, 1995, while residing in the Grand Lake Mental Health Center her mental health counselor, Paula Vella, requested that police officers with the City of Pryor take plaintiff to the Mayes County Medical Center under the provisions of the *Oklahoma Mental Health Emergency Detention and Protective Custody Act*, 43A O.S. § 5-206. Plaintiff contends that Ms. Vella knew that plaintiff was not a person in need of emergency detention and protective custody but that Ms. Vella arranged for plaintiff's detention purportedly to set an example to other patients that they must do as they are told by Ms. Vella. Plaintiff contends that although the Mayes County Medical



Center is not a facility designated by the state to conduct emergency mental health examinations, such an examination was conducted there by Dr. Christopher Delong. Plaintiff asserts that Dr. Delong purportedly knew that plaintiff was not in need of protective custody and emergency detention, but instead of releasing plaintiff, Dr. Delong concluded that "further evaluation was needed." Allegedly based upon this determination, the police officers took plaintiff to Eastern State Hospital where she was examined by Dr. Joe Fermo and Dr. K. W. Southern. Plaintiff contends that without justification, Dr. Southern authorized the filing of a petition requesting the Mayes County District Court to grant an extension of the 72 hour maximum protective custody and emergency detention. Plaintiff alleges that Dr. Southern caused a petition to be filed in the Mayes County District Court without the documentation required to support an extension of maximum emergency detention and protective custody. Plaintiff further asserts that based upon false and inadequate information, the Mayes County District Court granted the requested extension. Eight days after her initial detention, Plaintiff was released from Eastern State Hospital upon a finding that she was not in need of treatment.

In her complaint, Plaintiff contends that defendant Mayes County Medical Center is liable to plaintiff in damages because it: (1) is not an authorized facility to conduct emergency examinations, (2) failed to provide instructions and training to its physicians concerning Emergency Detention Orders, (3) permitted its physicians to perform examinations to determine whether treatment and emergency detention is needed, and (4) failed to comply with the safeguards provided for in the *Emergency Detention and Protective Custody Act*. Primarily plaintiff contends that the police officers failed to prepare a written

affidavit establishing, from their personal observation, the basis for plaintiff's emergency detention. Thus, according to plaintiff Mayes County Medical Center acted in deliberate indifference to plaintiff's constitutional and statutory rights.

Mayes County Medical Center seeks dismissal from plaintiff's claims by asserting that under 42 U.S.C. § 1993 it can not be held vicariously liable for the actions of others and plaintiff has failed to show its conduct involved the requisite state action to support a claim under Section 1993.

Under Section 5-207C of the Act, a police officer is not required to prepare a written affidavit, if "the officer does not make the determination to take an individual into protective custody on the basis of the officer's personal observation." In this instance the officers took plaintiff into protective custody by relying on the statements of Paula Vella. Further, plaintiff seeks liability against Mayes County Medical Center for allegedly permitting its employee to conduct an "emergency examination" of plaintiff to determine whether plaintiff "was a person in need of treatment." Yet, plaintiff admits in her complaint that such a determination was not made at that facility. The only determination made was that "further evaluation was needed." Plaintiff was taken to Eastern State Hospital where such an examination and determination may properly be made. Accordingly, since the determination to detain or treat plaintiff was not made at the Mayes County Medical Center, it cannot be held liable for purportedly making such a determination. Plaintiff was not admitted to Mayes County Medical Center, thus there is no evidence of emergency detention or protective custody on the part of Mayes County Medical Center. Plaintiff arrived at Eastern State Hospital within two hours of her

appearance at Mayes County Medical Center. Additionally, plaintiff seeks liability against Mayes County Medical Center for its failure to provide instructions and training to its physicians concerning Emergency Detention Orders. Since plaintiff admits that Mayes County Medical Center is not an authorized facility to conduct emergency mental health evaluation, there is no duty on the part of Mayes County Medical Center to conduct such training. Plaintiff also claims that Mayes County Medical Center is liable for permitting its physicians to perform examinations to determine whether treatment and detention is needed. Once again, plaintiff admits that such a determination was not made at Mayes County Medical Center, thus no liability for such conduct could arise. Finally, plaintiff contends that Mayes County Medical Center is liable for its alleged failure to comply with the procedural safeguards required under the Act. The only determination which was made at the Mayes County Medical Center was that "further evaluation was needed." Since Mayes County Medical Center had no authority under the Act to conduct state authorized emergency mental health examinations, it acted properly in referring the matter to a state institution to make that evaluation. With knowledge that police officers had taken plaintiff into protective custody on the request of a mental health counselor, it would be questionable conduct for that facility to immediately release plaintiff from protective custody. There is no allegation that medication was administered to plaintiff or that any improper medical treatment was performed. Since Mayes County Medical Center is not an authorized facility to conduct emergency medical health care treatment, it had no obligation to comply with the procedural requirements of that Act.

Accordingly, it is the order of the Court that the motion to dismiss filed by Baptist Healthcare Corporation d/b/a Mayes County Medical Center should be and hereby is GRANTED.

IT IS SO ORDERED this 21<sup>st</sup> day of February, 1997.

  
H. DALE COOK  
Senior United States District Judge

**FILED**

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

FEB 26 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 THE SUM OF EIGHTEEN )  
 THOUSAND FIVE HUNDRED )  
 NINETY-SIX AND NO/100 )  
 DOLLARS (\$18,596.00) )  
 IN UNITED STATES CURRENCY, )  
 )  
 Defendant. )

**CIVIL ACTION NO. 96-CV-944-C**

ENTERED ON FILE  
DATE FEB 27 1997

**JUDGMENT OF FORFEITURE**

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture against the defendant currency, and all entities and/or persons interested in the defendant currency, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 16th day of October 1996, alleging that the defendant currency, to-wit:

**THE SUM OF EIGHTEEN  
THOUSAND FIVE HUNDRED  
NINETY-SIX AND NO/100  
DOLLARS (\$18,596.00)  
IN UNITED STATES CURRENCY,**

is subject to forfeiture pursuant to 21 U.S.C. § 881(a)(6) because it was furnished, or intended to be furnished, in exchange for a controlled substance, or is proceeds traceable to such an exchange,

or is money used, or intended to be used, to facilitate a violation of Title 21 of the United States Code.

Warrant of Arrest and Seizure was issued by the Clerk of this Court on the 28th day of October, 1996, providing that the United States Marshals Service arrest and seize the defendant currency and retain it in their custody until the further order of this Court, and further providing that the United States Marshals Service for the Northern District of Oklahoma publish Notice of Arrest and Seizure once a week for three consecutive weeks in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in the district in which this action is pending and in which the defendant currency is located.

The United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrant of Arrest and Notice In Rem on the defendant currency and all known potential individuals or entities with standing to file a claim to the defendant currency, as follows:

**The Sum of Eighteen Thousand  
Five Hundred Ninety-six Dollars  
(\$18,596.00) In United States  
Currency**

**Served:  
November 4, 1996**

**RONALD CLAYTON ROSIER,  
served by serving Paul Brunton,  
his attorney, who agreed to  
accept service.**

**Served:  
November 12, 1996**

Melisa Lynn Payne executed a Stipulation for Forfeiture which was filed of record on October 16, 1996.

USMS 285s reflecting service upon the defendant currency and on Ronald Clayton Rosier, the only remaining individual or entity known to have standing to file a claim to the defendant currency, is on file herein.

All persons or entities interested in the defendant currency were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No persons or entities upon whom service was effected more than thirty (30) days ago have filed a claim, answer, or other response or defense herein, except Melisa Lynn Payne, who executed a Stipulation for Forfeiture filed herein on October 16, 1996, agreeing that the defendant currency is subject to forfeiture.

Publication of Notice of Arrest and Seizure occurred in the Tulsa Daily Commerce & Legal News, Tulsa, Oklahoma, the district in which this action is filed and in which the defendant currency is located, on December 5, 12, and 19, 1996.

No claims in respect to the defendant currency have been filed with the Clerk of the Court, and no other persons or entities have plead or otherwise defended in this suit as to the defendant currency, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, default exists as to the

defendant currency, and all persons and/or entities interested therein, except Melisa Lynn Payne, who agreed to the forfeiture of the defendant currency in a Stipulation for Forfeiture on file herein.

Pursuant to Department of Justice forfeiture policies all costs incurred in this action should be paid from the \$1,860.00 cost bond posted in the administrative action by Ronald Clayton Rosier, and the amount remaining after payment of all costs incurred in this action shall be returned to Ronald Clayton Rosier by mailing or delivering to his attorney, Paul D. Brunton, 610 South Main, Suite 312, Tulsa, Oklahoma 74119-1258.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that judgment of forfeiture be entered against the following-described defendant currency:

**THE SUM OF EIGHTEEN  
THOUSAND FIVE HUNDRED  
NINETY-SIX AND NO/100  
DOLLARS (\$18,596.00)  
IN UNITED STATES CURRENCY,**

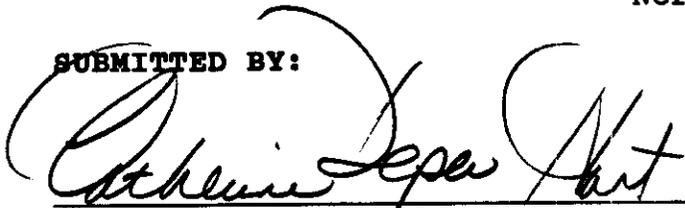
and that the defendant currency above described be, and it hereby is, forfeited to the United States of America for disposition according to law.

IT IS FURTHER ORDERED by the Court that pursuant to the United States Department of Justice asset forfeiture policies, all costs incurred in this judicial action shall be paid from the \$1,860.00 bond posted by Ronald Clayton Rosier in the

administrative forfeiture case, and the amount remaining after the payment of all costs incurred herein shall be returned to Ronald Clayton Rosier by mailing or delivering the same to Paul Brunton, attorney for Ronald Clayton Rosier, at 610 South Main, Suite 312, Tulsa, Oklahoma 74119-1258.

  
H. DALE COOK, Senior Judge  
United States District Court for the  
Northern District of Oklahoma

SUBMITTED BY:

  
CATHERINE DEPEW HART  
Assistant United States Attorney

N:\UDD\CHOOK\FC\ROSIER1\05814

ENTERED ON DOCKET  
FILE 2-26-97

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

FILED  
IN OPEN COURT

FEB 21 1997

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

CALLIE COCHRAN, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 COASTAL MART, INC., a Delaware )  
 corporation, )  
 )  
 Defendant. )

No. 96-C-132-K ✓

JUDGMENT

This action came on for jury trial before the Court, the Honorable Terry C. Kern, District Judge, presiding, and the jury having returned its verdict for the Plaintiff and against the Defendant as to the Plaintiff's hostile environment sexual harassment claim, and for the Defendant and against the Plaintiff as to the Plaintiff's Equal Pay Act claim and constructive discharge claim, and the jury having awarded \$500 in compensatory damages to the Plaintiff for emotional distress.

Judgment is therefore ENTERED for the Plaintiff and against the Defendant as to the Plaintiff's hostile environment sexual harassment claim, and judgment is ENTERED for the Defendant and against the Plaintiff as to the Plaintiff's constructive discharge claim and the Plaintiff's Equal Pay Act claim.

IT IS THEREFORE ORDERED that the Plaintiff Callie Cochran recover from the Defendant Coastal Mart, Incorporated, the sum of \$500, with post-judgment interest thereon at the rate of 5.64 percent as provided by law.

ORDERED THIS 21 DAY OF FEBRUARY, 1997.

