

4-28

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

FILED

APR 29 1997

UNITED STATES OF AMERICA)
)
) Plaintiff,)
 vs)
)
) BERTA HARPER)
)
) Defendant.)

96CV1181B

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

APR 30 1997

PAYMENT AGREEMENT

Plaintiff, the United States of America, having obtained its judgment herein, and the defendant, having consented to this Payment Agreement, hereby agree as follows:

1. Plaintiff's consent to this Payment Agreement is based upon certain financial information which defendant has provided it and the defendant's express representation to Plaintiff that she is unable to presently pay the amount of indebtedness in full and the further representation of the defendant that she will willingly and truly honor and comply with the Payment Agreement entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:

(a) Beginning on or before the 5th day of May, 1997, the defendant shall tender to the United States a check or money order payable to the "U. S. Department of Justice", in the amount of \$60.00 and a like sum on or before the 5th day of each following month until the entire amount of the Judgment, together with costs and accrued post judgment interest, is paid in full.

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

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

(d) The defendant shall keep the United States currently informed in writing of any material change in her financial situation or ability to pay, and of any change in her employment, place of residence or telephone number. Defendant shall provide such information to the United States Attorney at the address set forth in (b) above.

(e) The defendant shall provide the United States with current, accurate evidence of her assets, income and expenditures (including, but not limited to, her Federal income tax returns) within fifteen (15) days of the date of a request for such evidence by the United States Attorney.

2. Default under the terms of this Payment Agreement will entitle the United States to execute on the judgment without notice to the defendant.

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

4. The parties further agree that any Order of Payment which may be entered by the Court pursuant hereto may thereafter be modified and amended upon stipulation of the parties; or, should

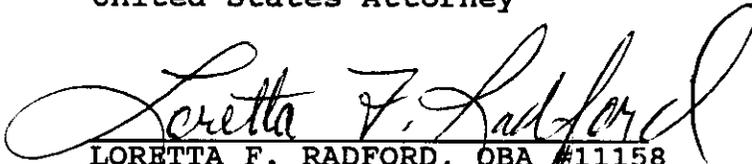
the parties fail to agree upon the terms of a new stipulated Order of Payment, the Court may, after examination of the defendant, enter a supplemental Order of Payment.


United States District Judge

4-29-97

APPROVED AS TO FORM:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant U. S. Attorney
Attorney for Plaintiff


BERTA HARPER, Debtor

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

FILED

APR 29 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TOM LESTER PUGH,)
)
Petitioner,)
)
vs.)
)
RON WARD, Warden, Oklahoma)
State Penitentiary, DREW)
EDMONDSON, Attorney General of)
the State of Oklahoma,)
)
Respondents.)

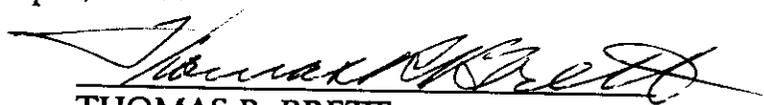
Case No. 97-CV-379-B ✓

ENTERED ON DOCKET
DATE APR 30 1997

ORDER

The Court hereby **DISMISSES WITHOUT PREJUDICE** the instant case as the Court has granted Petitioner leave to amend his Petition for a Writ of Habeas Corpus in Case No. 96-CV-976-B. The Amended Petition in Case No. 96-CV-976-B is identical to the Petition in the instant matter and obviates the necessity of this case.

IT IS SO ORDERED this 29th day of April, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

F I L E D

APR 28 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

HOMEWARD BOUND, INC.,)
et. al.,)

Plaintiffs,)

vs.)

THE HISSOM MEMORIAL CENTER,)
et. al.,)

Defendants.)

Case No: 85-C-437-E

ENTERED ON CLERK'S
APR 29 1997

ORDER & JUDGMENT

Plaintiffs' counsel, Bullock & Bullock, filed an Attorney Fee Application on April 8, 1997, for an award of attorney fees and expenses in accordance with the December 23, 1989 order and stipulation of the parties.

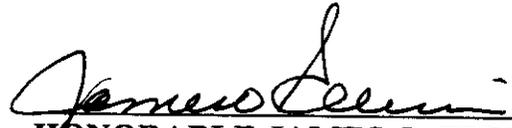
The Court has reviewed the application for fees and the Stipulation of the parties.

The Court hereby awards the firm Bullock & Bullock uncontested attorney fees and expenses in the amount of \$70,434.72.

IT IS THEREFORE ORDERED that the Department of Human Services, the Oklahoma Health Care Authority and the Department of Rehabilitation Services are each jointly and severally liable for the payment to Plaintiffs' counsel, Bullock & Bullock, for attorney fees and expenses in the amount of \$70,434.72 and a judgment in the amount of \$70,434.72 is hereby entered on this day.

The contested time and expenses will be held in abeyance pending a hearing to be held on July 22, 1997 at 1:30, P.M.

ORDERED this 25th day of April, 1997.


HONORABLE JAMES O. ELLISON
United States District Court


Louis W. Bullock
Patricia W. Bullock
BULLOCK & BULLOCK
320 South Boston, Suite 718
Tulsa, Oklahoma 74103-3783
(918) 584-2001


Mark Jones
Assistant Attorney General
**OFFICE OF THE ATTORNEY
GENERAL**
4545 North Lincoln, Suite 260
Oklahoma City, OK 73105-3498
(405) 521-4274

- and -

Frank Laski
Judith Gran
**PUBLIC INTEREST LAW CENTER
OF PHILADELPHIA**
125 South Ninth Street
Suite 700
Philadelphia, Pennsylvania 19107
(215) 627-7100


Lynn S. Rambo-Jones
Deputy General Counsel
**OKLAHOMA HEALTH CARE
AUTHORITY**
4545 N. Lincoln Blvd., Suite 124
Oklahoma City, Oklahoma 73105
(405) 530-3439

ATTORNEYS FOR PLAINTIFFS

ATTORNEYS FOR DEFENDANTS

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

ARLENE PHILLIPS,)
)
 Plaintiff,)
)
 v.)
)
 J. C. PENNEY COMPANY, INC.,)
)
 Defendant.)

Case No. 96-CV-516K ✓
Honorable Terry Kern

FILED ON DOCKET
4-29-97

FILED

APR 28 1997

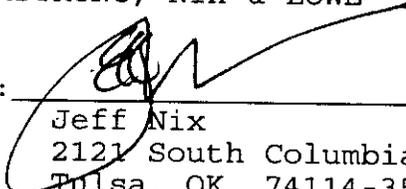
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

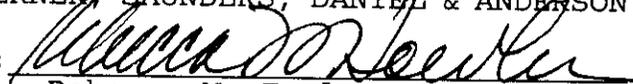
Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereto hereby stipulate that the above styled action should be dismissed in its entirety with prejudice, each party to bear its own costs and attorneys fees.

Dated this 21 day of April, 1997.

ARMSTRONG, NIX & LOWE

By: 
Jeff Nix
2121 South Columbia, Suite 710
Tulsa, OK 74114-3521
Attorney for Plaintiff

DOERNER, SAUNDERS, DANIEL & ANDERSON

By: 
Rebecca M. Fowler, OBA #13682
320 South Boston, Suite 500
Tulsa, OK 74103 (918) 582-1211

Attorneys for Defendant,
J. C. Penney Company, Inc.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 28 1997

UNITED STATES OF AMERICA,)
)
 Plaintiff)
)
 v.)
)
 JIMMIE M. STINNETT,)
)
 Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Action No. 96CV1180K

ENTERED ON DOCKET
4-29-97

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of April 28, 1997 and the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendant, **Jimmie M. Stinnett**, against whom judgment for affirmative relief is sought in this action has failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

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

Dated at Tulsa, Oklahoma, this 28 day of April, 1997.

PHIL LOMBARDI, Clerk
United States District Court for
the Northern District of Oklahoma

By A. Schwelke
Deputy Court Clerk for Phil Lombardi

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

FILED

APR 28 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DONNA ROGERS,)
)
Plaintiff,)
)
vs.)
)
ROGERS GALVANIZING COMPANY,)
a Delaware corporation, and)
KINARK CORPORATION, a Delaware)
corporation,)
)
Defendants.)

Case No. 96-CV-809-H

ENTERED ON DOCKET

DATE APR 29 1997

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, Plaintiff, Donna Rogers, and Defendants, Rogers Galvanizing Company and Kinark Corporation, hereby stipulate that this action may be and hereby is dismissed with prejudice to the refileing thereof.

DATED this 28th day of April, 1997

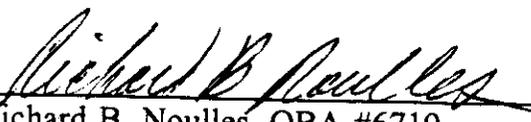


George H. Lowrey, OBA #10888
LOWREY & LOWREY
406 South Boulder, Suite 400
Tulsa, Oklahoma 74103-3825
(918) 599-9788
ATTORNEYS FOR PLAINTIFF

Handwritten mark

Handwritten mark

Handwritten mark


Richard B. Noulles, OBA #6719

**GABLE GOTWALS MOCK SCHWABE
KIHLE GABERINO**

2000 Boatmen's Center
15 West Sixth Street
Tulsa, Oklahoma 74119-5447
(918) 582-9201

ATTORNEYS FOR DEFENDANTS

Submitted by:

David Herrold

Andrew R. Turner (OBA No. 9125)
Bruce W. Freeman (OBA No. 10812)
David H. Herrold (OBA No. 17053)

of

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

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

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

FILED

APR 28 1997

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

BRENDA DEANN ROGERS,)
)
 Plaintiff,)
)
 vs.)
)
 MARVIN T. RUNYON, in his)
 official capacity as)
 United States Postmaster)
 General,)
)
 Defendant.)

Case No. 96-C-474-BU

ENTERED ON DOCKET
DATE APR 29 1997

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Michael Burrage, District Judge, presiding, and the plaintiff, Brenda DeAnn Rogers, having withdrawn her claim of disability discrimination during trial, and the remaining issues having been duly tried and the jury having duly rendered its verdict,

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of the defendant, Marvin T. Runyon, in his official capacity as United States Postmaster General, and against the plaintiff, Brenda DeAnn Rogers, on the plaintiff's claim of sexual discrimination based upon hostile work environment sexual harassment;

IT IS ALSO ORDERED AND ADJUDGED that judgment is entered in favor of the plaintiff, Brenda DeAnn Rogers, and against the defendant, Marvin T. Runyon, in his official capacity as United States Postmaster General, on the plaintiff's claim of retaliation for protected activity and that the plaintiff, Brenda DeAnn Rogers,

recover of the defendant, Marvin T. Runyon, in his official capacity as United States Postmaster General, compensatory damages in the sum of \$50,000.00, with interest thereon at the rate provided by law; and

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Brenda DeAnn Rogers, is entitled to recover her costs of action.

ENTERED this 24th day of April, 1997.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

F I L E D

APR 28 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORA J. BLANKENSHIP, an individual,)
and JOYCE BASS, an individual,)

Plaintiffs,)

vs.)

No. 96-C-492-B

METROPOLITAN LIFE)

INSURANCE COMPANY, a Delaware)

corporation; MONTGOMERY ELEVATOR)

COMPANY, a Delaware corporation; and)

DTM TULSA, INC., an Arizona corporation,)

Defendants.)

ENTERED ON DOCKET

DATE APR 20 1997

JUDGMENT

This action came on for jury trial before the Court, Honorable Thomas R. Brett, Senior Judge, presiding. The issues were duly tried on April 21 through April 24, 1997, and the jury rendered its verdict in favor of the Defendants, Metropolitan Life Insurance Company, DTM Tulsa, Inc., and Montgomery Elevator Company on April 24, 1997.

IT IS THEREFORE ORDERED that Judgment is entered in favor of the Defendants, Metropolitan Life Insurance Company, DTM Tulsa, Inc., and Montgomery Elevator Company and against the Plaintiffs, Ora J. Blankenship and Joyce Bass. Costs are assessed against Plaintiffs. Each party is responsible for its attorneys' fees.

IT IS SO ORDERED THIS 28th DAY OF APRIL, 1997.



THOMAS R. BRETT
UNITED STATES DISTRICT COURT

84

FILED

APR 28 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 DAWNA M. SPEARS,)
)
 Defendant,)
)
 and)
)
 CITGO PETROLEUM,)
)
 Garnishee.)

CIVIL ACTION NO. 96CV 651B

ENTERED ON DOCKET
APR 29 1997
DATE

ORDER DIRECTING DISBURSAL OF GARNISHMENT MONIES

This Court having reviewed the United States' Application for Disbursal of Garnishment Monies finds:

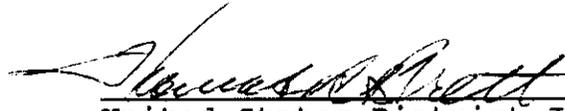
1. Pursuant to the Writ of Continuing Garnishment entered on March 5, 1997, the Garnishee, Citgo Petroleum, has made garnishment payments into the Court's registry deposit fund.

2. A Garnishee Order was issued April 11, 1997, ordering the Garnishee, Citgo Petroleum, to pay twenty-five percent (25%) of Dawna M. Spears's income to plaintiff and continue said payment until the debt to the plaintiff is paid in full or until the garnishee, Citgo Petroleum, no longer has custody, possession or control of any property belonging to the debtor, Dawna M. Spears, or until further Order of the Court. Payment is to be made to the U.S. Department of Justice and submitted to the U. S. Attorney's Office.

14

ml

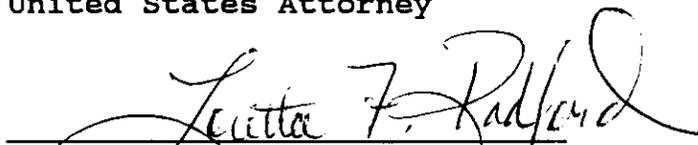
IT IS THEREFORE ORDERED that the United States Court Clerk is to disburse all monies paid into the Court's registry deposit fund as a result of the United States' garnishment on Dawna M. Spears.


United States District Judge

Submitted by:

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney


LORETTA F. RADFORD, OBA #11/158
Assistant United States Attorney
333 West 4th Ste 3460
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/11f

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

F I L E D

APR 28 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CORNELIOUS DEAN FINLEY,)

Plaintiff,)

v.)

THE CITY OF TULSA, et al.,)

Defendants.)

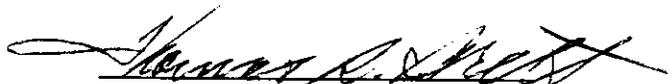
Case No. 96-CV-1121-B

ENTERED ON DOCKET
DATE APR 29 1997

ADMINISTRATIVE CLOSING ORDER

BY AGREEMENT of the Parties hereto and by consent of the Court, pursuant to N.D. L.R. 41, this case is hereby administratively closed until November 1, 1997. The case may be reopened for good cause upon application of either party prior to November 1, 1997. If such application is not made, the case will be dismissed with prejudice.

IT IS SO ORDERED, this 28th day of Apr., 1997.


THOMAS R. BRETT
U.S. DISTRICT JUDGE

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

WILLIE LEONARD GRANT,)
)
) Petitioner,)
)
) v.)
)
) JOHN MIDDLETON,)
)
) Respondent.)

Case No. 96-C-306-K
FILED

APR 28 1997 *PL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed March 28, 1997, in which the Magistrate Judge recommended that the Petitioner's Petition for Writ of Habeas Corpus should be denied. 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 Petitioner's Petition for Writ of Habeas Corpus is denied.

Dated this 25 day of April, 1997.

Terry G. Kern
TERRY G. KERN
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
4-29-97

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

HAROLD D. HORNSBY,)
)
Plaintiff,)
)
vs.)
)
R. ROHLOFF, and T. THIERRY,)
)
Defendants.)

No. 95-C-59-K ✓

F I L E D

APR 28 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on Plaintiff's second motion to compel discovery (Docket #41) and motion to stay proceedings (Docket #42). Defendants have objected to both motions.

In his motion to compel discovery, Plaintiff asks the Court to compel production by Defendants of his criminal trial transcripts, the procedures for the destruction of "radio-gram transcripts" and the identity of dispatcher John Doe. Plaintiff has previously requested an Order compelling production of these same materials. By its Order of August 13, 1996, the Court denied as moot that first motion to compel since Defendants had provided responses to Plaintiff's discovery requests. Nothing has changed since the entry of that Order. Therefore, the Court concludes that Plaintiff's current motion to compel should be denied.

In his motion to stay proceedings, Plaintiff requests a stay in this case while he completes his discovery and litigates the same issues in "criminal proceedings." The Court notes that the "criminal proceedings" referred to by Plaintiff is in fact his habeas corpus action, case no. 95-CV-940, filed in this district court. In that case, Plaintiff attacks the validity of his criminal

4/6

convictions in not only the state criminal case involving the facts at issue in the instant case, CRF-92-970, but also his earlier state criminal convictions from CRF-90-3198 and CRF-90-461. Petitioner's habeas case is currently on appeal to the Tenth Circuit Court of Appeals after the district court dismissed Plaintiff's petition.

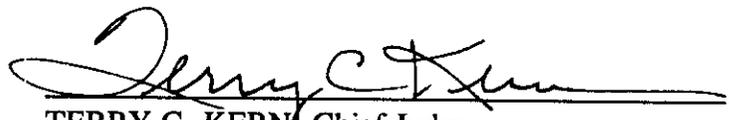
The United States Supreme Court has held that a § 1983 plaintiff seeking to recover money damages for unlawful conduct which would invalidate an underlying conviction must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. Heck v. Humphrey, 114 S.Ct. 2364, 2372 (1994). A claim for damages which challenges the legality of a conviction that has not been invalidated is not cognizable under § 1983. Id. Stated another way, if a judgment in favor of the plaintiff would necessarily invalidate his conviction, the § 1983 complaint must be dismissed unless the plaintiff can show that the conviction has already been invalidated. Id. In Heck, the plaintiff could not show the invalidity of the underlying conviction and, as a result, the Court upheld the validity of the district court's dismissal of Plaintiff's § 1983 claim. Id., at 2374.

In the instant case, Plaintiff has brought this § 1983 action seeking to recover monetary damages for his "unlawful conviction, mental anguish, pain, and suffering" all caused by Defendants' allegedly unlawful actions. Specifically, Plaintiff complains that his arrest and, ultimately, his conviction were unlawful since the Defendants' decision to stop and then arrest Plaintiff was based on the pretext that he was driving a stolen vehicle. He also alleges that he owned the vehicle and that, therefore, he could not have stolen it. However, Plaintiff's conviction

was affirmed on direct appeal and his habeas action has been dismissed by this federal district court, a decision Plaintiff is currently appealing. Unless Plaintiff is successful on appeal, then, pursuant to Heck, his § 1983 claim will be invalid. Because Plaintiff cannot show at this time that his criminal conviction has been reversed or called into question by the issuance of a writ of habeas corpus, the Court concludes that Plaintiff's motion to stay proceedings should be denied and this case should be dismissed without prejudice. In light of this decision, Defendants' motion for summary judgment, as amended, should be denied as moot.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's motion to compel discovery (Docket # 41) is DENIED. Plaintiff's motion to stay proceedings (Docket # 42) is DENIED and this case is DISMISSED without prejudice. Defendants' motion for summary judgment (Docket #19), as amended (Docket #40), is DENIED as moot.

SO ORDERED THIS 25 day of April, 1997.


TERRY C. KERN Chief Judge
UNITED STATES DISTRICT COURT

DATE 4-28-97

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

IN RE:)
)
 JEFF GEORGE and GINA GEORGE,)
)
 Debtors.)
)
)
 SCOTT P. KIRTLEY, Trustee,)
)
 Appellant,)
)
 vs.)
)
 JEFF GEORGE and GINA GEORGE, Debtors,)
)
 Appellees.)

Bankruptcy Case No.
 95-39996-C
 (Chapter 7)

FILED

MAY 27 1997

Phil Lombardi, Clerk
 U.S. DISTRICT COURT

Case No. 97-CV-40-K ✓

REPORT AND RECOMMENDATION^{1/}

This is an appeal from an Order and Judgment entered by United States Bankruptcy Judge, Stephen J. Covey, on July 29, 1996. [R. at 25 & 26]. Judge Covey determined that an Earned Income Credit of \$3,110.00, received by Appellees on their 1995 United States income tax return, was exempt property of the bankruptcy estate under 31 Okla. Stat. § 1(A)(19) and 1(B). See In re George, 199 B.R. 60 (Bankr. N.D. Okla. 1996). Pursuant to § 1(A)(19), Oklahoma provides an exemption for "alimony, support, separate maintenance or child support payments."

^{1/} This Report and Recommendation is entered pursuant to 28 U.S.C. § 636(b)(1)(B) and under the authority of Hall v. Vance, 887 F.2d 1041, 1045 (10th Cir. 1989); Virginia Beach Federal Savings & Loan Assoc. v. Wood, 901 F.2d 849, 850 (10th Cir. 1990); and Griego v. Padilla, 64 F.3d 580 (10th Cir. 1995).

4

The bankruptcy trustee appeals, arguing that an Earned Income Credit is not an "alimony, support, separate maintenance or child support" payment. For the reasons discussed below, the undersigned agrees with the trustee and recommends that Judge Covey's Order and Judgment be **REVERSED** and this case be **REMANDED** for further proceedings.

I. **INTRODUCTION AND BACKGROUND**

On December 19, 1995, the Appellees/Debtors filed a joint Voluntary Petition for Relief under Chapter 7 of the United States Bankruptcy Code. [R. at 1]. See 11 U.S.C. §§ 301 and 302. Debtors are a married couple with two minor children residing in their household. Appellant was the interim trustee and was elected as trustee at the meeting of creditors held on January 22, 1996. See 11 U.S.C. §§ 701 and 702.

On March 26, 1996, the trustee filed a motion to require the debtors to turn over property of the estate pursuant to 11 U.S.C. § 542 and Fed. R. Bank. P. 7001. The trustee was seeking Debtors' 1995 tax returns to determine whether Debtors' tax refund, if any, would become property of the bankruptcy estate. [R. at 11]. Debtors objected and disclosed that they had received a tax refund in 1995 of \$3,111.00. The \$3,111.00 refund was composed of \$1.00 as a return of withheld wages and \$3,110.00 as an Earned Income Credit. Debtors argued that the \$3,110.00 Earned Income Credit was property that could be exempted from the bankruptcy estate. [R. at 17]. Judge Covey held a hearing on May 8, 1996, ordered the parties to submit additional briefs on the issue, and took the matter under advisement. [R. at 19M].