  
TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE

43

ENTERED ON DOCKET

DATE 2-26-97

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

DEAN WITTER REYNOLDS, INC., )  
)  
Plaintiff, )

v. )

Civil No. 96-CV-847 K ✓

WILBERT H. MAXIMORE, Individually )  
and as Trustee of the ELZABAD TRUST, )  
an express trust; the ELZABAD TRUST, )  
an express trust; and the UNITED STATES )  
OF AMERICA, )

Defendants, )

UNITED STATES OF AMERICA, )

Cross Claim- )  
Plaintiff, )

v. )

WILBERT H. MAXIMORE, )  
Individually and as Trustee of the )  
ELZABAD TRUST, )  
the ELZABAD TRUST, and )  
MIDLAND MORTGAGE COMPANY, )

Defendants )  
On Cross Claim. )

**FILED**  
IN OPEN COURT

FEB 24 1997

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

JUDGMENT OF FORECLOSURE AND ORDER OF SALE

The Court hereby enters its judgment of foreclosure and order of sale pursuant to 28 U.S.C. §§ 2001 and 2002 and 26 U.S.C. §§ 7402 and 7403, as follows:

1. There are no material issues of fact with respect to the validity of the federal individual income tax assessment made against Wilbert H. Maximore for the tax year 1992.

2. The United States is entitled to judgment against Wilbert H. Maximore for his tax liability for the year 1992.

3. The United States is entitled to judgment against Wilbert H. Maximore in the amount of \$75,877.61 plus additional interest and additions accruing pursuant to law after May 14, 1996.

4. On November 21, 1994, a tax lien in favor of the United States arose under 26 U.S.C. § 6321 for liability assessed against cross claim defendant Wilbert H. Maximore for income taxes due for 1992.

5. Wilbert H. Maximore is the owner of real property described as follows:

Lot Twenty (20), Block Three (3), Kendalwood IV, an Addition to the City of Glenpool, Tulsa County, Oklahoma, according to the recorded plat thereof, and also referred to or described as 1097 East 137th Place, Glenpool, Oklahoma 74033.

6. The United States' tax lien is valid and subsisting and attaches to the real property described in paragraph 5. Section 7403 of the Internal Revenue Code (26 U.S.C.), entitles the United States to enforce that lien against the realty in order to satisfy the liability for tax, penalties, and interest of Wilbert H. Maximore .

7. The United States Marshal for the Northern District of Oklahoma, or such representative as he may employ, is authorized and directed under 28 U.S.C. §§ 2001 and 2002 to offer for public sale and to sell the real property. This judgment shall act as a special writ of execution and no further orders or process from the Court shall be required.

8. The United States Marshal or his representative is authorized to have free access to the realty and to take all actions necessary to preserve the realty until the deed to the realty is delivered to the ultimate purchaser.

9. The terms of the sale are:

a. The sale shall be free and clear of the interests of Wilbert H. Maximore, Individually and as Trustee of the Elzabad Trust, the Elzabad Trust, Midland Mortgage Co., Midfirst Mortgage Co., and the United States of America.

b. The sale shall be subject to building lines if established, all laws, ordinances and governmental regulations (including building and zoning ordinances), affecting the premises and easements and restrictions of record, if any.

c. The public sale of the realty shall be held either at the courthouse of the county, parish or city in which the realty is located, or on the premises.

d. The date and time for the sale are to be announced by the United States Marshal or his representative.

e. Notice of the sale shall be published once a week for at least four (4) consecutive weeks before the sale in at least one newspaper regularly issued and of general circulation in the county, state, or judicial district of the United States where the realty is situated and, at the discretion of the United States Marshall or his representative, by any other notice that he or his representative deem appropriate. The notice shall contain a description of the realty and shall contain the terms and conditions of sale in this judgment and decree.

f. A minimum bid of \$60,000 is set for the sale of the property. If the minimum bid is not met or exceeded, the United States Marshal or his representative may, without permission of this Court, and under the terms and conditions in this judgment and decree, hold a new public sale with a reduction of the minimum bid.

g. The successful bidder shall be required to deposit at the time of sale with the United States Marshal or his representative a minimum of ten (10) percent of his or her bid,

with the deposit to be made by certified check or cash. Before being permitted to bid at the sale, bidders shall display to the United States Marshal, or his representative, proof that they are able to comply with this requirement. No bids will be received from any person who has not presented proof that, if they are the successful bidder, they can make the deposit required by this judgment.

h. The balance of the purchase price for the realty is to be paid to the United States Marshal within sixty (60) days after the bid is accepted by a certified or cashier's check payable to the United States Marshal for the Northern District of Oklahoma. If the bidder fails to fulfill this requirement, the deposit shall be forfeited and shall be applied to cover the expenses of the sale, including commissions due under 28 U.S.C. § 1921(c), with any amount remaining to be returned to the bidder, and the realty shall again be offered for sale under the terms and conditions of the judgment and decree. The United States may bid as a credit against its judgment without tender of cash.

i. The sale of the realty shall be subject to confirmation of this Court. On confirmation of the sale, the United States Marshal shall execute and deliver a quit claim deed conveying the realty to the purchaser. On confirmation of the sale, all interests in, liens against, or claims to the realty that are held or asserted by the parties to this action are discharged and extinguished.

j. Until the Property is sold, the defendant Wilbert H. Maximore shall take all reasonable steps necessary to preserve the Property (including all buildings, improvements, fixtures and appurtenances on the realty) in its current condition including, without limitation, maintaining fire and casualty insurance policies on the Property. He shall neither commit waste against the Property nor cause or permit anyone else to do so. He shall neither do anything that

tends to reduce the value or marketability of the Property nor cause or permit anyone else to do so. He shall not record any instruments, publish any notice, or take any other action (such as running newspaper advertisements) that may directly or indirectly tend to adversely affect the value of the Property or that may tend to deter or discourage potential bidders from participating in the public auction.

k. All persons occupying the realty shall permanently leave and vacate the realty within thirty (30) days of the date this order is filed or on the date a copy of it is delivered to them, whichever is later, each taking with them their personal property (but leaving all improvements, buildings, fixtures, and appurtenances to the realty). If any person occupying the realty fails or refuses to leave and vacate the realty by the time specified in this order, the United States Marshal and his deputies are authorized and directed to take all actions that are reasonably necessary to bring about the ejection of those persons. If any person fails or refuses to remove his or her personal property from the realty from the time specified herein, the property remaining on the realty thereafter is deemed forfeited and abandoned, and the Marshal and his deputies are authorized to remove it and dispose of it in any manner the Marshal sees fit, including sale, in which case the proceeds of the sale are to be applied first to the expenses of sale, and then to the tax liabilities at issue herein.

10. When the sale is confirmed by this Court, the County Recorder of Tulsa County, Oklahoma shall permit transfer of the realty to be reflected on the County Recorder's register of title.

11. After the sale is confirmed by this Court, the United States Marshal shall distribute the amount paid by the purchaser as follows:

a. First, the Marshal shall retain an amount sufficient to cover the expenses of sale, including the commissions due under 28 U.S.C. § 1921(c) and including an amount sufficient to cover the expenses of any steps taken to secure the or maintain the realty pending sale and confirmation by the Court.

b. Second, the Marshal shall pay to the County Recorder of Tulsa County, Oklahoma the amount necessary to satisfy the property taxes owing, if any, on the date of the sale in regard to the realty.

c. Third, the Marshal shall pay to Midland Mortgage Co. the amount necessary to satisfy the outstanding mortgage it services on the realty.

d. Fourth, the Marshal shall pay to the Internal Revenue Service the amount of the outstanding liability of Wilbert H. Maximore for his 1992 tax liability.

e. Fifth, the Marshal shall pay to Wilbert H. Maximore the remainder of the proceeds of the sale.

Dated this 21 day of February, 1997.

  
UNITED STATES DISTRICT JUDGE  
HONORABLE TERRY C. KERN



ENTERED ON DOCKET  
DATE 2-26-97

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

COLONIAL PACIFIC LEASING  
CORP., an Oregon corporation,

Plaintiff,

vs.

PETE L. ABELN, individually, and d/b/a  
P&R REPAIR company,

Defendant,  
Third-Party Plaintiff,

vs.

Snap-On-Tools Company, a Wisconsin  
Corporation and Sun Electric Corp.,  
a subsidiary of Snap-On-Tools Company,

Third-Party Defendant.

No. 96-C-278-K ✓

**FILED**  
IN OPEN COURT  
FEB 25 1997

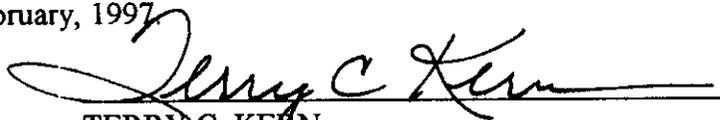
Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**ORDER**

Before the Court is the unopposed motion of the Defendant and Third-Party Plaintiff, Pete L. Abeln, d/b/a P&R Repair to dismiss this action. The Defendant has notified the Court that the alleged debt forming the basis of this action was discharged by Order of the Bankruptcy Court for the Northern District of Oklahoma on December 27, 1996. Plaintiff has likewise informed the Court of its agreement to dismiss the claim on the condition that the dismissal be without prejudice if the pending bankruptcy is a bar to Plaintiff's prosecution of the case, but is not a determination of the merits and is always subject to the potential of being removed.

For the foregoing reason, and subject to the conditions mentioned above, the motion of the Defendant is hereby GRANTED. The above-captioned case will be DISMISSED without prejudice.

ORDERED this 24 day of February, 1997

A handwritten signature in black ink, appearing to read "Terry C. Kern", written over a horizontal line.

TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET  
DATE 2-26-97

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

MYRNA S. OINES, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 SHIRLEY S. CHATER, )  
 COMMISSIONER OF SOCIAL )  
 SECURITY, )  
 )  
 Defendant. )

Case No. 96-C-29-K ✓

**FILED**  
IN OPEN COURT  
FEB 25 1997

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

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed January 29, 1997, in which the Magistrate Judge recommended that the court affirm the decision of the Administrative Law Judge ("ALJ"). 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.

IT IS THEREFORE ORDERED that the decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 24 day of February, 1997.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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

**FILED**

FEB 25 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CARL ELDRIDGE,

Plaintiff,

v.

SHIRLEY S. CHATER,  
COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

Case No. 96-C-44-B

ENTERED  
FEB 26 1997

**ORDER**

The court has for consideration the Report and Recommendation of the Magistrate Judge filed January 28, 1997, in which the Magistrate Judge recommended that the court affirm the decision of the Administrative Law Judge ("ALJ"). 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.

IT IS THEREFORE ORDERED that the decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 25 day of Feb., 1997.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

**F I L E D**

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

FEB 25 1997 *mu*

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

CLAYTON S. KROTZER, JR. and CAROL KROTZER, )  
)

Plaintiffs, )

vs. )

THE CITY OF CLEVELAND, OKLAHOMA, )  
a municipal subdivision, DENNIS WALLER, )  
BRUCE ANTHONY, and CHARLES SMITH, )

Defendants. )

ENTERED ON DOCKET

DATE 2-26-97

No. 97-CV-17-BU ✓

**ORDER APPROVING DISMISSAL WITHOUT PREJUDICE**

Now on this 25<sup>th</sup> Day of February, 1997, upon the joint Stipulation to Dismiss without Prejudice, the Court having examined the same and considered the circumstances thereof, finds that such stipulation should be accepted and a dismissal without prejudice entered.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED by the Court that the above captioned matter be dismissed without prejudice.

*Michael Burrage*  
Michael Burrage, Judge

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

ENTERED ON DOCKET  
DATE 2-25-97

GARY FREEMAN,  
Plaintiff,

vs.

THE UNIVERSITY OF TULSA, a domestic  
non-profit Oklahoma corporation  
and JOHN HARRIS, individually and as  
an employee and representative of the  
University of Tulsa,

Defendants.