Pursuant to Judge Covey's order, the parties filed additional briefs on June 14, 1996. [R. at 20 and 21]. Judge Covey filed a Memorandum Opinion and a separate Judgment on July 29, 1996. Judge Covey determined that the Debtors' Earned Income Credit was property of the estate that could be exempted pursuant to 31 Okla. Stat. § 1(A)(19). [R. at 25 and 26].

The trustee filed a Notice of appeal on August 8, 1996 and the record was designated on August 16, 1996. [R. at 28 and 32]. The trustee initially appealed to the Bankruptcy Appellate Panel of the Tenth Circuit under 28 U.S.C. § 158(b) and (c). The Debtors elected, however, to have this appeal heard by the district court pursuant to 28 U.S.C. § 158(c)(1)(B). Thus, the Court has jurisdiction over this appeal under 28 U.S.C. § 158(a).

The trustee raised the following issues in his Statement of Issues on Appeal:

1. Whether the Bankruptcy Court erred in holding that the earned income credit portion of an income tax refund is exempt when the same was not claimed exempt under any Oklahoma Statute by the Debtors?
2. If the Bankruptcy Court did not err in the first issue, whether the Bankruptcy Court erred in holding that the earned income credit portion of an income tax refund is exempt under Oklahoma law?

[R. at 32]. The trustee presented no argument in connection with the first issue in his brief filed with this Court. This issue is, therefore, waived. See, e.g., Bledsoe v. Garcia, 742 F.2d 1237, 1244 (10th Cir. 1984) (issues raised in a statement of issues but not argued or presented in the appellant's brief are waived). Therefore, the only issue on appeal is whether an Earned Income Credit is exempt under Oklahoma law.

II. DISCUSSION

A. NATURE OF THE FEDERAL EARNED INCOME CREDIT

The federal Earned Income Credit is codified in the Internal Revenue Code at 26 U.S.C. § 32. Section 32 provides a tax credit to “eligible individual[s]”^{2/} in an amount equal to the “credit percentage”^{3/} for that amount of a taxpayer’s “earned income”^{4/} that does not exceed the “earned income amount.”^{5/} 26 U.S.C. § 32(a)(1). “Unlike certain other credits, which can be used only to off-set tax that would otherwise be owed, the earned-income credit is ‘refundable.’ Thus, if an individual’s earned-income credit exceeds his tax liability, the excess amount is ‘considered an overpayment’ of tax An individual who is entitled to an earned-income credit that exceeds the amount of tax he owes thereby receives the difference as if he had overpaid his tax in that amount.” Sorenson v. Secretary of the Treasury, 475 U.S. 851, 854-55 (1986). A taxpayer receives an overpayment in the form of a tax refund. See 26 U.S.C. § 6402.

^{2/} See 26 U.S.C. § 32(c)(1). It is undisputed that Debtors qualify as “eligible individuals” under §§ 32(c)(1)(A)(i) and 32(c)(3).

^{3/} See 26 U.S.C. § 32(b)(1). The applicable credit percentage in this case is 36%. Id. at § 32(b)(1)(B). In other words, Debtors are entitled to 36% of their “earned income” as a credit on their 1995 tax return.

^{4/} See 26 U.S.C. § 32(c)(2). Earned income includes wages, salaries, tips, other employee compensation, and the net earnings from any self-employment. Id. at § 32(c)(2)(A). Earned income does not include any amount received as a pension or annuity. Id. at § 32(c)(2)(B).

^{5/} See 26 U.S.C. § 32(b)(2). The earned income amount applicable in this case is \$8,890.00.

Based on its review of § 32's legislative history, the United States Supreme Court summarized the purpose of the Earned Income Credit as follows:

The earned-income credit was enacted to reduce the disincentive to work caused by the imposition of Social Security taxes on earned income (welfare payments are not similarly taxed), to stimulate the economy by funneling funds to persons likely to spend the money immediately, and to provide relief for low-income families hurt by rising food and energy prices.

Sorenson, 475 U.S. at 865. The Tenth Circuit has similarly summarized the purpose of the Earned Income Credit as follows:

[The Earned Income Credit] was designed to provide relief to low income families who pay little or no income tax, and it was intended to provide an incentive for low income people to work rather than to receive federal assistance.

Rucker v. Secretary of the Treasury, 751 F.2d 351, 356 (10th Cir. 1984).

The principal federal taxes affecting low income individuals are the individual income tax and the Social Security payroll tax.

Because of standard deductions and personal exemptions, relatively few . . . low-income individuals pay any [individual] income taxes. On the other hand, because the Social Security tax system has no standard deductions or personal exemptions, many low-income individuals are required to pay regressive Social Security taxes. Fortunately, the earned income credit offsets the Social Security tax liabilities of many low-income workers. Consequently, relatively few low-income workers owe any federal taxes at the end of the year.

Jonathan Forman, How to Reduce the Compliance Burden of the Earned Income Credit on Low-Income Workers and on the Internal Revenue Service, 48 Okla. L. Rev. 63, 68

(1995). While it is true that the Earned Income Credit does directly benefit low income individuals, including low income individuals with children, the Earned Income Credit

was not designed as a type of welfare grant, but as a work incentive program, by negating the disincentive of Social Security taxes. Social Security taxes apply to earnings received through wages or salaries, whereas they do not apply to funds received through other sources, such as social welfare programs. The purpose of the legislation was to remove the disincentive to work provided by the Social Security taxes that would have to be paid on wages or salaries. See S.Rep. No. 36, 94th Cong., 1st Sess. 12, reprinted in 1975 U.S.Code Cong. & Ad.News 54, 63-64, 83-84. . . . The [Earned Income Credit is] in reality more akin to a refund of Social Security taxes than to a type of welfare grant.

Sorenson v. Secretary of the Treasury, 752 F.2d 1433, 1443 n.1 (9th Cir. 1985), aff'd, 475 U.S. 851 (1986).

For purposes of this case, it is noteworthy that for taxable years after 1993, one need not have a dependent child in order to be eligible to receive an Earned Income Credit. See 26 U.S.C. § 32(c)(1)(A)(ii) and Pub. L. 103-66, § 13131(b). Under § 32(c)(1)(A), "eligible individuals" are defined as (1) individuals with children who qualify under § 32(c)(3), or (2) any other individual if that individual lived in the United States for more than half of the taxable year, is between the ages of 25 and 64, and cannot be claimed as a dependent by another taxpayer. Id. It is true, however, that the Earned Income Credit for families having qualifying children is significantly higher than for families without a qualifying child. Id. at § 32(b). See also In re Rutter, 204 B.R. 57, 59 (Bankr. D. Or. 1997).

B. EXEMPT STATUS OF THE FEDERAL EARNED INCOME CREDIT UNDER OKLAHOMA LAW

Under the Bankruptcy Code, virtually all property in which a debtor has a legal or equitable interest when the bankruptcy is commenced is included in the bankruptcy estate. 11 U.S.C. § 541. A debtor may, however, exempt certain property from the estate. 11 U.S.C. § 522.

The Code includes a list of properties which may be exempted, see id. § 522(d), and it allows states to establish separate exemption lists. A debtor may choose either the federal exemption provisions or the state provisions unless he resides in a state that has 'opted out' of the federal exemption list. See id. § 522(b)(1); 3 Collier on Bankruptcy ¶ 522.02, (15th ed. 1991). In states that have 'opted out,' debtors are limited to the state exemption list. The relevant state in this case, Oklahoma, has 'opted out.' See Okla. Stat. Ann. tit. 31, § 1B (West 1991). Oklahoma bankrupt debtors therefore are limited to the Oklahoma exemptions. See id. § 1A (exemptions).

Walker v. Mather, 959 F.2d 894, 895-96 (10th Cir. 1992). See also Kretzinger v. First State Bank of Waynoka, 103 F.3d 943, 945 (10th Cir. 1996).

Debtors argue that their Earned Income Credit is exempt under Oklahoma law, pursuant to 31 Okla. Stat. § 1(A)(19). Section 1(A)(19) provides as follows:

[T]he following property shall be reserved to every person residing in the state, exempt from attachment or execution and every other species of forced sale for the payment of debts. . .

Such person's right to receive alimony, support, separate maintenance or child support payments to the extent reasonably necessary for the support of such person and any dependent of such person.

31 Okla. Stat. § 1(A)(19). Judge Covey noted that payments for “alimony, support, separate maintenance or child support” ordinarily arise out of a divorce decree. Judge Covey held, however, that § 1(A)(19) is not limited on its face to payments arising out of a divorce decree. Judge Covey also concluded that the Earned Income Credit is “in the nature of a payment for the support of a family with dependent children.” George, 199 B.R. at 62. These conclusions, coupled with the mandate from Oklahoma courts that Oklahoma’s exemption statutes are to be liberally construed,^{6/} led Judge Covey to hold that the Earned Income Credit is exempt under § 1(A)(19). Id. This Court will review Judge Covey’s conclusion of law *de novo*. In re Hedged Investments Associates, Inc., 48 F.3d 470 (10th Cir. 1995).

Section 1(A)(19) identifies four types of payments that are exempt: (1) alimony, (2) support, (3) separate maintenance, and (4) child support. The Earned Income Credit is clearly not an alimony or separate maintenance payment. Thus, the Earned Income Credit must be viewed as either “support” or “child support” to be exempt under § 1(A)(19). Under Oklahoma law, “[w]ords used in any statute are to be understood in their ordinary sense” 25 Okla. Stat. § 1. The undersigned finds that the phrase “child support payments,” as understood in its ordinary sense, does not include payments received as the result of an Earned Income Credit. Also, given the legislative history of the Earned Income Credit and the fact that an Earned Income Credit may be claimed by individuals who have no children, the undersigned finds that

^{6/} See In re Anderson, 932 P.2d 1110, 1113 (Okla. 1996); In re Siegmann, 757 P.2d 820, 822 (Okla. 1988) (doubts are to be resolved in favor of exemption).

the Earned Income Credit cannot be classified or deemed to be a form of child support. See, e.g., In re Rutter, 204 B.R. 57, 60-61 (Bankr. D. Oregon 1997) (holding that an Earned Income Credit is not child support under an Oregon statute very similar to 31 Okla. Stat. § 1(A)(19)).

The only remaining payment type in § 1(A)(19) is a payment for "support." "Support" is not defined in § 1(A)(19) or elsewhere. Debtors and Judge Covey read "support" to include the social benefits which result from the Earned Income Credit (i.e., support for low income workers with dependent children). The undersigned finds that this reading of support, or even "child support," goes too far. Words in statutes should be given their ordinary meaning and words used together in a statute should be construed in context. See Liberty Mut. Ins. v. East Central Oklahoma Elec. Co-op, 97 F.3d 383, 390 (10th Cir. 1996). In § 1(A)(19) the term "support" comes between "alimony" and "separate maintenance." Considering the context and giving the term its ordinary meaning, the statute indicates that the "support" payments being referred to are payments that arise out of and are awarded in the context of a domestic relations action. "Only by wrenching the term 'support' wholly out of its statutory context is it possible to include federal earned income tax credits within its scope." In re Fraire, 1997 W.L. 45465, at *3 (D.Kan. Jan. 2, 1997).

Chapter 7 of Title 56 of the Oklahoma Statutes provides for various forms of public assistance, including child support assistance to neglected and dependent children. 56 Okla. Stat. §§ 161-244. Section 173 of Title 56 provides that "[a]ll rights to assistance under this act . . . shall not be subject to execution, attachment,

garnishment or other process, and in the case of bankruptcy, the assistance shall not pass to or through any trustee or any other person acting on behalf of creditors.” 56 Okla. Stat. § 173.^{7/} Reading § 1(A)(19)’s “support” or “child support” provisions to include all forms of public assistance which benefit children would have the effect of rendering 56 Okla. Stat. § 173 superfluous and unnecessary. If Debtors’ interpretation of § 1(A)(19) were accepted, the benefits provided under Chapter 7 of Title 56 would already be exempted under § 1(A)(19) and 56 Okla. Stat. § 173 would not be necessary. An interpretation of § 1(A)(19) having such an effect would violate the principle of statutory construction which requires courts not to interpret a statute in such a way as to render other statutory provisions meaningless. See Parker v. United States, 448 F.2d 793, 797 (10th Cir. 1971).

The undersigned recognizes that Oklahoma’s exemption statutes are to be liberally construed. A court must be careful, however, “not to depart substantially from the express language of the exemption statute or extend the legislative grant.” In re Davis, 136 B.R. 203, 207 (Bankr. S.D. Iowa 1991). “To characterize the federal earned income credit as [child support] would substantially depart from the language of the statute and take this court into the realm of rewriting [Oklahoma] law, a task reserved for the [Oklahoma Legislature].” In re Goertz, 202 B.R. 614, 618 (Bankr.

^{7/} Debtors do not argue that 56 Okla. Stat. § 173 provides a basis for exempting federal Earned Income Credits. Section 173 would not provide an exemption for federal Earned Income Credits because § 173 expressly provides an exemption only for those benefits conferred by Title 56, Chapter 7 of the Oklahoma Statutes.

W.D. Mo. 1996) (refusing to interpret the term "local public assistance benefit" to include the federal Earned Income Credit).

CONCLUSION

The undersigned recommends that the Court find that the federal Earned Income Credit provided by 26 U.S.C. § 32 is not exempted from the property of a Chapter 7 bankruptcy estate as "alimony, support, separate maintenance or child support" under 31 Okla. Stat. § 1(A)(19). The undersigned further recommends that Judge Covey's July 29, 1996 Judgment be **REVERSED** and this case be **REMANDED** to the bankruptcy court for further proceedings.

TIME FOR OBJECTIONS

If the parties so desire, they may file with the District Judge assigned to this case, within 10 days from the date they are served with a copy of this Report and Recommendation, objections to the undersigned's recommended disposition of this appeal. See 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b).

Dated this 27 day of May 1997.


Sam A. Joyner
United States Magistrate Judge

ENTERED ON DOCKET
DATE 4-25-97

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

DAVID W. HOLDEN, an individual,)
and HOLLIMAN, LANGHOLZ, RUNNELS,)
& DORWART, an Oklahoma)
professional corporation,)
Plaintiffs,)
vs.)
EMERALD SERVICES CORPORATION,)
a Delaware corporation, and)
LOEHR H. SPIVEY, a/k/a)
LARRY SPIVEY, an individual,)
Defendants.)

FILED
APR 24 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 94-C-1021-BU ✓

FILED
APR 24 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

Pursuant to the Court's Order filed March 26, 1997, it is **ORDERED** that the Clerk administratively terminate this action in his records pending the resolution of the state court actions filed by American Reserve Oil & Gas Profit Sharing Plan and Dale E. Steinkuehler: (1) Case No. CJ-94-00743, District Court, Tulsa County, Oklahoma; (2) Case No. CJ-95-1744, District Court, Tulsa County, Oklahoma; and (3) Case No. CJ-95-00739, District Court, Tulsa County, Oklahoma.

Upon resolution of any or all of the state court actions, the parties may reopen this proceeding, if necessary, for final resolution of Defendant, Emerald Services Corporation's counterclaim for indemnification/contribution under state law.

Entered this 24th day of April, 1997.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

224

570

ENTERED ON DOCKET
DATE 4-25-97

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

FILED

APR 24 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

COBBLESTONE APARTMENTS)
LIMITED PARTNERSHIP, by and)
through its general partner,)
MDC REALTY CORP.,)

Plaintiff,)

vs.)

Case No. 97 CV 182 BU

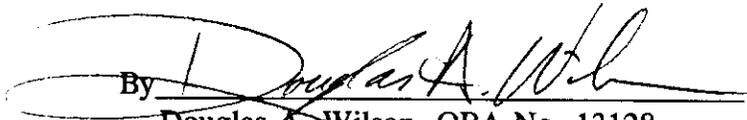
SHELL OIL COMPANY, a Delaware)
corporation, and HOECHST CELANESE)
CORPORATION, a Delaware corporation,)

Defendants.)

STIPULATION FOR DISMISSAL OF
HOECHST CELANESE CORPORATION

COME NOW the Plaintiff and Defendant Hoechst Celanese Corporation and hereby stipulate to the dismissal of Hoechst Celanese Corporation as a Defendant in this action.

Respectfully submitted,

By 

Douglas A. Wilson, OBA No. 13128
Riggs, Abney, Neal, Furpen, Orbison & Lewis
502 West Sixth Street
Tulsa, OK 74119-1010
(918) 587-3161
ATTORNEYS FOR PLAINTIFF

and

By 

Mike Barkley
Jennifer Keglovits
Barkley & Rodolf
2700 Mid-Continent Tower
401 South Boston Avenue
Tulsa, OK 74103
ATTORNEYS FOR DEFENDANT
HOECHST CELANESE CORPORATION

5

CKJ

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

4-25-97

CYNTHIA A. METZLER, Acting
Secretary of Labor, United
States Department of Labor,

Plaintiff,

v.

CON-WAY SOUTHERN EXPRESS, a
division of CON-WAY
TRANSPORTATION SERVICES, INC.

Defendant.

Civil Action

No. 97-CV-280K

FILED

APR 24 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NOTICE OF DISMISSAL

Plaintiff, Cynthia A. Metzler, Acting Secretary of Labor,
United States Department of Labor, pursuant to Rule 41(a)(1) of
the Federal Rules of Civil Procedure, hereby provides this Court
notice of its dismissal of its claim against defendant Con-Way
Southern Express, a division of Con-Way Transportation Services,
Inc. Defendant has not filed an answer or a motion for summary
judgment.

J. DAVITT McATEER
Acting Solicitor of Labor

JAMES E. WHITE
Regional Solicitor

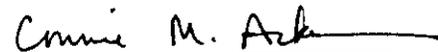
JACK F. OSTRANDER
Counsel for Safety and Health

Address:

U. S. Department of Labor
Office of the Solicitor
525 Griffin Street, Suite 501
Dallas, Texas 75202

Telephone: 214/767-4902

By:


CONNIE M. ACKERMANN
JANICE H. MOUNTFORD

Attorneys for Plaintiff.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 DONALD R. SEIGFRIED; PAULA R.)
 SEIGFRIED fka PAULA R. KELLER;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

ENTERED ON DOCKET
DATE APR 24 1997

FILED
IN OPEN COURT

APR 23 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Case No. 95-C 1083H/

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 23 day of April, 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 22, 1997, pursuant to an Order of Sale dated October 22, 1996, of the following described property located in Tulsa County, Oklahoma:

Lot Twelve (12), Block Four (4), CUNNINGHAM ADDITION, to the City of Tulsa, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

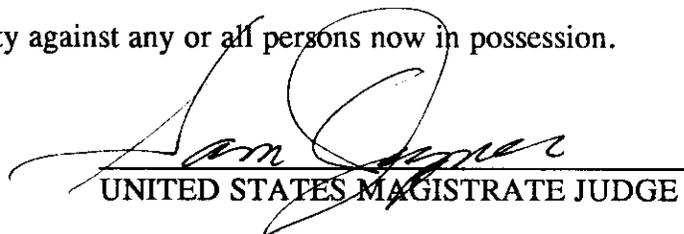
Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, by mail and to the Defendants, Donald R. Seigfried and Paula R. Seigfried by publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

20

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 the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

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

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


UNITED STATES MAGISTRATE JUDGE

WASHINGTON
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 23 1997

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

UNITED STATES OF AMERICA,

Plaintiff

v.

JO A. STEPNEY,

Defendant.

Civil Action No. 96CV1202BU

ENTERED ON DOCKET

DATE APR 24 1997

DEFAULT JUDGMENT

This matter comes on for consideration this 23rd day of April, 1997, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Jo A. Stepney, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Jo A. Stepney, was served with Summons and Complaint on February 28, 1997. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Jo A. Stepney, for the principal amount of \$2,686.85, plus accrued interest of \$1,285.43, plus interest thereafter at the rate of 8 percent per annum until judgment, a surcharge of 10% of the

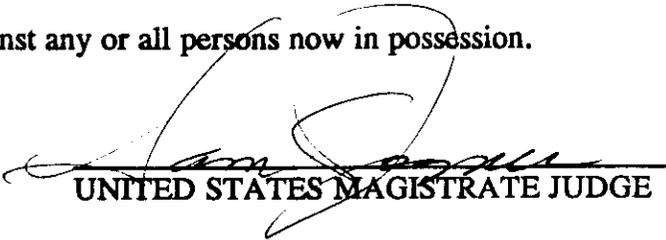
6

County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma and to R.L. Sharp and Fern Sharp, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

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

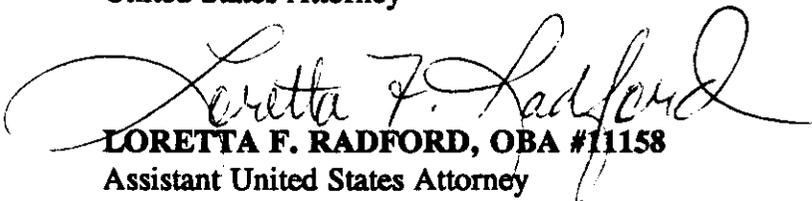
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United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

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


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. 93-C 435E

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

FILED

APR 23 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BILL R. COSSEY,

Plaintiff,

vs.

**MISSOURI PACIFIC RAILROAD COMPANY,
d/b/a UNION PACIFIC RAILROAD COMPANY,**

Defendant.

Case No. 96-CV-540E

ENTERED ON DOCKET

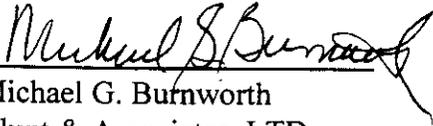
DATE APR 24 1997

STIPULATION FOR DISMISSAL WITH PREJUDICE

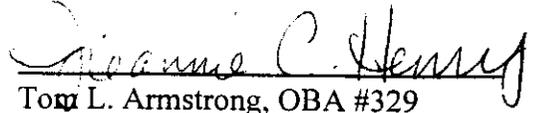
COME NOW the Plaintiff, Bill R. Cossey, and the Defendant, Missouri Pacific Railroad Company, d/b/a Union Pacific Railroad Company, by and through their attorneys of record and pursuant to Fed. R. Civ. Pro. 41, file this Stipulation for Dismissal dismissing with prejudice all claims raised by Plaintiff, Bill R. Cossey, against Missouri Pacific Railroad Company, d/b/a Union Pacific Railroad Company, in the case styled *Bill R. Cossey v. Missouri Pacific Railroad Company, d/b/a Union Pacific Railroad Company*, Case No. 96-CV-540E, filed in the United States Court District Court for the Northern District of Oklahoma, for the reasons that the parties have compromised and settled all matters in controversy. Each party is to bear their own respective costs, attorney fees and expenses.

mealy
chick
CT

19



Michael G. Burnworth
Blunt & Associates, LTD.
60 Edwardville Professional Park
P. O. Box 373
Edwardville, IL 62025



Tom L. Armstrong, OBA #329
Jeannie C. Henry, OBA #12331
Tom L. Armstrong & Associates
601 South Boulder. Ste 700
Tulsa, OK 74119-1300



Kevin T. Gassaway
Pierce, Couch, Hendrickson,
Baysinger & Green
100 West 5th, Suite 707
Tulsa, OK 74103

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

FILED

APR 23 1997 SAC

Principal Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

DOROTHEY M. RILEY,)
)
Plaintiff,)
)
v.)
)
JOHN J. CALLAHAN, Acting)
Commissioner of the Social Security)
Administration,)
)
Defendant.)