No. 96-C-700-K

FILED  
IN OPEN COURT

FEB 24 1997

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

O R D E R

Now before this Court is the motion of Defendants The University of Tulsa ("TU") and John Harris for dismissal for failure to state a claim, or, alternatively, for summary judgment.

I. Statement of Facts

Plaintiff is a former Assistant Professor of Accounting at TU whose application for tenure was denied in the Fall of 1994. TU is a private, non-profit university, and John Harris is a tenured professor at TU who served as chairperson for a review committee that initially considered the Plaintiff's request for tenure. In the Fall of 1994, Plaintiff submitted an application for tenure and promotion. The application was submitted to a review committee consisting of the Defendant Harris and another individual. At this first level of review, Plaintiff received a favorable

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recommendation, and the application was presented to the faculty of the TU School of Accounting. The department faculty voted against the recommendation for tenure, and Plaintiff alleges that tenure was not recommended because Defendant Harris, without notice to the Plaintiff, made statements to the faculty which caused them to vote against recommending tenure for the Plaintiff. Additionally, Plaintiff asserts that the faculty ignored the criteria established for determining tenure qualifications, and instead based its decision on personal reasons.

Plaintiff appealed his denial of tenure to the College of Business Promotion and Tenure Review Committee, which affirmed the faculty decision. Thereafter, the appellate process at TU became clouded due to revisions of "the Blue Book", TU's *Statement on Academic Freedom, Responsibility and Tenure*, which were being undertaken at the time of Plaintiff's appeal. According to the Plaintiff, he attempted to appeal through the University Appeal Board, but found that body had not yet been formed. Plaintiff further alleges that he appealed to the TU grievance committee, which initially refused to hear his appeal, then later reversed itself, and affirmed the denial of tenure. Plaintiff claims that Defendant Harris had *ex parte* contact with the grievance committee in violation of the Plaintiff's due process rights.

Plaintiff made his final appeal to the University President and requested that he convene the University Board of Appeals to

## II. Standard for Dismissal and Summary Judgment

A court may dismiss a complaint for failure to state a claim only if it is clear that the plaintiff can prove no set of facts in support of his claim entitling him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957); *Ramirez v. Oklahoma Dept. of Mental Health*, 41 F.3d 584, 586 (10th Cir. 1994). For purposes of making this determination, a court must "accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Ramirez*, 41 F.3d at 586; *Meade v. Grubbs*, 926 F.2d 994, 997 (10th Cir. 1991). Additionally, granting a motion to dismiss is a harsh remedy which must be "cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Morgan v. City of Rawlins*, 792 F.2d 975, 978 (10th Cir. 1986).

The standard for summary judgment is less demanding. As the Supreme Court stated in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986),

The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. court may dismiss a complaint for failure to state a claim only if it is clear that the plaintiff can prove no set of facts in support of his claim entitling him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L.Ed.2d 80 (1957); *Ramirez*

*Id.* at 322. Where no such showing is made, "[t]he moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Id.* at 323. 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).

### III. Discussion

The Court first considers the Plaintiff's Constitutional claims. The Fourteenth Amendment to the United States Constitution states that "No State shall . . . deprive any person of life, liberty, or property, without due process of law." This language establishes that only governmental action will be subject to Fourteenth Amendment scrutiny whereas private conduct, "however discriminatory or wrongful," will not. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349, 95 S. Ct. 449, 452-53, 42 L.Ed.2d

477 (1974) (quoting *Shelly v. Kramer*, 334 U.S. 1, 13, 68 S. Ct. 836, 842, 92 L.Ed. 1161 (1974)); *Gallagher v. "Neil Young Freedom Concert"*, 49 F.3d 1442, 1446 (10th Cir. 1995). This same rule is applicable to causes of action under the Fifth and First Amendments.

The Tenth Circuit has identified four different tests for determining whether a private individual or entity can be considered a governmental actor subject to constitutional scrutiny: (1) "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself"; (2) whether the State has "so far insinuated itself into a position of interdependence" with the private party that there is a "symbiotic relationship" between them; (3) whether a private party has been "a willful participant in joint activity with the State or its agents"; and (4) whether the private entity exercises "powers traditionally exclusively reserved to the State." *Gallagher*, 49 F.3d at 1447 quoting respectively, *Jackson*, 419 U.S. at 350, 95 S. Ct. at 453; *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725, 81 S. Ct. 856, 861-62, 6 L.Ed.2d 45 (1961); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175, 92 S. Ct. 1965, 1972-73, 32 L.Ed.2d 627 (1972); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S. Ct. 1598, 1605-06, 26 L.Ed.2d 142 (1970). Regardless of the test applied, the inquiry regarding whether or not state action

exists is fact specific, and the facts must show that the alleged conduct is "fairly attributable to the State." *Gallagher*, 49 F.3d at 1447 quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S. Ct. 2744, 2753-54, 73 L.Ed.2d 482 (1982).

A plaintiff must show state action by demonstrating that the alleged deprivation of constitutional rights was "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Id.*

In support of a finding of state action, the Plaintiff asserts that the activities of TU are "so intertwined with the public domain" that federal jurisdiction is appropriate, and cites *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856 (1961) in support of his contention. Plaintiff contends that TU has been a co-investor with government agencies in regard to bond issues. In particular Plaintiff refers to a bond issue currently pending with the Tulsa Industrial Authority which would provide \$75 million dollars to be raised through Tulsa Industrial Authority for various uses by TU. Additionally, Plaintiff asserts that TU receives substantial funds directly from federal agencies, and that without federal funding, TU, for all practical purposes, would have been closed. Plaintiff states that federal grantors exercise significant control over TU including requiring periodic technical reports and compliance with two or three looseleaf regulations, as

well as regulating the content of research projects prior to approval of cooperative agreements. Plaintiff likewise refers to extensive Office of Management and Budget requirements with which TU must comply.

Defendants contend that Plaintiff's factual allegations in the instant case do not support a finding of significant involvement by the state in the alleged unconstitutional conduct, and assert that this case should be governed by the holdings in *Blum v. Yaretsky*, 457 U.S. 991 (1982), and *Fendell-Baker v. Kohn*, 457 U.S. 830 (1982).

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), the Supreme Court found an interdependent or symbiotic relationship between a privately owned restaurant that refused to serve a black patron and a state agency which owned and operated the parking structure in which the restaurant was located. The Court found the following factors in that case significant:

1. the land and the building were publicly owned;
2. the leased areas constituted an important part of the state's plan to keep the unit self-sustaining;
3. the state was responsible for the upkeep and maintenance of the structure;
4. the parking structure provided a convenient location for restaurant patrons to park; and
5. the profits earned by the restaurant's discriminatory practices were indispensable elements in the financial success of the state agency.

In finding sufficient state involvement, the Court stated that it was

irony amounting to grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race, without rights and unentitled to service, but at the same time fully enjoys equal access to nearby restaurants in wholly privately owned buildings. . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.

After a careful review of case law in this area, the Court finds that the Plaintiff has failed to establish that there is a sufficient nexus between the government and TU's actions in denying the Plaintiff tenure to create federal or state action. See e.g., *Ward v. St. Anthony's Hospital*, 476 F.2d 671, 674-75 (10th Cir. 1973) (holding that the state must be involved in the decision to deny tenure before state action can be found); *Junior Chamber of Commerce of Rochester, Inc. v. United States Jaycees, Tulsa, Oklahoma*, 495 F.2d 883, 887 (10th Cir. 1974) (holding that receipt of federal grants and contracts from federal agencies for distribution to others did not create state action by private entity); *Loh-Seng yo v. Cibola General Hospital*, 706 F.2d 306, 307 (10th Cir. 1983) (finding no state action despite receipt of

government funding and extensive governmental regulation where the relationship between the state and the hospital had no impact on the decision to place medical doctor on probationary status). Although TU receives substantial federal funding in the form of grants and student loans, funding alone is insufficient to create state action. See *Cibulo, supra*. The Court likewise finds that the bond issues through the Tulsa Industrial Authority did not create a symbiotic relationship as required to create state action under *Burton v. Wilmington Parking Authority, supra*. As in *Rendell-Baker*, the school's fiscal relationship with the State is not different from that of many contractors performing services for the government. *Rendell-Baker v. Kohn*, 457 U.S. at 843, 102 S.Ct. at 2772. Similarly, the governmental regulations imposed upon TU through the receipt of federal grants is not sufficiently related to the action taken in denying the Plaintiff tenure so as to make the tenure denial fairly attributable to the state. The facts presented in this case fall directly within the scope of the holding in *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) where the Supreme Court found insufficient indicia of state involvement in a private school's decision to terminate teachers and vocational counselors despite the facts that the school received nearly all of its income from government funding and was required to comply with a variety of state regulations. Like the *Rendell-Baker* case, the government regulations here generally do not cover and are not

related to personnel policies. Although some of the federal grants involve some government intrusion into the types of research that can be undertaken, these requirements cannot be construed to create state action.

Because the Plaintiff has failed to make a showing sufficient to establish the existence of an element essential to his case, and on which he would bear the burden of proof at trial: state action, the Defendants are entitled to a judgment as a matter of law as to their constitutional claims. The dismissal of Plaintiff's constitutional claims leaves this Court without jurisdiction over the Plaintiff's remaining state law claims, therefore such claims are dismissed without prejudice.

Defendants' Motion for Summary Judgment is therefore GRANTED.<sup>1</sup>

IT IS SO ORDERED THIS 21 DAY OF FEBRUARY, 1997.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

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<sup>1</sup> Defendants' motion for dismissal is therefore moot.

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

**FILED**

FEB 24 1997

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

UNITED STATES OF AMERICA )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
WILLIAM W. LANGLEY, et al, )  
 )  
Defendants. )

Case No. 95-C-136-B

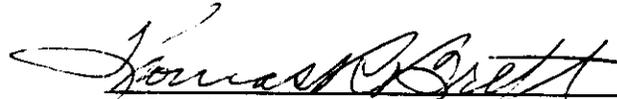
FEB 25 1997

**ADMINISTRATIVE CLOSING ORDER**

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

IF, by April 14, 1998, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 24th day of February, 1997.

  
\_\_\_\_\_  
THOMAS R. BRETT, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

82

ENTERED ON DOCKET  
2-25-97

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

FEB 24 1997

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

IN RE:	DECKER, AMOS	)
	ANDREW and DECKER,	)
	MARY GRACE,	)
		)
	Debtors,	)
		)
	KAIMACHA KENNELS, INC.,	)
	ET AL,	)
		)
	Appellants,	)
		)
vs.		)
		)
	KENNETH L. STAINER,	)
	TRUSTEE,	)
		)
		)
	Appellee.	)

CASE No. 96-C-761-K ✓

**REPORT AND RECOMMENDATION**

The undersigned United States Magistrate Judge RECOMMENDS DISMISSAL of this bankruptcy appeal, pursuant to Bankr. R. 8001(a), for failure to prosecute.

The record on appeal in the above referenced matter was filed in the United States District Court for the Northern District of Oklahoma on August 20, 1996. On August 21, 1996, the Court Clerk advised the parties by letter that the filing of the record on appeal commenced the briefing schedule in this matter. The letter from the Court Clerk further advised the parties that, pursuant to the Court's rules, the Appellants' brief was due within fifteen (15) days of the filing of the record on appeal.

On September 4, 1996, Appellants filed an application for an extension of time in which to file their opening brief [Dkt. 2]. The Court granted Appellants' motion and extended the due date for their opening brief to October 4, 1996 [Dkt. 3]. Appellants

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failed to file their opening brief by the October 4, 1996 deadline. To date no brief has been filed.