CASE NO. 96-cv-614-M ✓

ENTERED ON DOCKET

DATE

4/24/97

ORDER

Defendant, John J. Callahan, has filed a Motion To Remand for Further Administrative Proceedings [Dkt. 7], to which there has been no objection by Plaintiff. The Court, therefore, GRANTS Defendant's Motion and REMANDS this case to the Commissioner for further administrative action pursuant to sentence four (4) of § 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

DATED this 23rd day of APRIL, 1997.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

8

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

DOROTHEY M. RILEY,)
)
Plaintiff,)
)
v.)
)
JOHN J. CALLAHAN, Acting)
Commissioner of the Social Security)
Administration,)
)
Defendant.)

CASE NO. 96-cv-614-M

FILED
APR 23 1997
S.A.
Clerk
DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

4/24/97 DATE
ENTERED ON DOCKET

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 23rd day of APRIL, 1997.

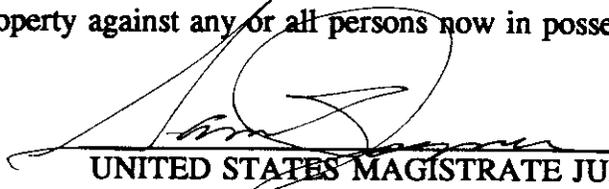
Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

aka Eldon Rutherford aka Eldon W. Rutherford and Judy Kay Rutherford aka Judy Rutherford aka Judy K. Rutherford, by mail and by publication; Defendant, Chemical Bank, as Trustee for the GCC Home Equity Trust 1990-1, by mail; Defendant, Greenwood Trust Company, a Delaware corporation, through its attorney J. Michael Morgan, by mail; and Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the 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 the United States of America on behalf of the Secretary of Veterans Affairs, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

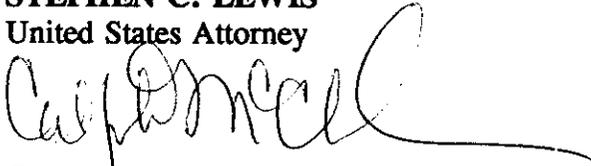
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Veterans Affairs, 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



CATHRYN D. MCCLANAHAN, OBA #014853
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

Report and Recommendation of United States Magistrate Judge
Case No. 95-C-562-K (Rutherford)

CDM:cas

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

ENTERED ON DOCKET
DATE 4-24-97

FILED

APR 22 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BARBARA J. DUCK,

Plaintiff,

v.

GEAR PRODUCTS, INC.,
an Oklahoma corporation,

Defendant.

Case No. 95-C-1227-K

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff and Defendant, by and through their respective attorneys, jointly stipulate that all of Plaintiff's claims herein should be dismissed with prejudice with each side to bear its own costs and attorneys' fees.

DATED this 22nd day of April, 1997.

Respectfully submitted,

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

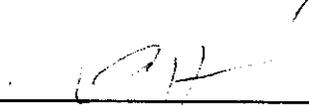
By: Kelly S. Kibbie
J. Patrick Cremin, OBA #2013
Kelly S. Kibbie, OBA #16333
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0594

ATTORNEYS FOR DEFENDANT
GEAR PRODUCTS, INC.

alt

FRASIER, FRASIER & HICKMAN

By: _____


Steven R. Hickman, Esq.
1700 Southwest Blvd., Suite 100
P.O. Box 799
Tulsa, OK 74101-0799

ATTORNEYS FOR PLAINTIFF
BARBARA DUCK

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

FILED

APR 22 1997



Phil Lombardi, Clerk
U.S. DISTRICT COURT

FIRST BANK OF TURLEY,)
)
 Plaintiff,)
)
 vs.)
)
 FIDELITY AND DEPOSIT INSURANCE)
 COMPANY OF MARYLAND,)
)
 Defendant.)

Case No. 93-C-284-E ✓

ENTERED ON DOCKET
DATE APR 23 1997

J U D G M E N T

This action came on for jury trial before the Court, Honorable James O. Ellison, Senior Judge, presiding. The issues were duly tried and the jury rendered its verdict in favor of plaintiff.

IT IS THEREFORE ORDERED that the Plaintiff, First Bank of Turley, recover of the Defendant, Fidelity and Deposit Insurance Company of Maryland, the sum of \$20,000, with interest thereon, and the costs of this action.

IT IS SO ORDERED THIS 22^d DAY OF APRIL, 1997.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

99

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

CARLOS E. SARDI, On Behalf of
Himself and All Others Similarly
Situated,

Plaintiff,

v.

STRUTHERS INDUSTRIES, JOHN C.
EDWARDS, G. DAVID GORDON, and
MICHAEL B. FINE,

Defendants.

Civil Action No.
94-C-787-H

FILED

APR 15 1997

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

JOAN DWORKIN,

Plaintiff,

v.

STRUTHERS INDUSTRIES, INC.,
JOHN C. EDWARDS and G. DAVID
GORDON,

Defendants.

Civil Action No.
94-C-838-H

ENTERED ON DOCKET

DATE APR 22 1997

CONSENT JUDGMENT

This cause having come on to be heard on this 15th day
of April, 1997, and plaintiffs and defendant Struthers
Industries, Inc. ("Struthers"), appearing by their counsel of
record, jointly submit this Consent Judgment to the Court for its
approval. It appearing to the Court that:

1. Plaintiffs and defendant Struthers, along with the
other defendants in the above-captioned actions (the "Actions"),
entered into a Stipulation and Agreement of Compromise and

100

Settlement dated June 27, 1996 (the "Stipulation"), whereby Struthers undertook, inter alia, to make certain payments in settlement of these Actions (the "Settlement") upon the occurrence of the events set forth in said Stipulation;

2. following preliminary approval by this Court and proper notice to the plaintiff class members, the ~~Settlement~~ between the parties was approved on October 21, 1996;

3. the conditions precedent to Struthers' obligation to pay the sum of \$1,850,000, plus interest payable at twelve percent (12%) per annum from 15 days after preliminary approval of the Settlement until date of payment have occurred, the time within which Struthers was to make such payment has passed, and Struthers has failed to make payment as prescribed in the Stipulation and Settlement;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the plaintiffs and the class be awarded judgment against Struthers in the amount of \$1,850,000, plus interest payable at twelve percent (12%) per annum from 15 days after preliminary approval of the Settlement until the date of payment.

DONE this 15th day of April, 1997.


SVEN ERIK HOLMES

Sven Erik Holmes
United States District Judge

APPROVED AS TO FORM
AND CONTENT:

WOLF POPPER ROSS WOLF &
JONES, L.L.P.

By: Lawrence D. Levit
Lawrence D. Levit
845 Third Avenue
New York, New York 10022

HINKLE ZERINGUE & SMITH
William Hinkle, Esq.
320 South Boston
Suite 1100
Tulsa, Oklahoma 74103

Attorneys for Plaintiff
Joan Dworkin and the Class

KLEND A, GORDON &
GETCHELL P.C.

By: Robert J. Getchell
Robert J. Getchell
100 West 5th Street
Suite 610
Tulsa, Oklahoma 74103

Attorneys for Defendants
Industries, Inc.
and John C. Edwards

MILBERG WEISS BERSHAD HYNES &
LERACH LLP

By: Helen J. Hodges
Helen Hodges
600 West Broadway
1800 One America Plaza
San Diego, California 92101-5050

WEISS & YOURMAN

By: Kevin Yourman/Helen J. Hodges
Kevin Yourman, Esq.
1800 Avenue of the Stars
Suite 1000
Los Angeles, CA 90067

MORREL, WEST, SAFFA, CRAIGE
& HICKS, INC.
5310 East 31st Street
Ninth Floor
City Plaza West
Tulsa, OK 74135

Attorneys for Plaintiff
Carlos E. Sardi and the Class

KLEND A, MITCHELL, AUSTERMAN
& ZUERCHER, L.L.C.

By: Alexander B. Mitchell, II
Alexander B. Mitchell, II
1600 Epic Center
301 N. Main
Wichita, Kansas 67202-4888

Attorneys for Defendants Struthers
Industries, Inc. and John C.
Edwards

52

FILED IN DISTRICT
DATE 4-22-97

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

FILED

APR 21 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BARBARA J. DUCK,)
)
 Plaintiff,)
)
 v.)
)
 GEAR PRODUCTS, INC.,)
 an Oklahoma corporation,)
)
 Defendant.)

Case No. 96-C-644-K

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff and Defendant, by and through their respective attorneys, jointly stipulate that all of Plaintiff's claims herein should be dismissed with prejudice with each side to bear its own costs and attorneys' fees.

DATED this 10th day of April, 1997.

Respectfully submitted,

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

By: 

J. Patrick Cremin, OBA #2013
Kelly S. Kibbie, OBA #16333
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0594

ATTORNEYS FOR DEFENDANT
GEAR PRODUCTS, INC.

alt

6

FRASIER, FRASIER & HICKMAN

By:



Steven R. Hickman, Esq.
1700 Southwest Blvd., Suite 100
P.O. Box 799
Tulsa, OK 74101-0799

ATTORNEYS FOR PLAINTIFF
BARBARA DUCK

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

F I L E D

APR 21 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN PAUL HANEY, JR.,)
)
)
 Plaintiff,)
)
 vs.)
)
 STANLEY GLANZ, et al.,)
)
)
 Defendants.)

No. 96-CV-442-B

ENTERED ON DOCKET
DATE APR 22 1997

ORDER

In this prisoner *pro se* complaint, pursuant to 42 U.S.C. § 1983, the Court has for decision Defendants' motion to dismiss (Docket #9) pursuant to Fed.R.Civ.P. 12(b)(6) or motion for summary judgment pursuant to Fed.R.Civ.P. 56, and also the motion for summary judgment of the Petitioner, John Paul Haney, Jr. ("Haney").

Petitioner's complaint arises from an altercation while he was incarcerated in the Adult Detention Center, Tulsa, Oklahoma, awaiting trial on charges in the state court of Kidnaping AFCF, First Degree Rape AFCF, Forcible Sodomy AFCF, and miscellaneous charges.

On April 26, 1996, at about 4:45 a.m., apparently following some words between them, Haney struck an older inmate, Elmo Anderson, in the face with a metal breakfast tray. Anderson received a bloody nose from the incident and was treated by the Detention Center nurse. Detention Officer Andrea Petty, pursuant to Jail Operations Manual paragraph 3.3.1 completed an incident report which stated she had observed Haney in a group standing in an

aggressive manner as Anderson walked away with food particles on his shoulder, face and chest.

Supervisor Sergeant Doyle Edge was assigned to conduct an inmate rule violation report after Officer Petty completed her incident report. Officer Edge discussed the matter with Haney, who admitted he had struck Anderson when he "lost his temper."

Exhibit "C" to the Special Report filed herein reflects that Haney was given notice of the Detention Center rule violation paragraph 3.3.2 of the Jail Operations Manual, regarding assault and battery and disrupting the orderly and safe operation of the detention facility. Haney acknowledged by his signature on Exhibit "C" being notified of the violation the same day, April 26, 1996, at 0632 a.m. Haney also by his signature on Exhibit "C" waived his right to a hearing and entered a plea of guilty; and additionally by his signature thereon waived his right to an appeal. The action taken against Haney, as provided in paragraph 3.3.1 of the Jail Operations Manual - Rules and Offender Discipline - was a two-week lock-down but he was allowed his commissary, visitation, telephone and exercise privileges. As a pretrial detainee, Haney lost no good time credits. Haney does not deny his four separate signatures that appear on Exhibit "C" (Inmate Rule Violation Report), nor does he contend he cannot read or that he was not given an opportunity to read Exhibit "C."

In his civil rights complaint, Haney asserts unfair disciplinary action in that he did not receive a fair hearing because the officer conducting it was not impartial and the officer failed to question various eye witnesses. Additionally, Haney asserts he was the victim of cruel and unusual punishment in that he was denied proper personal hygiene in not getting

to take three showers a week. Petitioner seeks damages of \$1,000.00 a day, a letter of apology from each defendant, and suspension for two weeks of each of the officers involved.

The Court will first address Petitioner's denial of due process claim. A first impulse is to conclude that because the internal jail rules provide for procedural Due Process in lock-down (administrative segregation) discipline cases, the issue is, did Haney receive procedural due process? However, the Supreme Court in 1995 reformulated the test for determining whether a state law creates a protected liberty interest affording procedural due process. *See, Sandin v. Connor*, 115 S.Ct. 2293 (1995). *Hewitt v. Helms*, 459 U.S. 460 (1983), points out that due process does not create a protected liberty interest in an inmate remaining in the general population. In *Sandin*, the court abandoned the methodology established in *Hewitt* and *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454 (1989), and decided to return to the due process principles established in *Wolff v. McDonnell*, 418 U.S. 539 (1974), and *Meachum v. Fano*, 427 U.S. 215, 224-225 (1976).¹ Under *Sandin*, therefore, courts no longer examine the language of prison regulations to determine whether such regulations place substantive restrictions on an official's discretion. Rather, courts must focus on the particular discipline imposed and ask whether it “present[s] the type of atypical, significant

¹ Under *Hewitt*, in order for a state law establishing procedural guidelines for prisons to create a liberty interest, the law must use “explicitly mandatory language” that forbids certain outcomes absent “specified substantive predicates.” *Hewitt*, 459 U.S. at 472. This approach focuses on the language of the regulation rather than the nature of the deprivation and “encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges.” *Sandin*, 115 S.Ct. at 2299.

deprivation in which a state might conceivably create a liberty interest.” *Sandin*, 115 S.Ct. at 2301.

Based on the Supreme Court's decision in *Sandin*, the Court finds that there is no liberty interest at issue in the case at hand. The deprivation allegedly suffered by Plaintiff, 14 days lock-down (disciplinary segregation), for the battery incident, is not of the “atypical” or “significant” kind that the Supreme Court has determined constitute deprivations in which a state might create a liberty interest. *See, Mujahid v. Meyer*, 59 F.3d 931, 932 (9th Cir. 1995) (fourteen days in disciplinary segregation as a result of a misconduct did not implicate any liberty interest pursuant to *Sandin*). The conditions in disciplinary segregation are not dramatically different from what prisoners expect to encounter in the general population. Since no liberty interest was implicated, the Court finds that Plaintiff was not even entitled to a hearing. *See, Brown v. Champion*, 1995 WL 433221 (10th Cir. July 24, 1995) (unpublished opinion) (inmate was not entitled to hearing because no constitutional liberty interest was implicated either by his ten-day disciplinary segregation, or by his reclassification by prison officials).

The fact that in this instance Haney was a pretrial detainee, rather than a convicted person, would create no greater liberty interest. *Bell v. Wolfish*, 441 U.S. 520 (1979), and *Block v. Rutherford*, 468 U.S. 576 (1984). To appropriately manage and supervise the Detention Center jail, the administrators and detention officers must have authority to segregate pretrial detainees and/or inmates, particularly in instances of physical altercations or tensions that justify such action. The segregation or lock-down was not purely punitive,

but a justifiable restriction to maintain order and compliance with reasonable rules of group living under detention. There must be a “mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.” *Wolff*, 418 U.S. at 556. This principle applies to both pretrial detainees and convicted persons. *Bell*, supra.

Aside from *Sandin*, Haney signed his name four times to the inmate rule violation report acknowledging notice of the rule violation, waiver of hearing, pleading guilty to the assault and battery, and waiving the right to appeal. Thus, the documentary exhibit, Exhibit “C,” indicates voluntary knowing waiver of procedural due process.

Regarding the entitlement to three showers a week claim, the record reveals Petitioner was in lock-down from April 28, 1996 to May 10, 1996. Throughout this period the record specifically reflects that on April 29, 1996 and again on May 2, 1996, Haney had left his cell for the purpose of taking a shower. From May 3, 1996 to May 10, 1996, the record does not reflect Haney being permitted to take a shower. However, it is undisputed that there was a sink with hot and cold water in Haney's cell and that he was provided with soap. With such, Haney could have taken a sponge bath between the period of May 3 and May 10, 1996, if he desired.

The Court concludes that Petitioner's not being permitted to take a shower for a period of eight days does not create a deprivation of constitutional dimension. Temporary conditions of confinement, such as that complained of here, does not amount to subjection to “cruel and unusual punishment.” *See, e.g., Harris v. Fleming*, 839 F.2d 1232, 1235-36

(7th Cir. 1988) (confinement in a “filthy, roach-infested” cell without articles of hygiene for five to ten days did not violated the Eighth Amendment); *see also*, *Bono v. Saxbe*, 620 F.2d 609, 613-614 (7th Cir. 1980) (generally harsher conditions in segregation unit do not violate the Eighth Amendment). The Eighth Amendment prohibits prison conditions which cause “the unnecessary and wanton infliction of pain.” *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981). A pretrial detainee's inconvenience and discomfort, as alleged in this case, falls outside the Eighth Amendment.

There is nothing that Petitioner alleges and nothing in the evidence suggesting the Defendants were deliberately indifferent to any serious risk to Petitioner's health or safety sufficient to meet the “sufficiently culpable state of mind” test set out in *Farmer v. Brennan*, 114 S.Ct. 1970, 1973-1974 (1984), and *Wilson v. Seiter*, 111 S.Ct. 2321, 2323-26 (1991). Moreover, the Prison Litigation Reform Act of 1996, Pub.L. No. 104-134, 110 Stat. 1321, bars civil rights actions absent a prior showing of physical injury. The Petitioner has neither alleged nor shown any physical injury as a result of the lock-down segregation or the failure to provide showers over the subject period, and he only seeks damages for his mental pain and suffering and deprivation.²

² On April 26, 1996, President Clinton signed into law the omnibus fiscal year 1996 appropriations measure, which contains amendments significantly affecting jail and prison litigation. These amendments are entitled the Prison Litigation Reform Act, Pub.L. No. 104-134, 110 Stat. 1321. In Section 803, Congress imposed the following limitation on recovery in prisoner civil actions brought by those in confinement:

No federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

Therefore, the Court concludes no material issues of fact remain herein and Defendants' motion for summary judgment pursuant to Fed.R.Civ.P. 56 is hereby SUSTAINED. The Court deems it unnecessary to pass on Defendants' claims of qualified immunity. Further, Plaintiff's motion for summary judgment is hereby OVERRULED.

A separate Judgment in favor of the Defendants and against the Plaintiff shall be entered contemporaneous with the filing of this Order.

DATED this 21ST day of April, 1996.


THOMAS R. BRET
UNITED STATES DISTRICT JUDGE

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

JOHN PAUL HANEY, JR.,)
)
Plaintiff,)
)
vs.)
)
STANLEY GLANZ, et al.,)
)
Defendants.)

APR 21 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

No. 96-CV-442-B

ENTERED ON DOCKET
DATE APR 22 1997

JUDGMENT

In keeping with the Order sustaining the Defendants' motion for summary judgment entered this date, Judgment is hereby entered in favor of the Defendants, Stanley Glanz, Sgt. Edge, Lt. Bass and Andrea Petty, and against the Plaintiff, John Paul Haney, Jr. Costs are hereby assessed against the Plaintiff, and the parties are to pay their own respective attorneys fees.

DATED this 21st day of April, 1996.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

F I L E D

UNIVERSAL SHOWCASE, INC.,)
a corporation,)
)
Plaintiff,)
)
v.)
)
OKLAHOMA FIXTURE COMPANY,)
a corporation,)
)
Defendant.)

APR 21 1997 *SAC*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 95-C-534-W ✓

ENTERED ON DOCKET

DATE 4/22/97

ORDER

This order pertains to Plaintiff's Motion to Assess Attorney's Fees (Docket #39), Defendant's Application to Approve Supersedeas Bond (Docket #41), Defendant's Objection to Bill of Costs (Docket #48), Defendant's Objection to Plaintiff's Motion for Attorney Fees (Docket #49), Plaintiff's Objection to Defendant's Motion to Approve Supersedeas Bond (Docket #51), Defendant's Reply to Plaintiff's Objection to Defendant's Motion to Approve Supersedeas Bond (Docket #52), Plaintiff's Motion for Review Clerk's Denial of Costs (Docket #54), Plaintiff's Motion to Extend Time for Filing of Costs (Docket #56), Defendant's Objection to Plaintiff's Motion to Review Clerk's Denial of Costs and to Plaintiff's Motion to Extend Time for Filing Bill of Costs (Docket #58). A hearing was held on April 14, 1997, and live testimony was taken.

On January 16, 1997, the court in this case granted judgment to the plaintiff in the principal sum of \$141,332.87, and awarded pre-judgment interest thereon from June 14, 1995, to the date of the entry of judgment, post-judgment interest thereon

60

from the date of entry of judgment, and costs, including a reasonable attorney's fee to be later set by the court.

Plaintiff's Motion to Assess Attorney's Fees (Docket #39) is granted. Plaintiff's counsel submitted records for professional services rendered in the amount of \$39,081.25. Defendant objects to plaintiff's motion (Docket #49), claiming that plaintiff is not a "prevailing party" under Okla. Stat. tit. 12, § 936. Defendant contends that the main issue in this case was not whether plaintiff was owed anything on the open invoices, but whether defendant was entitled to an offset, and on that issue plaintiff did not prevail because defendant received an "offset judgment" in excess of \$25,000.