On October 16, 1996, the Court entered an Order directing Appellants to show cause on or before October 31, 1996 why this appeal from the Bankruptcy Court should not be dismissed for their failure to timely file an opening brief. On October 31, 1996, Appellants filed their Response to Show Cause Order. They advised that there had been a disagreement between them and their counsel concerning the manner in which this appeal should be conducted and further advised that Appellants' attorney simultaneously filed a motion to withdraw as attorney of record. [Dkt. 5].

On November 6, 1996, the Court granted Appellants' attorney's motion to withdraw, "effective upon the entry of appearance of substitute counsel or upon Appellants' filing of a statement to the effect that they wishes [sic] to represent themselves in this matter." [Dkt. 6]. Appellants were directed to, within 20 days, cause new counsel to enter an appearance or advise that they wish to proceed *in propria persona*. The Court advised that failure to do so may result in dismissal or other sanction. *Id.*

Within the 20 day time-frame the Court received correspondence dated November 23, 1996 signed by Laurie J. Greer-Reed on behalf of Kaimacha Kennels, Inc. advising of problems with her former counsel and asking for additional time in which to find new counsel because she would be out of the state until December 20, 1996. The Court notes that two months has passed since December 20, 1996 and

new counsel has not entered the case on behalf of Kiamacha Kennels, Inc., nor has any other action been taken in prosecution of this matter.

By order dated January 7, 1997 [Dkt. 7] the Court advised Appellants that failure to file an opening brief on or before the 7th day of February, 1997 would result in the issuance of a recommendation that the appeal be dismissed for failure to prosecute. The docket reflects that as of February 24, 1997, Appellants have not filed a brief or a request for an extension of time.

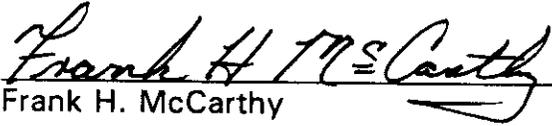
Appellants voluntarily initiated this appeal and they have an obligation to comply with the rules governing their action. Appellants have been repeatedly advised of their responsibility to file a brief in support of their appeal. The Order of January 22, 1997 advised Appellants that their brief was due February 7, 1997 and that the Court would not tolerate any further delays. Despite such warning Appellants have taken no action. Appellants' inaction demonstrates a lack of intention to prosecute this appeal. The district court has discretion to dismiss a bankruptcy appeal for failure to prosecute under Bankr. R. 8001. *Nielson v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994).

IT IS THEREFORE THE RECOMMENDATION of the undersigned United States Magistrate Judge that the appeal be DISMISSED, pursuant to Bankr. R. 8001(a), for failure to prosecute.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections

within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 24<sup>th</sup> day of February, 1997.

  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE

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

JOHN P. DRING, JR.,  
Plaintiff,

vs.

THE WILLIAMS COMPANIES, INC.,  
et al,

Defendants.

No. 96-C-730-K ✓

**FILED**  
IN OPEN COURT

FEB 24 1997

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

ORDER

Before the Court is the motion of defendant Bob McCoy to dismiss. Plaintiff, a Virginia resident, was employed as senior attorney for TXG Gas Marketing Company and its affiliate, Transco Gas Marketing Companies. In April, 1995, these companies and their parent merged with defendant Williams Companies. Plaintiff was not offered a job. He asserts it was because of his age (49) and the fact he is HIV positive. He brings claims under the Age Discrimination in Employment Act and the Americans with Disabilities Act. Defendant McCoy, it is alleged, was the general counsel of both defendants Williams Energy Ventures, Inc., and Williams Pipe Line Company, and functioned as plaintiff's supervisor.

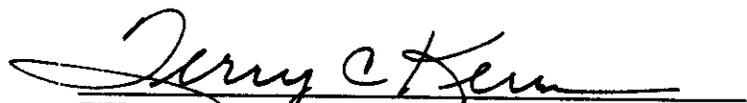
In the present motion, McCoy cites Haynes v. Williams, 88 F.3d 898 (10th Cir.1996), which holds that personal capacity suits are inappropriate under Title VII. Title VII principles in this area have been held by other circuits to apply to the Age Discrimination Act and the Americans with Disabilities Act. See, e.g., U.S. E.E.O.C. v. AIC Security Investigations, Ltd., 55 F.3d 1276, 1280-

82 (7th Cir.1995). Plaintiff concedes the holding of Haynes but argues this does not preclude a suit against both the employer and the supervisor in his official capacity.

Relief under Title VII is against the employer. Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir.1993). The proper method for a plaintiff to recover under Title VII is by suing the employer, either by naming the supervisory employees as agents of the employer or by naming the employer directly. Id. Individual capacity suits are inappropriate. Id. Consequently, the Court dismisses plaintiff's Title VII individual capacity claims against McCoy. The Supreme Court has held that a suit against a defendant in his or her official capacity is in reality "only another way of pleading an action against an entity of which an officer is an agent." Monell v. New York City Dept. of Soc. Servs., 436 U.S. 658, 690 n.55 (1978). It is duplicative to sue both the individual defendant and the entity. See Miller v. Brungardt, 916 F.Supp. 1096, 1098 (D.Kan.1996). There seems no point in maintaining McCoy as a named defendant even in his official capacity.

It is the order of the Court that the motion of the defendant Bob McCoy to dismiss (#2) is hereby GRANTED.

ORDERED this 21 day of February, 1997.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE





address Plaintiff's subjective complaints of pain. Consequently, the Commissioner's denial of benefits is **REVERSED** and this case is **REMANDED** for further proceedings.

### **I. STANDARD OF REVIEW**

A disability under the Social Security Act is defined as the

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

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

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

42 U.S.C. § 423(d)(2)(A). To make a disability determination in accordance with these provisions, the Commissioner has established a five-step sequential evaluation process.<sup>2/</sup>

The standard of review to be applied by this Court to the Commissioner's disability determination is set forth in 42 U.S.C. § 405(g), which provides that "the

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<sup>2/</sup> Step one requires the claimant to establish that he is not engaged in substantial gainful activity as defined at 20 C.F.R. §§ 416.910 and 416.972. Step two requires the claimant to demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 416.921. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). See 20 C.F.R. § 416.925. If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if he can perform his past work. If a claimant is unable to perform his past work, the Commissioner has the burden of proof at step five to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See, 20 C.F.R. § 416.920; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); and Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988).

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

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

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

## II. SUMMARY OF THE EVIDENCE

At the time of the hearing below, Plaintiff was a 38 year old female with a General Equivalency Degree. *R. at 17*. Plaintiff testified that from 1976 to 1993 (i.e., approximately 15 years) she worked as a kitchen assistant at a local restaurant. Plaintiff washed dishes, stocked the salad bar, helped cook and did anything else she was asked to do in the restaurant. *R. at 49-50 & 64*. Plaintiff's restaurant work was at the medium exertional level. *R. at 64*. Plaintiff alleges that she became unable to work as of November 1993 due to constant burning pain and numbness in her legs and feet.

The objective medical records are in relative agreement as to Plaintiff's underlying medical condition. Plaintiff has non-insulin dependent diabetes, which can be substantially controlled through diet and medication. Plaintiff's compliance with doctor-recommended changes in her diet has been inconsistent. *R. at 142, 148 & 219*. Plaintiff is suffering from some form of diabetes-induced neuropathy<sup>3/</sup> in her lower legs and feet.

The medical records confirm that Plaintiff's neuropathy<sup>4/</sup> could produce the pain symptoms Plaintiff describes (i.e., pain, burning and numbness). Apart from the exertional and non-exertional limitations caused by Plaintiff's pain, the medical records

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<sup>3/</sup> The original diagnosis was "peripheral neuropathy." Plaintiff was, however, referred to the Mayo Clinic in Scottsdale, Arizona for a complete evaluation. The doctors there found no evidence of "peripheral neuropathy," but did find the early stages of "autonomic neuropathy." *R. at 149-52, 166-76, 197, 210 & 223-25*. It is clear, therefore, that Plaintiff is suffering from some type of diabetes-induced neuropathy.

<sup>4/</sup> "Neuropathy" is defined by Taber's as "[a]ny disease of the nerves." Taber's Cyclopedic Medical Dictionary 1302 (17th ed. 1993).

do not support any other significant limitations. Plaintiff's muscle tone and strength are good. *R. at 150-52, 166 & 222.* Plaintiff has good grip strength and good strength in all her extremities. *R. at 162-64 & 166.* X-rays establish that Plaintiff is not experiencing any arthritic changes. *R. at 222.* Plaintiff has excellent pulses in her legs. There was no swelling, redness or increased heat in Plaintiff's legs. *R. at 184 & 213.* There were no edemas or cyanosis in Plaintiff's legs. Plaintiff's motor skills and coordination were normal, except for heel to toe walking, which was compromised by pain in her feet. *R. at 150-58, 166 & 213.* Plaintiff has full range of motion in all her peripheral joints and straight leg raisings do not produce additional pain. *R. at 153-58 & 213.*

Plaintiff alleges that her primary limitations are the result of her pain. Plaintiff states that most of the pain is in her toes, feet and ankles, while most of the burning is in her lower legs *R. at 49-50, 53 & 116-23.* Plaintiff states that the pain is crippling and that nothing, including pain medication and postural changes, gives her relief from the pain. *R. at 53-54.* Plaintiff alleges that her legs are very sensitive to being touched and that it hurts her to wear regular shoes. Plaintiff also alleges that the pain causes her crying and shaking spells and also causes her to loose concentration and forget things. *R. at 55-57.* According to Plaintiff, the pain prevents her from standing for more than five minutes and sitting for more than five to ten minutes. Plaintiff testified that she cannot walk any further than from a parking lot to a store. Once inside the store, Plaintiff states that she will use a wheel chair if one is provided. *R. at 55-56.* Plaintiff states that the pain prevents her from stooping and/or bending. *R.*

at 56-57. Plaintiff states that she cannot lift more than 10 pounds without dropping it. *R. at 59.* Plaintiff also alleges that due to the fatigue caused by the pain, she has to take naps during a regular day. *R. at 61-62.*

#### **IV. DISCUSSION**

Based on the above-described record, the ALJ determined that Plaintiff retained the RFC to perform work at the sedentary level. The ALJ considered Plaintiff's subjective complaints of pain and found them not credible to the extent that they would prevent Plaintiff from performing a full range of sedentary work. *R. at 22-23.*

The ALJ's questioning of the vocational expert seems to suggest, however, that the ALJ actually found that Plaintiff was not able to perform the full range of sedentary work. The ALJ's hypothetical question to the VE described a 38 year old person with a GED who could perform sedentary work, with the limitation that the person needed to be able to change positions at will (i.e., sit or stand at will). *R. at 66.* The ALJ later relies on the VE's response to this hypothetical question to support his conclusion at Step Five that there are significant jobs in the national economy Plaintiff could perform. While referring to the VE's testimony, the ALJ refers to the fact that the jobs identified by the VE would facilitate any need Plaintiff would have to change positions. *R. at 23.* Thus, it appears that the ALJ actually finds that Plaintiff retains the RFC to perform sedentary work which permits her to change positions at will.

Following is the passage from the ALJ's opinion where he discusses Plaintiff's credibility:

In view of the claimant's documented peripheral neuropathy, she would undoubtedly have some pain. However, an individual does not have to be entirely pain free in order to have the residual functional capacity to perform work activity. The issue is not the existence of pain, but whether the pain experienced by the claimant is of sufficient severity as to preclude her from engaging in all types of work activity. The record does not reflect a medically determinable impairment that would necessitate that the claimant take naps daily. While she testified that she could only sit for 5 minutes, it was noted that, although she appeared uncomfortable sitting in one position for very long, she did sit for 30 minutes during the hearing before needing to stand. She testified that she had been diagnosed with carpal tunnel syndrome; however, there are no medical records regarding such a diagnosis. Although the claimant testified that she experienced blurry vision and her most recent eye examination done June 30, 1994, did indicate a change in her peripheral retina (Exhibit 31), she described occasional mild double vision or blurred vision during the physical examination of April 1994 (Exhibit 17). While the claimant has alleged constant severe pain, the records reflect that she did not seek medical treatment from September 1994 until March 1995.

The Administrative Law Judge has considered the claimant's testimony and finds it to be credible to the extent that it is consistent with the performance of sedentary work activity.

*R. at 22-23.* The Court must determine whether this credibility analysis comports with the Tenth Circuit's holdings in Kepler v. Chater, 68 F.3d 387 (10th Cir. 1995) and Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). Plaintiff argues that it does not. In particular, Plaintiff argues in her brief that

the ALJ must show in his opinion that he applied the correct legal standard by articulating specific reasons for rejecting a claimant's testimony and by linking his credibility findings to substantial evidence. Such documentation is necessary to assure that the individual had a full and fair review of her claim. The ALJ breached this duty.

Plaintiff's Brief, p. 3 (citations omitted).

Plaintiff alleges that the ALJ failed to adequately evaluate Plaintiff's complaints of pain. The familiar nexus test in Luna was developed as a guide to explain when an ALJ must consider subjective complaints of pain. If the nexus between pain-producing impairment and alleged pain can be established, Luna requires that an ALJ consider the claimant's subjective complaints of pain.

When the ALJ reaches the last step of Luna and considers subjective complaints of pain, he is still entitled to judge the credibility of the claimant in light of all other evidence. Luna, 834 F.2d at 161-63. The ALJ's credibility determinations are entitled to great deference by this Court. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992). Even if the ALJ finds the claimant to be credible, the mere existence of pain is insufficient to support a finding of disability. Claimant's pain must be "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988). "Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment." Id.

The ALJ reached the last step of the Luna analysis, because he considered Plaintiff's subjective complaints of pain. The ALJ concluded, however, that Plaintiff's allegations of disabling pain were not credible. This conclusion shall be affirmed on appeal if it is supported by substantial evidence. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). In assessing the credibility of a claimant's subjective complaints of pain, the following factors should be considered.

[T]he levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Hargis v. Sullivan, 945 F.2d 1482, 1488 (10th Cir. 1991). In Kepler, the Tenth Circuit made it clear that an ALJ's credibility determination cannot be conclusory (i.e., "I find the claimant's testimony not credible."). An ALJ, using the Hargis factors, must give detailed reasons, with reference to specific evidence in the record, for his credibility determinations. Kepler, 68 F.3d at 390-92. In particular, findings as to credibility should be closely and affirmatively linked to substantial evidence and not just a conclusion in the guise of findings. Id.

This Court has an appreciation for the fact that determinations regarding another person's credibility are often made at an instinctual (i.e., gut) level. The Court also appreciates the fact that these instinctual reactions regarding the believability of a person are often difficult to quantify and articulate. In the context of daily living, most

of us make credibility determinations everyday. We choose who and what to believe and who and what not to believe, and we are very rarely asked to articulate the specific reasons that caused us to believe one person and doubt another. The same rules cannot, however, apply in the administrative hearing context. Administrative agencies must give reasons for their decisions. Reyes v. Bowen, 845 F.2d 242, 244 (10th Cir. 1988).

The Court is persuaded that the ALJ's credibility analysis, as quoted above, is not sufficient to pass muster under Kepler. In the ALJ's defense, however, the Court points out that Kepler was decided in October 1995, six months after the ALJ rendered his decision in this case. Initially, the Court finds the ALJ's credibility determination insufficient because he did not discuss many of the factors listed in Hargis and Luna. The Court also finds that the factors actually discussed by the ALJ do not provide substantial evidence for his credibility determination.

The ALJ begins his credibility determination by pointing out that Plaintiff alleges that she has to take naps and that there is no medical evidence to support the fact that she must take naps. The Court finds the ALJ's reasoning to be somewhat circular. Plaintiff alleges that she must take naps because her daily activities, which she must perform with severe pain, cause her fatigue. Plaintiff's naps are, therefore, not a result of her objective medical condition, but a result of her subjective complaints of pain. One would not, therefore, expect to find support for Plaintiff's alleged need to take naps in the objective medical evidence. To determine whether Plaintiff's

alleged need to take naps is credible, the ALJ must determine whether Plaintiff's allegations of pain are credible. We are, therefore, back to step one.

Plaintiff alleged that she could not sit for more than five minutes at a time. The ALJ stated that Plaintiff sat at the hearing for 30 minutes before she asked to stand. This observation is not entirely supported by the record. The record indicates that the hearing lasted 35 minutes. *R. at 37 & 69.* During this time period, Plaintiff was excused to go to the bathroom once and in the middle of the hearing, Plaintiff was allowed to stand up. *R. at 42-43 & 59.* Plaintiff stood and moved about twice in a 35 minute period. The ALJ also noted that even when Plaintiff was sitting, she was doing so uncomfortably. *R. at 22.*

Plaintiff alleged that her vision was constantly blurry. The ALJ noted that the medical records establish that Plaintiff did have a drusen in her right peripheral retina and that Plaintiff had reported only mildly blurred vision one year earlier. Plaintiff also testified that she had been diagnosed with carpal tunnel syndrome. The ALJ correctly pointed out that there is no evidence in the record that Plaintiff was ever diagnosed with carpal tunnel syndrome. While the ALJ has identified some inconsistencies, these inconsistencies, standing alone, do not provide substantial evidence to reject all of Plaintiff's testimony regarding her subjective complaints of pain.

The ALJ also points out that despite Plaintiff's complaints of constant pain, Plaintiff did not seek medical treatment from September 1994 to March 1995. Before the ALJ can rely on a claimant's failure to pursue treatment as support for a determination of noncredibility, the ALJ should consider the following: (1) whether the

treatment at issue would restore the claimant's ability to work, (2) whether the treatment was prescribed, (3) whether the treatment was refused, and (4) if the treatment was refused, whether the claimant has a justified excuse for refusal of the treatment (e.g., financial restrictions and/or religious objections). Thompson v. Sullivan, 987 F.2d 1482, 1490 (10th Cir. 1993). The ALJ considered none of these factors in this case.

There is no indication that Plaintiff was refusing to undergo treatment that had been prescribed by one of her treating doctors. The time period referred to by the ALJ is at the end of a fairly exhaustive treatment regimen for Plaintiff. In April 1994, Dr. Jerome Wade, Plaintiff's treating neurologist, noted that all the medications he had tried were not working and that Plaintiff needed to be referred to a research center such as the Mayo Clinic. *R. at 208*. Plaintiff was seen at the Mayo Clinic in July 1994, just two months prior to the beginning of the period referred to by the ALJ. There is, therefore, no indication that had Plaintiff sought treatment, the treatment would have improved her condition.

As the Court in Kepler held:

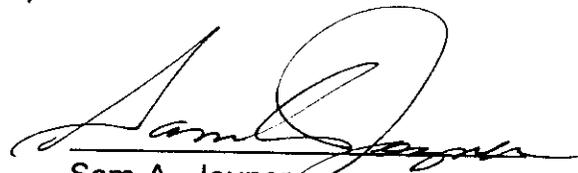
We therefore order a limited remand of this case for the Commissioner to make express findings in accordance with Luna, with reference to relevant evidence as appropriate, concerning claimant's [subjective allegations of pain]. We do not dictate any result. Our remand 'simply assures that the correct legal standards are invoked in reaching a decision based on the facts of the case.' Hudson, 838 F.2d at 1132.

Kepler, 68 F.3d at 391-92 (internal citations omitted).

The Commissioner's disability determination is, therefore, **REVERSED**. This case is remanded for proceedings not inconsistent with this Order.

IT IS SO ORDERED.

Dated this 20 day of February 1997.

  
Sam A. Joyner  
United States Magistrate Judge

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

HEATHER LIEBLANG, )  
)  
Plaintiff, )  
)  
-vs- )  
)  
THE CONTINENTAL INSURANCE )  
COMPANY, )  
)  
Defendant. )

No. 97 CV 10H

**FILED**

FEB 21 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

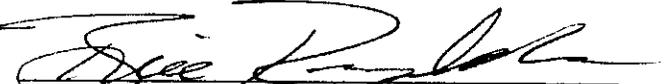
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FEB 24 1997  
DATE \_\_\_\_\_

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

Come now the plaintiff, Heather Lieblang, and the defendant, The Continental Insurance Company, by and through their respective counsel of record, and pursuant to Rule 41 of the Federal Rules of Civil Procedure would stipulate that the above styled matter may be dismissed with prejudice in that the parties hereto have reached an agreed and compromised resolution of the matters involved herein and there remain no issues for this Court to determine as between these parties.

Dated this 19th day of February, 1997.

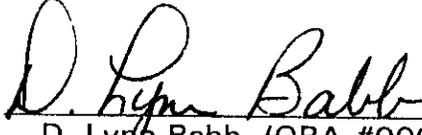
HEATHER LIEBLANG, Plaintiff

By: 

Bill D. Reynolds (Ark. Bar #92021)  
NOLAN, CADDELL & REYNOLDS, P.A.  
Post Office Box 184  
Fort Smith, Arkansas 72902  
501/782-5297

Attorney for Plaintiff,  
Heather Lieblang

THE CONTINENTAL INSURANCE COMPANY,  
Defendant

By:  \_\_\_\_\_

D. Lynn Babb (OBA #000392)  
PIERCE COUCH HENDRICKSON  
BAYSINGER & GREEN, L.L.P.  
Post Office Box 26350  
Oklahoma City, Oklahoma 73126  
405/235-1611

Attorney for Defendant,  
The Continental Insurance Company



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

**FILED**

FEB 24 1997

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

KAREN LEA HART,  
Petitioner,

v.

UNITED STATES OF AMERICA,  
Respondent.

Case No. 96-CV-1158-H

ENTERED ON DOCKET  
DATE FEB 24 1997

**ORDER**

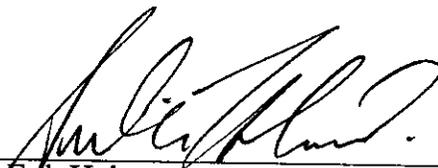
Before the Court for consideration is the Report and Recommendation of the United States Magistrate Judge (Docket #2).

In accordance with 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b), any objections to the Report and Recommendation must be filed within ten (10) days of the receipt of the report. The time for filing objections to the Report and Recommendation has expired, and no objections have been filed.

Based on a review of the Report and Recommendation of the Magistrate Judge, the Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge. The petition for a writ of habeas corpus is hereby dismissed without prejudice.

IT IS SO ORDERED.

This 21<sup>st</sup> day of February, 1997.

  
Sven Erik Holmes  
United States District Judge

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

Phil Lovell  
U.S. District Court  
Northern District of Oklahoma  
Clerk

JOY WRIGHT RHODES,

Plaintiff,

v.

BED BATH & BEYOND

Defendant.

Case No. 96-CV-346

ENTERED ON DOCKET  
DATE FEB 24 1997

ORDER OF DISMISSAL UPON SETTLEMENT

The parties to the action, by their counsel, have advised the court that they have agreed to a settlement.

IT IS HEREBY ORDERED that this matter is DISMISSED WITH PREJUDICE. However, if any party hereto certifies to this Court, with proof of service of a copy thereon on opposing counsel, within ninety days from the date hereof, that settlement has not in fact occurred, the foregoing order shall be vacated and this cause shall forthwith be restored to the calendar for further proceedings.

IT IS SO ORDERED.

This 21<sup>st</sup> day of FEBRUARY, 1997.

  
Sven Erik Holmes  
United States District Judge

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

ANDY SPODNICK,  
SSN: 548-60-4453,

Plaintiff,

vs.

SHIRLEY S. CHATER, Commissioner of the  
Social Security Administration,

Defendant.

ENTERED ON DOCKET

DATE

2/24/97

Case No. 93-CV-304-J ✓

**FILED**

**FEB 21 1997** *sc*

**Phil Lombardi, Clerk  
U.S. DISTRICT COURT**

**ORDER**

Now before the Court is Plaintiff's attorney's motion for an award of fees pursuant to 42 U.S.C. § 406(b). [Doc. No. 16]. The Court refers the parties to its previous Orders, dated October 9, 1996 and January 14, 1997. [Doc. Nos. 20 and 23]. The Court's last Order set an evidentiary hearing to receive evidence and argument on the following issues:

1. Prevailing Hourly Rate -- (a) the prevailing hourly rate in the Northern District of Oklahoma for legal services performed by lawyers in social security cases, and (b) the effect a contingency fee contract has on the prevailing hourly rate.
2. Contingency Enhancement -- (a) the need for a contingency enhancement to the lodestar to achieve a reasonable fee in this case; and (b) how a contingency enhancement, if appropriate, should be calculated.
3. Delay Enhancement -- how a delay enhancement should be calculated.

The evidentiary hearing was held on February 5, 1997 and the only evidence presented was expert testimony from Paul McTighe, an attorney who specializes in social security cases in Oklahoma.

**Prevailing Hourly Rate**

Based on the evidence received from Mr. McTighe, the Court finds that the prevailing hourly rate in the Northern District for legal services performed by social security lawyers is \$125-150 per hour. As discussed in previous orders, the Court has found that Plaintiff's attorney's reputation, experience, skill and ability qualify him for an hourly rate at the top of the range of prevailing hourly rates. Thus, the Court finds that the prevailing hourly rate in this case is \$150 per hour.

Plaintiff's attorney alleges that he spent 23 hours litigating Plaintiff's case in this Court. The Court has previously reviewed these hours and previously found that they are reasonable. Thus, the lodestar for this case would be 23 hours at \$150 per hour or \$3,450.00.

**Contingency Enhancement**

Plaintiff's attorney seeks a contingency enhancement of 100% of the prevailing hourly rate. That is, to account for the contingent nature of his fee, Plaintiff's attorney argues that the prevailing hourly rate should be doubled. As support for his argument, Plaintiff's attorney relies on Fraizer v. Sullivan, 768 F. Supp. 1511 (M.D. Ala. 1991).

The Court in Fraizer found the prevailing hourly rate for social security work to be \$150 per hour in the state of Alabama. The Court then determined that a 100% enhancement to the prevailing hourly rate was necessary to compensate for the

contingent nature of payment. The Court reached this conclusion without discussion and referred to two other reported decisions in which it had already addressed the issue of contingency enhancements. See Hidle v. Geneva County Bd. of Education, 681 F. Supp. 752 (M.D. Ala. 1988); and Stokes v. City of Montgomery, 706 F. Supp. 811 (M.D. Ala. 1988).<sup>1/</sup>

Both Stokes and Hidle were employment discrimination lawsuits brought pursuant to Title VII of the Civil Rights Act of 1964. In these cases, the judge was attempting to set a reasonable attorney fee to be paid by the losing party to the prevailing party (i.e., the fees were to be paid under a fee-shifting statute). See 42 U.S.C. § 2000e-5(k).<sup>2/</sup> The judge in Stokes and Hidle determined that he was bound by Justice O'Connor's concurring opinion in Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 107 S.Ct. 3078 (1987). In Delaware Valley, Justice O'Connor determined that a contingency enhancement was proper only when there was sufficient evidence to establish that without a contingency enhancement, the prevailing party would have faced substantial difficulties in finding counsel in the relevant market. Justice O'Connor further held that a court may not enhance a fee any more than is necessary to bring the fee within the range that would attract competent counsel. Id. at 3091.

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<sup>1/</sup> Stokes and Hidle were decided seven months apart by the same trial judge.

<sup>2/</sup> Contingency enhancements under such statutes are no longer permissible. City of Burlington v. Dague, 112 S.Ct. 2638 (1992).

To determine whether a contingency enhancement was warranted under Justice O'Connor's approach, the judge in Stokes and Hidle held extensive evidentiary hearings. The evidence established that there were only 25 to 30 civil rights lawyers in all of Alabama. The evidence also established that very few lawyers in Alabama were willing to take employment discrimination cases, even on a contingency basis, because as a rule they were uneconomical. The situation was exacerbated by the fact that the 25 to 30 civil rights attorneys did not take employment discrimination cases because there was plenty of more profitable civil rights litigation available. The evidence before the judge also established that new lawyers in the state of Alabama were not entering into the employment discrimination field. The plaintiffs in both Stokes and Hidle testified to having had significant problems finding a lawyer who was willing to represent them. As a result of this evidence, the judge found that there was

a severe and critical shortage of civil rights lawyers -- and more specifically, plaintiff's employment discrimination lawyers -- in [Alabama]. It is therefore very difficult, and becoming increasingly more difficult, for those who are alleged victims of employment discrimination and who cannot afford to pay the costs and fees of litigation, to get a lawyer.

Hidle, 681 F. Supp. at 757. Because of the "severe and critical" shortage of employment discrimination lawyers, the judge felt that a contingency enhancement of 100% was necessary to attract competent counsel. Id. at 758.

The evidentiary record in this case is nothing like the record in Hidle and Stokes. There is no indication that there is a severe and critical shortage of social security lawyers in Oklahoma. There is also no evidence that Plaintiff had difficulty in obtaining

a lawyer to represent him in this case. In short, the Court is not convinced that a contingency enhancement of 100% is necessary to attract competent counsel to the social security field in Oklahoma.

Mr. McTighe testified in this case that approximately 99.9% of all social security work is performed on a contingent fee basis. Social security work is rarely performed on an hourly basis. The \$125-150 prevailing hourly rate cited by Mr. McTighe is, therefore, somewhat artificial, given the absence of a per hour market in social security cases. Mr. McTighe's testimony failed to establish that more than \$150 per hour was necessary to attract competent social security attorneys in this district. The Court is convinced from the totality of Mr. McTighe's testimony that the contingent nature of payment in social security cases is accounted for within the \$125-150 figure cited by Mr. McTighe.

#### **Delay Enhancement**

The Court previously found that a delay enhancement was appropriate. At the hearing, Plaintiff's attorney argued that the delay enhancement should be calculated at 6-7% per year. The Court finds this amount to be substantially similar to the amount recoverable on judgments under 28 U.S.C. § 1961. The court will, therefore, apply to the lodestar a delay enhancement of \$1,036.39.<sup>3/</sup> This brings Plaintiff's attorney's total fee under § 406(b) to \$4,486.39.

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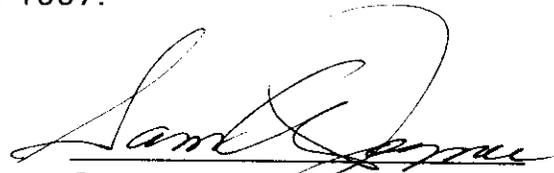
<sup>3/</sup> Plaintiff's attorney was retained in 1993. The delay enhancement is, therefore, based on 6.5% interest per year, compounded annually, for 1993 to present.

**CONCLUSION**

Plaintiff's attorney's motion for an award of fees pursuant to 42 U.S.C. § 406(b) is granted. [Doc. No. 16]. Plaintiff's attorney is entitled to a reasonable fee under § 406(b) of \$4,486.39.

IT IS SO ORDERED.

Dated this 21 day of February 1997.

  
\_\_\_\_\_  
Sam A. Joyner  
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MATHEW ERWIN III aka Matthew Erwin )  
 aka Mathew Freeman Erwin III; PEGGY )  
 ERWIN aka Peggy Lynn Erwin; )  
 BRIGHTSIDE PROPERTIES; LIBERTY )  
 BANK & TRUST COMPANY OF )  
 TULSA, N.A. Successor by merger to The First )  
 National Bank & Trust Company of Tulsa, as Trustee )  
 for The Trustees of the Tulsa County Home Finance )  
 Authority, a Public Trust; COUNTY )  
 TREASURER, Tulsa County, Oklahoma; )  
 BOARD OF COUNTY )  
 COMMISSIONERS, Tulsa County, )  
 Oklahoma, )  
 )  
 Defendants. )

Civil Case No. 95 C 985H

**FILED**

FEB 19 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET  
DATE FEB 21 1997

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 19th day of February, 1997, 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 October 28, 1996, pursuant to an Order of Sale dated July 8, 1996, of the following described property located in Tulsa County, Oklahoma:

**Lot Eight (8), Block Two (2), AMENDED PLAT OF RIVERVIEW VILLAGE, Tulsa County, State of Oklahoma, according to the recorded plat thereof.**

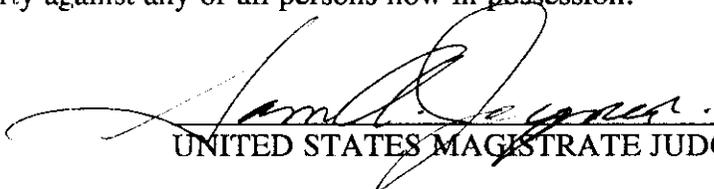
Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Brightside Properties, Liberty Bank & Trust Company of Tulsa, N.A. Successor by merger to the First National Bank & Trust

Company of Tulsa, as Trustee for the Trustees of the Tulsa County Home Finance Authority, a Public Trust, County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, and to the purchasers, Harold E. Hackler and Michael K. Marker, by mail and to the Defendants, Mathew Erwin III and Peggy Erwin, by publication, 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 Harold E. Hackler and Michael K. Marker, their 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.

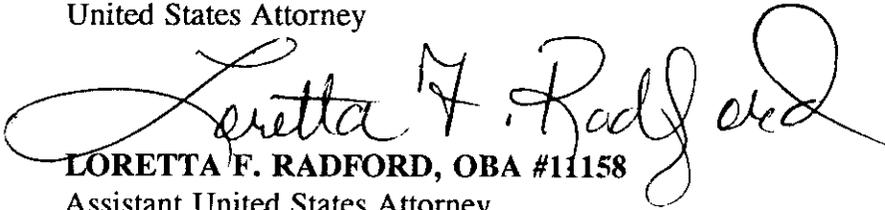
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchasers, Harold E. Hackler and Michael K. Marker, 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.

  
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

LFR:flv

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95 C 985H

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy  
of the foregoing pleading was served on each  
of the parties hereto by mailing the same to  
them or to their attorneys of record on the  
14th Day of February, 1997.

Loretta F. Radford

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

FEB 20 1997

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 THE HEIRS, PERSONAL )  
 REPRESENTATIVES, EXECUTORS, )  
 ADMINISTRATORS, DEVISEES, )  
 TRUSTEES, SUCCESSORS AND )  
 ASSIGNS, IMMEDIATE AND )  
 REMOTE, KNOWN AND UNKNOWN )  
 OF WILLIAM TOTTRISS, )  
 DECEASED, et al., )  
 )  
 Defendants. )

ENTERED ON COURT

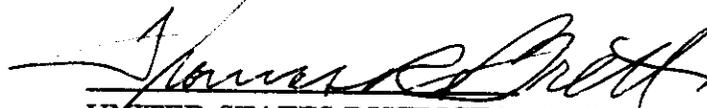
FEB 21 1997

Civil Case No. 95-C 693B ✓

**ORDER**

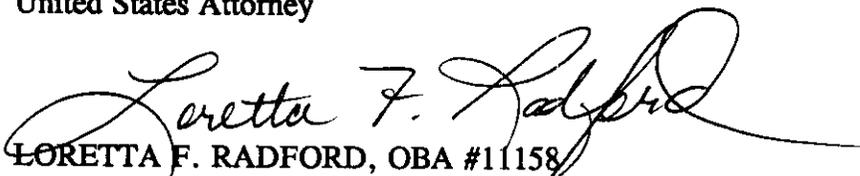
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney,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

Dated this 20 day of Feb., 1997.

  
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 typed name.

LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney

333 W. 4th St., Ste. 3460

Tulsa, Oklahoma 74103

(918) 581-7463

LFR/esf

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
JACK L. MCKENZIE aka JACK )  
MCKENZIE; CENHYA A. MCKENZIE )  
aka CINDY MCKENZIE; VICTORIA )  
POND HOMEOWNERS' ASSOCIATION, )  
INC.; TOWN OF JENKS, Oklahoma; )  
COUNTY TREASURER, Tulsa County. )  
Oklahoma; BOARD OF COUNTY )  
COMMISSIONERS, Tulsa County, )  
Oklahoma, )  
)  
Defendants. )

**F I L E D**

FEB 19 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE FEB 21 1997

Civil Case No. 96CV 170E ✓

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 19 day of February, 1997, 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 January 21, 1997, pursuant to an Order of Sale dated September 24, 1996, of the following described property located in Tulsa County, Oklahoma:

Lot Fourteen (14), Block Three (3), BLOCKS 1 thru 5 of VICTORIA POND, an Addition to the City of Jenks, Tulsa County, State of Oklahoma, according to the recorded Plat No. 4566.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Jack L. McKenzie, Cenhya A. McKenzie, Victoria Pond Homeowners' Association, Inc., Town of Jenks, Oklahoma, State of Oklahoma, ex rel. Oklahoma Tax Commission, County Treasurer, Tulsa County, Oklahoma

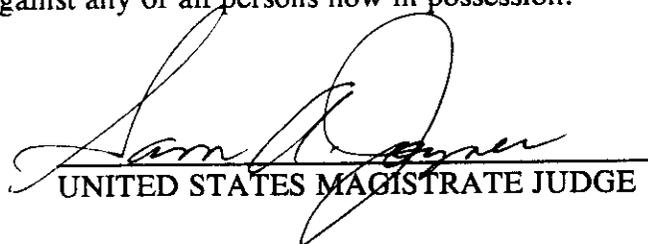
22

and Board of County Commissioners, Tulsa County, Oklahoma, and to the purchaser Jarry M. Jones, 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 Jenks Journal, a newspaper published and of general circulation in Jenks, Oklahoma, and that on the day fixed in the notice the property was sold to Jarry M. Jones, his 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.

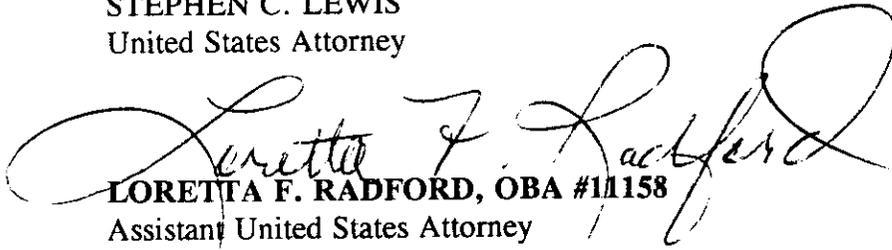
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, Jarry M. Jones, 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.

  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

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

**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. 96CV 170E

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 20 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,  
on behalf of Farm Service Agency,  
formerly Farmers Home Administration,

Plaintiff,

v.

RAYMOND L. MCKINNEY  
aka Raymond McKinney;  
THE UNKNOWN HEIRS, EXECUTORS,  
ADMINISTRATORS, DEVISEES,  
TRUSTEES, SUCCESSORS AND  
ASSIGNS OF BETTY J. MCKINNEY  
aka Betty McKinney  
aka Betty Jean McKinney, Deceased;  
RANDY MCKINNEY;  
SPOUSE, if any, OF RANDY MCKINNEY;  
PAM TELLIS;  
SPOUSE, if any, OF PAM TELLIS;  
DANA COLBY;  
SPOUSE, if any, OF DANA COLBY;  
LEON WALKER dba LEON'S COAL;  
BIG ERNIE'S FEED;  
CHETOPA IMPLEMENT, INC.;  
LEE EQUIPMENT COMPANY;  
COUNTY TREASURER, Craig County,  
Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Craig County, Oklahoma,

Defendants.

CIVIL ACTION NO. 96-C-332-B

ENTERED ON CLERK  
DATE FEB 21 1997

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 20<sup>th</sup> day of February,

1997. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendants, County Treasurer, Craig County, Oklahoma, and Board of County Commissioners, Craig County, Oklahoma, appear by Clint Ward, Assistant District Attorney, Craig County,

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Oklahoma; the Defendants, Randy McKinney and Spouse of Randy McKinney who is one and the same person as Barbara McKinney, appear not, having previously filed their Disclaimer; the Defendant, Chetopa Implement, Inc., appears by its attorney Karl D. Jones; and the Defendants, Raymond L. McKinney aka Raymond McKinney; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Betty J. McKinney aka Betty McKinney aka Betty Jean McKinney, Deceased; Pam Tellis; Spouse, if any, of Pam Tellis; Dana Colby; Spouse, if any, of Dana Colby; Leon Walker dba Leon's Coal; Big Ernie's Feed; and Lee Equipment Company, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Raymond L. McKinney aka Raymond McKinney, was served with Summons and Complaint by a United States Deputy Marshal on August 5, 1996; that the Defendant, Pam Tellis, was served with Summons and Complaint by a United States Deputy Marshal on August 5, 1996; that the Defendant, Dana Colby, executed a Waiver of Service of Summons on May 17, 1996; that the Defendant, Leon Walker dba Leon's Coal, executed a Waiver of Service of Summons on May 6, 1996; that the Defendant, Big Ernie's Feed, executed a Waiver of Service of Summons on April 25, 1996; that the Defendant, Chetopa Implement, Inc., executed a Waiver of Service of Summons on April 29, 1996.

The Court further finds that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Betty J. McKinney aka Betty McKinney aka Betty Jean McKinney, Deceased; Spouse, if any, of Pam Tellis; Spouse, if any, of Dana Colby; and Lee Equipment Company, were served by publishing notice of this action in the Vinita Daily Journal, a newspaper of general circulation in Craig County,

Oklahoma, once a week for six (6) consecutive weeks beginning October 21, 1996, and continuing through November 25, 1996, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(C)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Betty J. McKinney aka Betty McKinney aka Betty Jean McKinney, Deceased; Spouse, if any, of Pam Tellis; Spouse, if any, of Dana Colby; and Lee Equipment Company, and service cannot be made upon said Defendants by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Betty J. McKinney aka Betty McKinney aka Betty Jean McKinney, Deceased; Spouse, if any, of Pam Tellis; Spouse, if any, of Dana Colby; and Lee Equipment Company. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of Farm Service Agency, formerly Farmers Home Administration, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the

relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, County Treasurer, Craig County, Oklahoma, and Board of County Commissioners, Craig County, Oklahoma, filed their Answer and Cross-Petition on May 2, 1996; that the Defendants, Randy McKinney and Spouse of Randy McKinney who is one and the same person as Barbara McKinney, filed their Disclaimer and Consent to Judgment In Rem on May 8, 1996; that the Defendant, Chetopa Implement, Inc., filed its Answer on June 27, 1996; and that the Defendants, Raymond L. McKinney aka Raymond McKinney; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Betty J. McKinney aka Betty McKinney aka Betty Jean McKinney, Deceased; Pam Tellis; Spouse, if any, of Pam Tellis; Dana Colby; Spouse, if any, of Dana Colby; Leon Walker dba Leon's Coal; Big Ernie's Feed; and Lee Equipment Company, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that Barbara McKinney is one and the same person as the spouse of Randy McKinney.

The Court further finds that Raymond L. McKinney aka Raymond McKinney and Betty J. McKinney aka Betty McKinney aka Betty Jean McKinney are hereinafter referred to by any of these names.

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

**TRACT 1:** The East Half of the East Half of the Southwest Quarter and the West Half of the West Half of the Southeast Quarter and the Northeast Quarter of the Northwest Quarter of the Southeast Quarter of Section 3, Township 28 North, Range 20 East of Indian Meridian, according to the United States Government Survey thereof.

**TRACT 2:** The West Half of the Northwest Quarter of the Northwest Quarter and the Northwest Quarter of the Southwest Quarter of the Northwest Quarter of Section 17, Township 27 North, Range 21 East of Indian Meridian and the East Half of the Northeast Quarter, less 5.89 acres for Missouri-Kansas-Texas Railroad right-of-way, in Section 20, Township 27 North, Range 21 East of Indian Meridian, according to the United States Government Survey thereof.

**TRACT 3:** The East Half of the Northwest Quarter and the West Half of the Northeast Quarter of Section 21, Township 27 North, Range 21 East of Indian Meridian, according to the United States Government Survey thereof.

The Court further finds that this a suit brought for the further purpose of judicially determining the death of Betty Jean McKinney, judicially terminating the joint tenancy of Raymond L. McKinney and Betty J. McKinney as to Tracts 1 and 3 of the subject real property, and judicially determining the heirs of Betty Jean McKinney as to Tracts 2 and 3 of the subject real property.

The Court further finds that on February 6, 1986, Raymond McKinney and Betty McKinney dba McKinney Farms filed their voluntary petition in bankruptcy in Chapter 11 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 86-00228. The subject real property was a part of the bankruptcy estate as shown on Schedule B and attached as Exhibit "A" to the Complaint. On June 24, 1987, an Order of Dismissal Without Prejudice was entered in Case No. 86-00228, United States Bankruptcy Court, Northern District of Oklahoma.

The Court further finds that on October 9, 1987, Raymond McKinney filed his voluntary petition in bankruptcy in Chapter 12 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 87-02812. The subject real property was a part of the bankruptcy estate as shown on Schedule B and attached as Exhibit "B" to the Complaint. On March 4, 1988, an Order was entered in Case No. 87-02812, United States Bankruptcy Court, Northern District of Oklahoma, converting the case to Chapter 7. Raymond L. McKinney and Betty J. McKinney reaffirmed their debt to the Farmers Home Administration, now known as Farm Service Agency, by executing a New Promise to Pay on November 11, 1988. This document was made a part of the Agreed Stipulation filed on December 13, 1988 in Case No. 87-02812. Debtors were discharged of all dischargeable debts on July 18, 1989; subsequently, Case No. 87-02812, United States Bankruptcy Court, Northern District of Oklahoma, was closed on August 24, 1989.

The Court further finds that Raymond L. McKinney and Betty J. McKinney became the record owners of Tract 1 of the real property involved in this action by virtue of that certain Warranty Deed dated January 26, 1970, from Vita Riddle, nee Bilello and John W. Riddle, her husband, to Raymond L. McKinney and Betty J. McKinney, husband and wife, as joint tenants and not as tenants in common, with right of survivorship, the whole estate to vest in the survivor in event of the death of either, which Warranty Deed was filed of record in Book 267, Page 929, in the records of the County Clerk of Craig County, Oklahoma.

The Court further finds that Raymond L. McKinney and Betty J. McKinney became the record owners of Tract 2 of the real property involved in this action by virtue of that certain Warranty Deed dated December 15, 1971, from George A. Fox and Lillian M.

Fox, his wife, to Raymond L. McKinney and/or Betty J. McKinney, his wife, which Warranty Deed was filed of record in Book 273, Page 878, in the records of the County Clerk of Craig County, Oklahoma. This tract of land was not owned in joint tenancy.

The Court further finds that Raymond L. McKinney and Betty J. McKinney became the record owners of Tract 3 of the real property involved in this action by virtue of that certain Warranty Deed dated March 19, 1976, from Jannie L. Clarkson, a single person, to Raymond L. McKinney and Betty J. McKinney, as joint tenants and not as tenants in common, with right of survivorship, the whole estate to vest in the survivor in event of the death of either, which Warranty Deed was filed of record in Book 291, Page 354, in the records of the County Clerk of Craig County, Oklahoma. The marital status of the McKinneys was not shown on this deed.

The Court further finds that Betty Jean McKinney died on November 28, 1995 in Bluejacket, Craig County, Oklahoma. Upon the death of Betty Jean McKinney, Tracts 1 and 3 of the subject property vested in her surviving joint tenant, Raymond L. McKinney, by operation of law. Tract 2 of the subject real property was not held in joint tenancy; therefore, upon the death of Betty Jean McKinney, Tract 2 of the subject property vested in her surviving heirs by operation of law. A copy of a Certificate of Death certifying Betty Jean McKinney's death was attached as Exhibit "F" to the Complaint.

The Court further finds that Raymond L. McKinney and Betty J. McKinney executed and delivered to the United States of America, acting on behalf of the Farmers Home Administration, now known as Farm Service Agency, the following described promissory notes.

Loan Number	Original Amount	Date	Interest Rate
41-01	\$29,560.00 <sup>1</sup>	07/31/73	5.00%
41-13	11,808.64	07/03/84	5.00%
	18,600.00 <sup>2</sup>	03/19/76	5.00%
41-23	20,588.75	07/03/84	5.00%
	30,000.00 <sup>3</sup>	09/22/77	5.00%
41-14	34,314.25	07/03/84	5.00%
	116,400.00 <sup>4</sup>	08/22/79	9.00%
43-16	153,849.93	07/03/84	9.00%
43-12	18,140.00	08/15/84	5.00%

The Court further finds that as security for the payment of the above-described notes, Raymond L. McKinney and Betty J. McKinney executed and delivered to the United States of America, acting on behalf of the Farmers Home Administration, now known as Farm Service Agency, the following described real estate mortgages.

Instrument	Dated	Filed	County	Book	Page
Real Estate Mortgage	07/31/73	07/31/73	Craig	280	9
Real Estate Mortgage	03/19/76	03/19/76	Craig	291	356
Real Estate Mortgage	09/22/77	09/22/77	Craig	299	382
Real Estate Mortgage	08/22/79	08/23/79	Craig	311	533
Real Estate Mortgage	07/31/81	07/31/81	Craig	324	476
Real Estate Mortgage	07/03/84	07/05/84	Craig	341	709
Real Estate Mortgage	08/15/84	08/15/84	Craig	342	479

<sup>1</sup>Reamortized to Loan No. 41-13

<sup>2</sup>Reamortized to Loan No. 41-23

<sup>3</sup>Reamortized to Loan No. 41-14

<sup>4</sup>Reamortized to Loan No. 43-16

These mortgages cover the above-described property, situated in the State of Oklahoma, Craig County.

The Court further finds that Raymond L. McKinney aka Raymond McKinney and Betty J. McKinney aka Betty McKinney aka Betty Jean McKinney, now deceased, made default under the terms of the aforesaid notes, mortgages and security agreements, as well as the agreed stipulation, by reason of their failure to make the yearly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the notes, mortgages and security agreements, after full credit for all payments made, the principal sum of \$208,936.96, plus accrued interest in the amount of \$118,057.79 as of August 3, 1995, plus interest accruing thereafter at the rate of \$53.1406 per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$465.13 (\$50.00 fee for evidentiary affidavit, \$405.13 publication fees, \$10.00 fee for recording Notice of Lis Pendens).

The Court further finds that Plaintiff, United States of America, is entitled to a judicial determination of the death of Betty Jean McKinney, a judicial termination of the joint tenancy of Raymond L. McKinney and Betty J. McKinney as to Tracts 1 and 3 of the subject real property, and a judicial determination of the heirs of Betty Jean McKinney as to Tracts 2 and 3 of the subject real property.

The Court further finds that the Defendant, Randy McKinney and Spouse of Randy McKinney who is one and the same person as Barbara McKinney, disclaim any right, title or interest in the subject property.

The Court further finds that the Defendant, Chetopa Implement, Inc., claims no right, title or interest in the subject real property.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Craig County, Oklahoma, claim no right, title or interest in the subject real property since all taxes due have been made paid by Farm Service Agency.

The Court further finds that the Defendants, Raymond L. McKinney aka Raymond McKinney; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Betty J. McKinney aka Betty McKinney aka Betty Jean McKinney, Deceased; Pam Tellis; Spouse, if any, of Pam Tellis; Dana Colby; Spouse, if any, of Dana Colby; Leon Walker dba Leon's Coal; Big Ernie's Feed; and Lee Equipment Company, are in default and therefore have no right, title or interest in the subject real property.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the death of Betty Jean McKinney be and the same hereby is judicially determined to have occurred on November 28, 1995, in Bluejacket, Craig County, Oklahoma.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the joint tenancy of Raymond L. McKinney and Betty J. McKinney as to Tracts 1 and 3 of the subject real property be and the same is judicially terminated as of the date of the death of Betty Jean McKinney on November 28, 1995.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the only known heirs of the heirs of Betty Jean McKinney, Deceased, as to Tracts 2 and 3 of the subject real property, are Randy McKinney, Pam Tellis and Dana Colby, and that despite the exercise of due diligence by Plaintiff and its counsel, no other known heirs of Betty Jean McKinney, Deceased, have been discovered and it is hereby judicially determined that

Randy McKinney, Pam Tellis and Dana Colby are the only known heirs of Betty Jean McKinney, Deceased, as to Tracts 2 and 3 of the subject real property, and that Betty Jean McKinney, Deceased, has no other known heirs, executors, administrators, devisees, trustees, successors and assigns; and the Court approves the Certificate of Publication and Mailing filed on December 12, 1996, regarding said heirs.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of Farm Service Agency, formerly Farmers Home Administration, have and recover judgment **in rem** against the Defendant, Raymond L. McKinney aka Raymond McKinney, in the principal sum of \$208,936.96, plus accrued interest in the amount of \$118,057.79 as of August 3, 1995, plus interest accruing thereafter at the rate of \$53.1406 per day until judgment, plus interest thereafter at the legal rate until fully paid, plus the costs of this action in the amount of \$465.13 (\$50.00 fee for evidentiary affidavit, \$405.13 publication fees, \$10.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property, plus any other advances.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, Raymond L. McKinney aka Raymond McKinney; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Betty J. McKinney aka Betty McKinney aka Betty Jean McKinney, Deceased; Randy McKinney; Spouse of Randy McKinney who is one and the same person as Barbara McKinney; Pam Tellis; Spouse, if any, of Pam Tellis; Dana Colby; Spouse, if any, of Dana Colby; Leon Walker dba Leon's Coal; Big Ernie's Feed; Chetopa Implement, Inc.; Lee Equipment Company;

County Treasurer, Craig County, Oklahoma; and Board of County Commissioners, Craig County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

**First:**

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

**Second:**

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

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

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

  
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



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**PHIL PINNELL, OBA #7169**  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

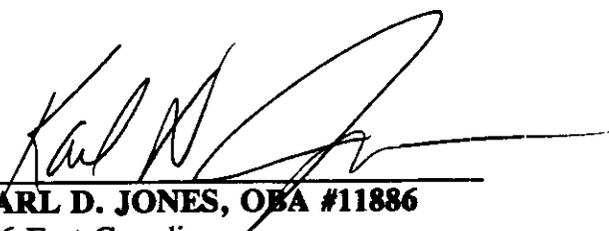


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**CLINT WARD, OBA #12027**  
Assistant District Attorney  
301 West Canadian Avenue  
Vinita, Oklahoma 74301  
(918) 256-3320  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Craig County, Oklahoma

Judgment of Foreclosure  
Case No. 96-C-332-B (McKinney)

PP:cas



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**KARL D. JONES, OBA #11886**

106 East Canadian

P.O. Box 553

Vinita, Oklahoma 74301

(918) 256-8791

Attorney for Defendant,

Chetopa Implement, Inc.

Judgment of Foreclosure  
Case No. 96-C-332-B (McKinney)

PP:cas

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

**FILED**

FEB 20 1997

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

CHARLES L. BOYD, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
JOHN SELPH, et al., )  
 )  
Defendants. )

Case No. 96-C-1108-BU

ENTERED ON DOCKET

DATE FEB 21 1997

**ORDER**

On January 8, 1997, United States Magistrate Judge Sam A. Joyner entered an Order denying Plaintiff's motion to proceed in forma pauperis because Plaintiff had had at least three actions in the courts of the United States dismissed as frivolous. Magistrate Judge Joyner ordered Plaintiff to pay the full filing fee of \$120.00 within 30 days.

Upon review of the record, it appears that Plaintiff has not paid the filing fee within the time ordered by Magistrate Judge Joyner.

Accordingly, the Court hereby **DISMISSES WITHOUT PREJUDICE** Plaintiff's action for failure to pay the required filing fee.

ENTERED this 20<sup>th</sup> day of February, 1997.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

DATE 2-21-97

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
LORI ANN LITTLE; ROUSSEAU )  
MORTGAGE CORPORATION; CITY OF )  
BROKEN ARROW, Oklahoma; COUNTY )  
TREASURER, Tulsa County, Oklahoma; )  
BOARD OF COUNTY )  
COMMISSIONERS, Tulsa County, )  
Oklahoma, )  
Defendants. )

**F I L E D**

FEB 19 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Civil Case No. 96-C 74K ✓

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 19 day of Feb, 1997, 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 January 21, 1997, pursuant to an Order of Sale dated September 24, 1996, of the following described property located in Tulsa County, Oklahoma:

LOT FORTY (40), BLOCK FOUR (4), INDIAN SPRINGS ESTATES 4TH ADDITION, AN ADDITION TO THE CITY OF BROKEN ARROW, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF. ALSO KNOWN AS 8612 SOUTH FAWNWOOD COURT, BROKEN ARROW, OKLAHOMA 74012.

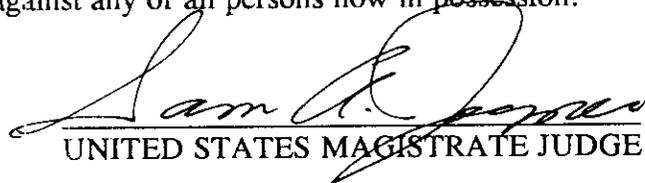
Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Lori Ann Little, Rousseau Mortgage Corporation, City of Broken Arrow, Oklahoma, County Treasurer, Tulsa County,

Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma and to the purchaser, M&M Construction, 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 Broken Arrow Ledger, a newspaper published and of general circulation in Broken Arrow, Oklahoma, and that on the day fixed in the notice the property was sold to the M&M Construction, 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.

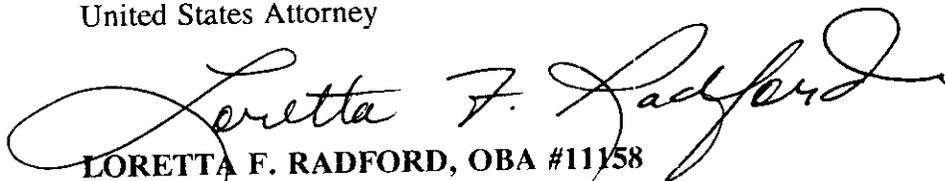
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the M&M Construction, 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.

  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

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

**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. 96-C 74K