Defendant agrees that the award of attorney fees is within the sound discretion of the trial judge, but then cites Arkla Energy Resources, a Division of Arkla, Inc. v. Roye Realty and Developing Inc., 9 F.3d 855, 866 (10th Cir. 1993), as an example of a case where the court declared that neither party had prevailed, so neither was entitled to fees. In that case, the court entered judgment in favor of defendant on plaintiff's claims and in favor of plaintiff on defendant's claims and neither side received an affirmative judgment against the other, so the court concluded that neither was a prevailing party. *Id.* The court cited Hutchison v. Kelton, 99 Idaho 866, 590 P.2d 1012, 1013 (1979), where the court held that neither party prevailed where both lost their affirmative claims and Sardam v. Morford, 51 Wash. App. 908, 756 P.2d 174, 175 (1988), where the court found that neither party prevailed where each successfully defended against a major claim by the other.

Defendant also relies on Moen v. Norwest Bank of Minot, 647 F.Supp. 1333, 1344 (D.N.D. 1986), where the court found that there was no prevailing party since both parties prevailed on certain issues. In that case, also, there was no affirmative judgment for either party because defendant could show no damages for plaintiff's contract breach and negligence.

However, in the case at bar, the court granted plaintiff a judgment in the amount of \$141,332.87 and granted defendant an offset judgment in the amount of \$1,500.00 plus \$25,000.00, although \$96,928.00 in "back charges" and \$534,576.81 in total damages had been claimed. A prevailing party under section 936 must have prevailed upon the merits, and section 936 allows only one prevailing party, which is the party that has "the most points at the end of the contest," or that receives the greatest affirmative judgment. Arkla, 9 F.3d at 866 (quoting Quapaw Co. v. Varnell, 566 P.2d 164, 167 (Okla. Ct. App. 1977)).

In Western Paper Co. v. Bilby, 783 P.2d 980 (Ct. App. Okla. 1989), the plaintiff brought an action on an open account for an amount due and owing, and the defendant counterclaimed for breach of warranty. The court entered judgment for plaintiff for \$6,924.60 and for defendant for \$7,982.70 and granted defendant's attorney's fees of \$2,270.47. The Court of Appeals affirmed, saying: "Bilby was clearly the prevailing party, receiving a judgment of \$1,058.10 over that of Western Paper." Id. at 983.

The court finds that plaintiff is the prevailing party in this case, having received a judgment far in excess of defendant's, and is therefore entitled to attorney fees.

Defendant also argues that the fee request is excessive, as the hours claimed by plaintiff's counsel exceed the hours spent on this case by defendant's counsel by 91.45 hours. Defendant's counsel claims that plaintiff should not be entitled to receive attorney's fees related to calls to the court, to the "excessive" amount of time attributed to pretrial preparation, and to calls to defense counsel for which counsel has no records. Defendant's counsel argues that plaintiff's counsel's time entries are incomplete as to the work done.

The Tenth Circuit has established the steps to be followed in determining fee awards. In Ramos v. Lamm, 713 F.2d 546, 553 (10th Cir. 1983), the court said that the first step was to determine the number of hours reasonably spent by counsel for the party seeking the fees, based on time records presented by the attorney.

In determining what is a reasonable time in which to perform a given task . . . the court should consider that what is reasonable in a particular case can depend upon factors such as the complexity of the case, the number of reasonable strategies pursued, and the responses necessitated by the maneuvering of the other side.

Id. at 554.

The second step was to set a rate of compensation for the hours expended by determining what lawyers of comparable skill and experience practicing in the area in which litigation occurs would charge. Id. at 555. Following these calculations the court may consider whether adjustments to a fee are necessary, based on considerations such as whether the plaintiff prevailed on all his claims for relief, whether "excellent results" were achieved, whether the success achieved was exceptional, and whether the case was undesirable because of a stigma attached, as

with civil rights lawsuits. Id. at 556-557.

An award of attorney's fees falls within the sound discretion of the trial court, and cannot be disturbed absent a showing of abuse of that discretion. Allen v. Denver Pub. School Bd., 928 F.2d 978,986 (10th Cir. 1991), and Wise v. Johnson Controls, Inc., 784 P.2d 86, 87 (Okla. Ct. App. 1989). The court finds that the number of hours which plaintiff's counsel claims he spent on this case is reasonable. Defendant does not contest the amount of \$125.00 per hour as being a reasonable rate of compensation for the hours expended. There is no duplication of hours for tasks attended to by more than one attorney, no paralegal time, and no law clerk time included. The plaintiff's open account claim, and the defendant's counterclaim for consequential damages and offset claim, all arose out of the same factual milieu. The court finds that the hours claimed for work done in pursuing the accounts receivable claim, and in defending the counterclaim and offset claim, are inextricably intermingled and cannot be apportioned. This finding is well within the discretionary power of the court. See County Line Investment Company, 936 F.2d 582, 1991 WL 114703 (10th Cir.(Okla.))¹; Transpower Constructors v. Grand River Dam Authority, 905 F.2d 1413, 1423 (10th Cir. 1990). See also, Sisney v. Smalley, 690 P.2d 1048, 1051-52 (Okla. 1984) (allowing, but not requiring that fees be apportioned where the court is able to do so).

The plaintiff is located in Toronto, Canada, which made it more expensive for

¹ This unpublished opinion is attached.

it to pursue its rights in an Oklahoma court.²

During the hearing, defendant objected to plaintiff's attorney's time records showing telephone calls to defense counsel's office because they did not exactly correspond to defense counsel's records, but defendant's counsel admitted he is often out of his office and therefore could have missed calls made. Defendant also raised objections to calls made to the court clerk's office,³ and to time entries which were characterized as being insufficiently detailed. Defense counsel put plaintiff's counsel on the stand, "flyspecked" individual time entries that were several years old, and then argued that the time should be disallowed, because plaintiff's counsel could not always specify, without his file in front of him, exactly which pleadings had been examined in connection with an entry which read "Review pleadings." Plaintiff's

² Defendant is located within this judicial district, and has used the advantage of being able to litigate locally to resist paying what it admittedly owed. This case was initiated only after defendant unilaterally imposed a \$96,000.00 "back charge" upon plaintiff. This back charge was erroneously based upon the assumption that plaintiff had provided the "defective" frames initially installed. However, when it was shown to defendant that those frames came from a different vendor, it shifted ground and contended that the replacement frames, that were in fact supplied by plaintiff, were also defective. Instead of reasonably adjusting this modified claim, defendant continued to unreasonably insist upon the full back charge mistakenly assessed in the first instance. Further, defendant resorted to the use of an *in terrorem* counterclaim for massive consequential damages.

³ The clerk's office fields many calls every day from attorneys checking the status of filings, confirming dates, times, and subject matter of hearings, and seeking information regarding preferred procedures and practices. This court has had a tremendous turnover in judicial and support personnel during the pendency of this lawsuit, thus making such calls necessary and reasonable. The clerk's office is designed to act as an information clearing-house for the court, as *ex parte* calls directly to judges or law clerks are prohibited. See Local Rule 1.4(C). Consequently, this objection is overruled.

counsel was also unable to testify as to the exact substance of each "telephone call" which was listed. The court was not particularly impressed with this line of attack, and sees no frailty in the time records presented as a result of it. Defense counsel's time records are also contained in this record, and were shown at the hearing to be at least equally "vague."

Defendant's Application to Approve Supersedeas Bond (Docket #41) is granted. The court approves a supersedeas bond filed with defendant's notice of appeal in the amount of \$200,000.00. That amount is sufficient to cover the balance of plaintiff's judgment and accruing interest. However, in the event this order is appealed, the court will require an additional \$50,000.00 supersedeas bond.

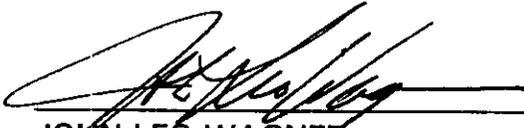
Plaintiff's Motion to Extend Time for Filing of Costs (Docket #56) is granted. Plaintiff's counsel filed the Bill of Costs on February 7, 1997, while judgment was entered on January 17, 1997. Local Rule 54.1 states that a bill of costs is to be submitted within fourteen (14) days after the entry of judgment and any party failing to comply will be deemed to have waived the claim. However, under Local Rule 1.1(E), a judge may waive any requirement of the rules when the administration of justice requires such waiver. The court finds that the administration of justice requires waiver of Rule 54.1 under the circumstances of this case. Plaintiff is granted an extension of time until February 7, 1997 to file its Bill of Costs.

Plaintiff's Motion for Review Clerk's Denial of Costs (Docket #54) is granted. At the hearing, defendant did not contest the amount of costs claimed, but only contended that the Bill of Costs was not timely filed. The short delay in filing the Bill

of Costs was the result of excusable neglect, and resulted in no prejudice to defendant. The court awards costs to the plaintiff in the sum of \$1,677.85.

In summary, Plaintiff's Motion to Assess Attorney's Fees (Docket #39), Defendant's Application to Approve Supersedeas Bond (Docket #41), Plaintiff's Motion to Extend Time for Filing of Costs (Docket #56), and Plaintiff's Motion for Review Clerk's Denial of Costs (Docket #54) are granted.

Dated this 18th day of April, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

s:\orders\universa.or

NOTICE: Although citation of unpublished opinions remains unfavored, unpublished opinions may now be cited if the opinion has persuasive value on a material issue, and a copy is attached to the citing document or, if cited in oral argument, copies are furnished to the Court and all parties. See General Order of November 29, 1993, suspending 10th Cir. Rule 36.3 until December 31, 1995, or further order.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

**COUNTY LINE INVESTMENT COMPANY and
Wagco Land Development, Inc., Plaintiffs-
Appellants,**

v.

Calvin L. TINNEY, Defendant-Appellee.

No. 90-5169.

United States Court of Appeals, Tenth Circuit.

June 27, 1991.

N.D.Ok., No. 88-C-550-E.

N.D.Ok.

AFFIRMED.

Before TACHA, BARRETT and BRORBY,
Circuit Judges.

ORDER AND JUDGMENT [FN*]

BARRETT, Circuit Judge.

****1** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R.App.P. 34(a); 10th Cir.R. 34.1.9. The case is therefore ordered submitted without oral argument.

The single issue presented in this appeal is whether the district court erred in granting \$46,390.00 in attorney's fees to defendant Calvin Tinney in this action to recover costs incurred in closing a sanitary landfill in Wagoner County,

Oklahoma. Plaintiffs County Line Investment Company (County Line) and Wagco Land Development, Inc. (Wagco), brought three claims against Tinney, two under CERCLA [FN1] and one for unjust enrichment under Oklahoma law. The district court granted summary judgment on all claims, which we affirmed. See County Line Inv. Co. v. Tinney, Nos. 89-5118, 89-5119 (10th Cir. May 24, 1991). We now likewise affirm the award of attorney's fees.

BACKGROUND

The factual background of this case is set forth in some detail in our opinion affirming the grant of summary judgment. See County Line Inv. Co., slip op. at 2-5. In this order and judgment, we recite only those facts necessary to our disposition.

In March 1982, County Line purchased the property in issue, which was being used as a sanitary landfill. The property was transferred to Wagco, a subsidiary of County Line's parent company, in June 1985. Defendant Tinney was the previous owner of the landfill site. From 1978 through November 1983, the property was leased to third parties who allowed waste containing hazardous substances to be placed in the landfill.

In late 1986, plaintiffs initiated proceedings to undertake formal closure of the landfill pursuant to Environmental Protection Agency standards. Wagco contacted Tinney to request he participate, both financially and in developing a closure plan. Tinney declined. County Line and Wagco ultimately completed the closure themselves at a cost of approximately \$360,000.00.

In June 1988, plaintiffs filed suit against Tinney seeking reimbursement of those monies spent in securing the landfill. The district court granted Tinney's summary judgment motion on all claims. He subsequently filed a motion for attorney's fees pursuant to Okla.Stat. tit. 12, § 936 (1981), which the district court granted upon the recommendation of the magistrate judge.

On appeal, plaintiffs assert that section 936 does not allow attorney's fees under the circumstances of this case. In the alternative, they contend the district court erred in failing to apportion the fees

between the unjust enrichment claim and the two CERCLA claims, for which fees are not allowed. We review these issues in turn.

A. Attorney's fees under Okla.Stat. tit. 12, § 936 (1981)

Oklahoma adheres to the American rule, which provides that attorney's fees are not recoverable absent some express statutory or contractual provision. *Wieland v. Danner Auto Supply, Inc.*, 695 P.2d 1332, 1333 (Okla.1984). Of plaintiffs' three claims, only the unjust enrichment claim allows for the potential recovery of attorney's fees. The statutory authority for those fees is found in section 936, which states:

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

Okla.Stat. tit. 12, § 936 (1981) (footnote omitted).

The district court held plaintiffs' unjust enrichment cause of action constituted a claim for "labor or services" under this provision. On appeal, plaintiffs argue this ruling is erroneous because the claim was actually for the value of the benefit conferred in closing the landfill, rather than strictly for monies expended in that effort. We disagree.

Oklahoma courts have had many opportunities to interpret the "labor or services" language of section 936. In cases invoking this section,

it is the underlying nature of the suit itself which determines the applicability of the labor or services provisions of § 936. The question is whether the damages arose directly from the providing of labor or services, such as the failure to pay for those services, or from an aspect collaterally relating to labor or services.

ABC Coating Co. v. J. Harris & Sons, Ltd., 747 P.2d 271, 272 (Okla.1987) (citing *Burrows Constr.*

Co. v. Independent School Dist. No. 2, 704 P.2d 1136, 1138 (Okla.1985)).

In order to recover under this section, the prevailing party must show "that the claim is for labor or services rendered, not just that the claim relates to the performance of labor or services." *Merrick v. Northern Natural Gas Co.*, 911 F.2d 426, 434 (10th Cir.1990). Thus, in order to recover fees, plaintiffs' unjust enrichment claim must be for "labor or services" rendered in closing the landfill.

Although plaintiffs now contend that their unjust enrichment claim was never premised on recovery for labor or services, their complaint reveals otherwise. Paragraph fifteen of that complaint states, in part, "[d]efendant is liable to [plaintiffs] under CERCLA (relating to private cost recovery actions) in an amount not less than \$250,000.00 to repay [plaintiffs] the costs expended by them...." Rec.Vol. I, doc. 1 at 4. (Emphasis added.) Likewise, paragraph twenty-two provides, "[p]laintiffs conferred a benefit on Tinney and Tinney has been unjustly enriched thereby in the amount of these costs." *Id.* at 5. (Emphasis added.)

The plain language of the complaint, particularly of the unjust enrichment claim, shows plaintiffs were seeking recovery of the monies they necessarily expended in cleaning up the landfill. We agree with the magistrate judge that it would require putting form over substance to rule otherwise. Despite their current arguments to the contrary, plaintiffs' original complaint reveals this claim as a direct attempt to recover the costs they expended in having the landfill closed. Consequently, we affirm the district court on this issue.

B. Apportionment of attorney's fees

****3** In the alternative, plaintiffs contend the district court should have apportioned the fees between the CERCLA claims and the unjust enrichment claim because fees are generally not allowed on the former. The magistrate judge's recommendation, which the district court adopted, ruled that the three claims were indivisible, thereby justifying recovery of all reasonable fees expended in defending the litigation. We agree.

An award of attorney's fees falls within the sound discretion of the trial court, and cannot be disturbed

absent a showing of abuse of that discretion. See *Allen v. Denver Pub. School Bd.*, 928 F.2d 978, 986 (10th Cir.1991); *Wise v. Johnson Controls, Inc.*, 784 P.2d 86, 87 (Okla.Ct.App.1989). Here, the district court made a discretionary finding that the claims presented were so intertwined factually as to make it impossible to apportion the fees involved. This finding was well within the discretionary power of the court. See generally *Sisney v. Smalley*, 690 P.2d 1048, 1051-52 (Okla.1984) (court allowing, but not requiring, that fees be apportioned where the court was able to do so); see also *Concorde Limousines, Inc. v. Moloney Coachbuilders, Inc.*, 835 F.2d 541, 546 (5th Cir.1987) (award of entire fee is appropriate where there was overlapping effort).

Consequently, the judgment of the United States District Court for the Northern District of Oklahoma is **AFFIRMED**. In light of our disposition, plaintiffs' motion to reconsider this court's order allowing supplementation of the record and defendant's motion to file a reply brief are **DENIED**.

FN* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir.R. 36.3.

FN1. The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675.

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

FILED

APR 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ALICE REBECCA WALLACE, et al.,)
)
Plaintiff,)
)
v.)
)
THE CITY OF BROKEN ARROW, et al.,)
)
Defendant.)

Case No.: 96 C 469K ✓

STIPULATION FOR DISMISSAL OF APPEAL

On the 24th day of February, 1997, Alice Rebecca Wallace, the above-named Plaintiff, filed in this cause a notice of appeal to the United States Court of Appeals for the 10th Circuit.

The undersigned hereby certify that the appeal in this cause has not been docketed in the above-named Court of Appeals; and, pursuant to the provisions of Rule 42(a) of the Federal Rules of Appellate Procedure, the undersigned, counsel for plaintiff and counsel for defendant, hereby stipulate and agree that this appeal shall be dismissed.

DATED this 17th day of April, 1997.


WILLIAM J. SCHMITT, OBA #16724
6846 South Canton, Suite 150
Tulsa, Oklahoma 74136
(918) 494-9595
ATTORNEY FOR PLAINTIFF


MICHAEL VANDERBURG
Post Office Box 610
Broken Arrow, Oklahoma 74012
(918) 259-8423
ATTORNEY FOR DEFENDANT

52

ENTERED ON DOCKET
DATE 4-21-97

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

RANDY D. GRIFFIN,)
)
 Plaintiff,)
)
 v.)
)
 LLOYD RICHARDS)
 TEMPORARIES, INC.,)
 an Oklahoma corporation,)
)
 Defendant.)

Case No. 96-C-463-K

FILED

APR 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

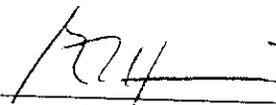
STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW Plaintiff and Defendant and stipulate to the dismissal of the above styled and numbered cause with prejudice to any future action, each party to bear his or its own attorney's fees and costs.

Respectfully submitted,

FRASIER, FRASIER & HICKMAN

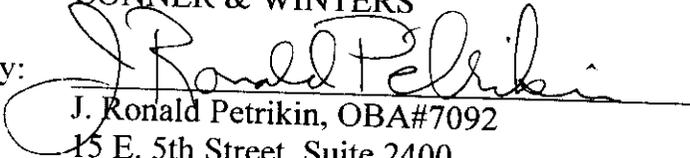
By:



Steven R. Hickman, OBA#4172
1700 Southwest Blvd.
P.O. Box 799
Tulsa, OK 74101-0799
918/584-4724

CONNER & WINTERS

By:



J. Ronald Petrikin, OBA#7092
15 E. 5th Street, Suite 2400
Tulsa, OK 74103
918/586-5711

25

26

ENTERED ON DOCKET
DATE 4-21-97

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

JAMES BAUHAUS,)
)
Plaintiff,)
)
vs.)
)
STUART T. HINKLE,)
)
Defendant.)

No. 97-CV-313-K

FILED

APR 17 1997 *JD*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff, a state prisoner appearing pro se, has filed a civil rights complaint pursuant to 28 U.S.C. § 1983 and a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. 1915. In his complaint, Plaintiff alleges that Defendant, formerly employed by the Tulsa County medical examiner's office, violated his due process rights by failing to analyze blood recovered from the crime scene.

The Prison Litigation Reform Act of 1996, added a new section to the in forma pauperis statute, entitled "Screening." See 28 U.S.C. § 1915A. That section requires the Court to review prisoner complaints before docketing, or as soon as practicable after docketing, and "dismiss the complaint, or any portion of the complaint, if the complaint . . . is frivolous, malicious, or fails to state a claim upon which relief may be granted. Id. A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989); Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A suit is factually frivolous, on the other hand, if "the factual contentions are

clearly baseless." Id.

Plaintiff was convicted of murder and sentenced to life in prison on or about June 27, 1974. The Oklahoma Court of Criminal Appeals affirmed on or about February 19, 1975. Plaintiff now sues Defendant, a former chief deputy medical examiner, alleging that during the pre-trial investigation Defendant failed to analyze the "killer's blood found at the crime scene" thereby violating Plaintiff's due process rights. He seeks damages, costs and maximum fines according to 12 O.S. §§ 1460, 1462,¹ analysis of blood and "release from fraudulent judgement & sentence (sic)."²

After liberally construing Plaintiff's pro se pleading, see Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's action lacks an arguable basis in law as it is clear from the face of the complaint that Plaintiff's claim against Defendant is barred by the two-year statute of limitations. See Fratus v. Deland, 49 F.3d 673, 674-75 (10th Cir. 1995) (district court may consider affirmative defense sua sponte when the defense is "obvious from the face of the complaint" and "[n]o further factual record [is] required to be developed"). The applicable statute of limitations for civil rights actions under Oklahoma law is the two-year limitations period for "an action for injury to the rights of another." Meade v. Grubbs, 841 F.2d 1512, 1523 (10th Cir. 1988).

¹These Oklahoma statutes define remedies available in a state mandamus action.

²The Court notes that the relief sought by Plaintiff is in the nature of habeas corpus as opposed to civil rights. Plaintiff currently has a habeas corpus action, alleging that the State of Oklahoma has deprived him of due process by concealing exonerating blood and fingerprint evidence, pending in this Court. In support of that petition for writ of habeas corpus, Plaintiff states that "county med. examiner Dr. Hinkle has blood samples from the killer that OK refuses to analyse (sic)."

Plaintiff's action arose, at the latest, in 1975, more than twenty (20) years ago, when his conviction became final and long after Defendant allegedly took possession of the blood sample. Therefore, Plaintiff's claim against Defendant became time barred, at the latest, after 1977. See Hardin v. Straub, 490 U.S. 536, 540 n.8 (1989) (the State of Oklahoma has no tolling provision for civil lawsuits filed by prisoners).

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's motion for leave to proceed in forma pauperis is GRANTED and Plaintiff's action is DISMISSED as frivolous. The Clerk shall MAIL to Plaintiff a copy of the complaint.

SO ORDERED this 16th day of April, 1997.



TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

MODERN INVESTMENT CASTING)
COMPANY, an Oklahoma)
Corporation,)
)
Plaintiff,)
)
vs.)
)
PREDATOR PROPS, INC., a)
Missouri Corporation, and)
OZARK MARINE DESIGN, a)
Missouri Corporation,)
)
Defendants.)

APR 1 1997

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

Case No. 96-C-688-BU ✓

ENTERED ON DOCKET
DATE APR 21 1997

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 90 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 17 day of April, 1997.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE