

ENTERED ON DOCKET

DATE 5-30-97

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

FILED

DONNOVON L. BURNETT,)
)
 Plaintiff,)
)
 vs.)
)
 J. SPITLER, B. YELTON,)
 A. CULLOM, and P. SCHROEDER,)
)
 Defendants.)

MAY 30 1997

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

No. 96-CV-963-H

ORDER

On October 22, 1996, Plaintiff filed a civil rights complaint pursuant to 42 U.S.C. § 1983 and a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a), as amended by The Prison Litigation Reform Act, Pub.L.No. 104-134, 110 Stat. 1321 (1996). The Court granted leave to proceed in forma pauperis and the Plaintiff was directed to pay an initial partial filing fee on or before January 16, 1997, or his case would be dismissed. Plaintiff failed to comply with the order. Again on February 5, 1997, Plaintiff was directed to pay the initial partial filing fee.

Upon review of the record, the Court found that Plaintiff may not have received proper notice of the orders previously entered in this matter, and directed the Clerk to mail copies of this Court's order granting in forma pauperis and directing payment of the initial filing fee to the Plaintiff at the Tulsa County Jail, 500 S. Denver, Tulsa, Oklahoma 74103. On April 2, 1997, Plaintiff was granted an additional thirty (30) days in which to pay the initial partial filing fee of \$6.43. The Court notes that no mail has been returned, and

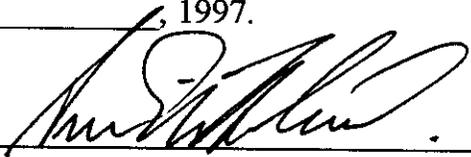
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Plaintiff has failed to comply.

Accordingly, Plaintiff's complaint is hereby **dismissed without prejudice** for failure to pay the filing fee. See Local Rule 5.1(F).

IT IS SO ORDERED.

This 29TH day of MAY, 1997.



Sven Erik Holmes
United States District Judge

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

FRED EUGENE WASHINGTON,)
)
Petitioner,)
)
vs.)
)
TULSA COUNTY JAIL,)
et al,)
Respondents.)

MAY 30 1997

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

No. 97-CV-192-H ✓

ORDER

Petitioner has filed a habeas action pursuant to 28 U.S.C. § 2254, and by Order of this Court entered on March 17, 1997, was denied leave to proceed *in forma pauperis*. This Court directed Petitioner to submit the requisite \$5.00 filing fee within thirty days of the entry of the March 17, 1997 Order, but he has failed to do so. The Court also notes that a copy of the March 17, 1997 Order was mailed to Plaintiff at his last known address but has been returned marked, "attempted not known." Plaintiff has failed to notify the Court of a change of address.

ACCORDINGLY, IT IS HEREBY ORDERED that this action is **dismissed without prejudice** for failure to pay the filing fee. See Local Rule 5.1(F). The Court **may reinstate** this action if Petitioner submits to the Court the proper filing fee within twenty (20) days from the date of entry of this order, or by June 20, 1997, and for good cause shown.

IT IS SO ORDERED.

This 29th day of MAY, 1997.


Sven Erik Holmes
United States District Judge

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

ENTERED ON DOCKET
DATE 5-30-97

MIDWEST INDUSTRIAL
CONTRACTORS, INC.

Plaintiff,

v.

SS&S FABRICATORS, INC.

Defendant/Third-
Party Plaintiff,

v.

ABB LUMMUS GLOBAL, INC.,

Third-Party Defendant.

Case No. 96-CIV-609H ✓

FILED

MAY 30 1997

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

ORDER OF DISMISSAL WITH PREJUDICE

Considering the foregoing Joint Motion for Order of Dismissal With Prejudice:
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this suit be and is
hereby dismissed, with prejudice, each party to bear its own costs.

Dated this 22TH day of May, 1997.


UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 29 1997

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

UNITED STATES OF AMERICA,

Plaintiff

v.

MICHAEL PAYNE,

Defendant.

Civil Action No. 97CV 202BU ✓

ENTERED ON DOCKET

DATE MAY 30 1997

DEFAULT JUDGMENT

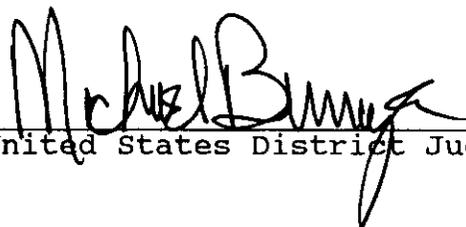
This matter comes on for consideration this 29th day of May, 1997, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Michael Payne, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Michael Payne, was served with Summons and Complaint on April 23, 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.

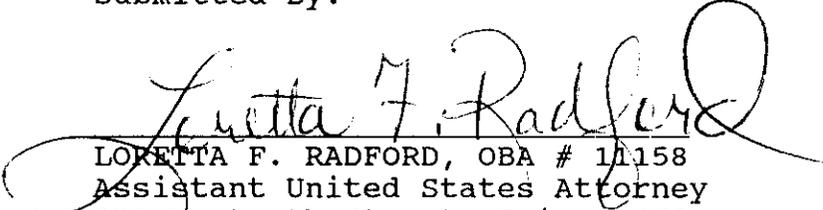
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Michael Payne, for the principal amounts of \$5,266.63 and \$968.71, plus accrued interest in the amounts of \$3,785.37 and \$258.24, plus administrative charges in the amounts of \$100.00 and \$91.58, plus

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interest thereafter at the rates of 8% and 5% per annum respectively until judgment, a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.88 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 29 1997

Phil Lombardi,
U.S. DISTRICT COURT

JOHN P. DRING, JR.,)

Plaintiff)

vs.)

Civil Action No. 96-CV-730K

THE WILLIAMS COMPANIES, INC.)
et al.,)

Defendants.)

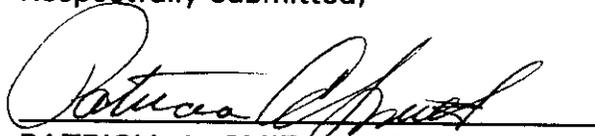
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JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

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

DATED this 23rd day of May, 1997.

Respectfully submitted,

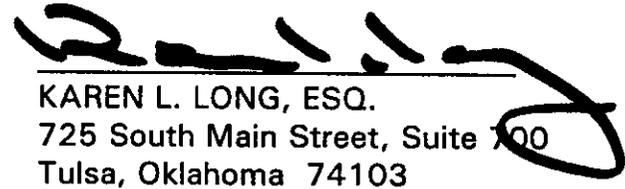


PATRICIA A. SMITH, ESQ.
515 King Street, Suite 400
Alexandria, Va. 22314

ATTORNEY FOR PLAINTIFF

ROSENSTEIN, FIST & RINGOLD

BY:



KAREN L. LONG, ESQ.
725 South Main Street, Suite 700
Tulsa, Oklahoma 74103

ATTORNEYS FOR PLAINTIFF

26

015

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

BY: 

J. PATRICK CREMIN, (OBA #2013)
KELLY S. KIBBIE, (OBA #16333)
320 South Boston Ave.,
Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0594

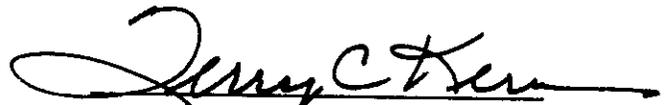
ATTORNEYS FOR DEFENDANTS

Disruption" incident referred to in his pleadings are hereby **DISMISSED**. Mr. Lopez shall prosecute these claims in 95-CV-907-H.

As detailed in a January 2, 1997 Order, the magistrate removed the remainder of Mr. Lopez' claims from this action and set them up as two other distinct lawsuits -- 97-CV-6-K and 97-CV-7-K. [Doc. No. 4]. The 97-CV-6-K lawsuit deals with Mr. Lopez' civil rights claims and 97-CV-7-K deals with Mr. Lopez' *habeas corpus* claims. Mr. Lopez has no other claims pending in this lawsuit. The Court Clerk is directed to show this lawsuit as terminated.

IT IS SO ORDERED.

Dated this 27 day of ~~April~~
May 1997.


Terry C. Kern
United States District Judge

DATE: 5-29-97

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ROBYN LOPEZ and GALINO LOPEZ,)
)
Plaintiffs,)
)
vs.)
)
RON CHAMPION, et al.,)
)
Defendants.)

Case No. 96-C-1104-K ✓

FILED

MAY 28 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff, Robyn Lopez, alleges that she was unlawfully deprived of her right to visit her husband, Galino Lopez, at the Dick Connors Correctional Facility. Mrs. Lopez brings this action pursuant to 42 U.S.C. § 1983. Despite being ordered to do so by the magistrate judge assigned to this case, Mrs. Lopez has not paid the \$150 filing fee for civil actions and she has not filed a motion to proceed with this action *in forma pauperis*. Due to this failure, Mrs. Lopez' claims are hereby **DISMISSED** without prejudice.

IT IS SO ORDERED.

Dated this 27 day of ~~April~~^{May} 1997.



Terry C. Kern
United States District Judge

ENTERED ON DOCKET

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

DATE 5-29-97

UNITED STATES OF AMERICA,)
)
 Appellant,)
)
 vs.)
)
 MICHAEL RAY BROWN, and)
 SUE BROWN,)
)
 Appellees.)

No. 97-C-355-K ✓

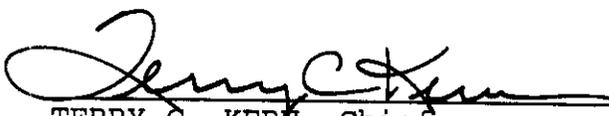
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MAY 28 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the motion of the United States of America to dismiss its appeal from the Bankruptcy Court, which commenced this district court action. The debtors have responded that they have no objection to dismissal.

It is the Order of the Court that the motion of the United States of America to dismiss appeal (#2) is hereby GRANTED. This action is hereby dismissed.

ORDERED this 27th day of May, 1997.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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5-29-97

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

RUBY GRACE WISE,)
)
 Plaintiff,)
)
 vs.)
)
 THE PAUL REVERE LIFE)
 INSURANCE COMPANY,)
)
 Defendant.)

No. 96-C-923-K ✓

F I L E D

MAY 28 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised that the parties to this action have agreed to a settlement and dismissal with prejudice of all claims, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to N.D. LR 41.0.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 27th day of May, 1997.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

FILED

MAY 29 1997

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

HOMER H. KIRKWOOD,
SS# 443-36-0941

Plaintiff,

vs.

John J. Callahan, Acting
Commissioner of Social
Security Administration,

Defendant.

Case No. 96-C-137-BU

ENTERED ON DOCKET

DATE MAY 29 1997

ORDER

On May 9, 1997, United States Magistrate Judge Sam A. Joyner issued a Report & Recommendation, wherein he recommended that this Court reverse and remand the decision of the Commissioner for further proceedings. In the Report & Recommendation, Magistrate Judge Joyner advised the parties that any objections to the Report & Recommendation must be filed within ten (10) days of service of the notice. To date, no written objection to Magistrate Judge Joyner's Report & Recommendation has been filed and no request for an extension of time to file any written objection has been filed.

With no written objection being filed, the Court, pursuant to 28 U.S.C. § 636(b)(1), accepts Magistrate Judge Joyner's Report & Recommendation in its entirety.

Accordingly, the Report & Recommendation (Docket Entry #12) issued by United States Magistrate Judge Sam A. Joyner is **AFFIRMED**. The decision of Defendant, John J. Callahan, Acting Commissioner of the Social Security Administration, denying Social Security

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disability benefits is **REVERSED** and **REMANDED** for further proceedings.

ENTERED this 29th day of May, 1997.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

MAY 29 1997

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

HOMER H. KIRKWOOD,
SS# 443-36-0941

Plaintiff,

vs.

Case No. 96-C-137-BU ✓

JOHN J. CALLAHAN, Acting
Commissioner of Social
Security Administration,

Defendant.

ENTERED ON DOCKET

DATE MAY 29 1997

JUDGMENT

Pursuant to the Court's Order, judgment is hereby entered in favor of Plaintiff, Homer H. Kirkwood, against Defendant, John J. Callahan, Acting Commissioner of Social Security Administration, and this action is remanded to Defendant for further administrative proceedings consistent with the Court's Order.

ENTERED this 29th day of May, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

✓

FILED

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

MAY 29 1997



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

RONALD W. SMITH,)
)
 Plaintiff,)
)
 vs.)
)
 ALLEN GOODING, d/b/a GOODING)
 RV CENTER and his employee,)
 MARTIN ELI KETOLA,)
)
 Defendants.)

Case No. 96-C-711-BU ✓

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MAY 29 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 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 29th day of May, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

23

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

FILED

MAY 28 1997

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

ANNIE L. JONES,
SSN: 271-36-2227,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner
Social Security Administration,

Defendant.

NO. 96-CV-130-M

ENTERED ON DOCKET

DATE MAY 29 1997

ORDER

Plaintiff, Annie L. Jones, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.¹ In accordance with 28 U.S.C. §636(c) the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this decision will be directly to the Circuit Court of Appeals.

The role of the Court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26

¹ Plaintiff's February 4, 1993 application for disability benefits was denied March 2, 1993 and was affirmed on reconsideration. A hearing before an Administrative Law Judge (ALJ) was held March 15, 1994. By decision dated December 8, 1994, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on January 26, 1996. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its discretion for that of the Secretary. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). The record of the proceedings has been meticulously reviewed by the Court.

Plaintiff claims she has been unable to work since November 25, 1991 due to chronic back pain, bowel problems, dysthymic disorder, anxiety disorder, somatoform pain in the back and legs, iatrogenic narcotic dependency and histrionic personality traits. [Plf's Brief, p. 2].

The Secretary has established a five-step evaluation process pursuant to the Social Security Act for determining whether a claimant is disabled within the meaning of the Act. See *Williams v. Bowen*, 844 F.2d 748 (10th Cir. 1988)(discussing five-step disability test in detail). The claimant bears the burden of proving disability through step four of the analysis. *Id.* at 751. In the December 8, 1994 denial decision in this case, the ALJ, reaching step four, determined that Plaintiff retains the residual functional capacity to perform the unskilled light work she had previously performed of "stocker"² and waitress. [R. 20].

² Plaintiff completed a job duties form describing her past relevant work (PRW) at Centrilit for two positions: QA Tester Inspector and Lam Stacker [R. 84]. At the hearing, Plaintiff testified that the

Plaintiff challenges the ALJ's rejection of the opinion of her treating physician in reaching his conclusion that she can perform her past relevant work and his evaluation of her residual functional capacity (RFC) to perform light work activities as not supported by substantial evidence. The Court agrees.

Medical Evidence

The record contains general medical treatment notes from Douglas Brown, M.D. for Plaintiff as far back as November 1989. [R. 153]. On December 2, 1991, Plaintiff reported to Dr. Brown that she had left posterior hip and back pain after moving furniture on November 28, 1991. [R. 152]. Dr. Brown diagnosed muscle sprain of the back and prescribed Motrin 800 mg., Flexeril and Darvocet. On December 16, 1991, Dr. Brown noted that Plaintiff's back had been quite a bit better but that she had gone shopping and suffered exacerbation of her back pain. [R. 151]. He noted Plaintiff's pain as "severe" and, on December 18, 1991, he added a prescription for Vicodin ES. [R. 152]. Upon being notified by Plaintiff on December 20, 1991 that her company wanted her to have a second opinion, an appointment was made with David A. Fell, M.D., a neurosurgeon. [R. 151].

quality control inspector or tester job required a lot of rolling, pushing and pulling of very heavy weights [R. 208-209]. She testified that the lam stacker job required lifting of about five to ten pounds and was lighter work than the quality control/tester job [R. 211-212]. At the hearing the VE referred to Plaintiff's PRW as "inspector and tester" and "stacker" [R. 245]. The ALJ wrote in his decision that Plaintiff could return to her PRW "as a stocker", [R. 20] and in both Plaintiff's and Defendant's briefs, Plaintiff's PRW is described as "stocker" instead of "stacker." Because there is a marked difference between the two job descriptions in the DOT, the Court concludes that the ALJ's and parties' references to work as a "stocker" was actually meant to refer to Plaintiff's PRW as a "Lam Stacker."

Dr. Fell examined Plaintiff on January 10, 1992 and wrote a letter to Dr. Brown regarding that examination. [R. 129-130]. Dr. Fell recommended lumbar spine x-rays and CT scan, evaluation and modality therapy by a physical therapist for three weeks before seeing her again for follow-up and prescribed Naprosyn in lieu of ibuprofen. X-rays of the lumbar spine on January 15, 1992 were without significant abnormality. [R. 100]. The CT scan did, however, identify a moderately large herniated disk at L5, midline and to the left. [R. 128]. Physical therapy did not benefit Plaintiff and, on March 2, 1992, Dr. Fell performed a Left Lumbar 4-5 hemilaminectomy for excision of the herniated disk. [R. 103-112]. After the surgery, Dr. Fell prescribed Flexeril and Percodan.³ [R. 127]. One month after the surgery, Dr. Fell noted that Plaintiff still reported pain and remarked that she was making slow recovery from the hemilaminectomy. [R. 127]. On April 16, 1992, Dr. Fell wrote Melissa Dover, Benefits Administrator for Plaintiff's employer, Centrilift, the following letter:

I am writing in response to your letter of April 13, 1992 and have now completed the back of the Physician Statement Disability Form.

My prognosis is that she be released to work when I see her back in early May. However, I do not believe it will be safe to ever release her to heavy strenuous exertion. However, she should be able to return to work activities which I indicated on the Physical Capacity Evaluation sometime in early May of 1992.

³ The Court notes that Dr. Brown continued to see Plaintiff and to prescribe antidepressants, narcotic analgesics and ulcer medications for Plaintiff during the time she was also being treated by Dr. Fell. [R. 150, 151].

[R. 126]. On May 7, 1992, Dr. Fell again wrote Dr. Brown to report on Plaintiff's two month follow-up examination. [R. 124-125]. The closing paragraphs of that letter are as follows:

Mrs. Jones is still having enough pain that I cannot release her to any job activities. I am going to keep her off work one more month so I will see her back in one month for follow-up visit, and plan to dismiss her from follow-up care at that time. No prescriptions were written today.

She and I previously discussed her job at Centrilift, and I feel that it would be unwise for her ever return to that job. Therefore, I have advised her to start looking for a lighter job at Centrilift or start looking for a less strenuous job with another employer prior to next month's visit.

Id. On May 8, 1992, Dr. Brown examined Plaintiff for bowel problems and noted that she had seen Dr. Fell the day before, that her back felt better but that she still could not do housework or her current job. [R. 151].

Dr. Fell reported to Dr. Brown on June 6, 1992, that Plaintiff was continuing to complain of low back pain made worse by activity, especially forward flexing at the waist and twisting or bending. [R. 122-123]. He recommended blood work and a bone scan to look for evidence of a disk space infection, arthritis or any other source of bone pain. He decided not to release her from follow-up until these tests were done.

Id. p. 123. On June 9, 1992, Dr. Brown sent Dr. Fell the requested lab work and X-rays. [R. 150]. He also prescribed Percodin for Plaintiff. *Id.* The bone scan conducted on June 10, 1992 was negative. [R. 121].

On June 11, 1992, Dr. Brown wrote the first of five "To Whom It May Concern" letters which are at the heart of the controversy in this case. [R. 146-147].

In that letter, Dr. Brown stated that Plaintiff's prognosis was still pending and that it was "likely that patient will never be able to return to heavy labor."

Dr. Fell wrote Plaintiff on June 25, 1992, reporting that the isotope bone scan was normal, that there was no evidence to raise suspicion of disk space infection and that he was releasing her from follow-up care as she had achieved maximum medical benefit from the laminectomy and disk excision. Dr. Fell advised Plaintiff that he was releasing her "to light work duties effective this date with the provision that [she] not lift more than 30 lbs unassisted, or push or pull with more than 50 pounds of force. Furthermore, [she] should try to avoid frequent squatting, stooping, bending and kneeling." [R. 120]. Apparently, however, Dr. Fell continued to search for the cause of Plaintiff's pain, advising her by letter on July 10, 1992 that she still needed to have "blood work" done. [R. 118].

On September 8, 1992, Plaintiff was again seen by Dr. Brown for a "check-up" on her back. [R. 149]. His notes indicate that Plaintiff was "granted disability" and that she would need to continue under a doctor's care to be recertified in a year. He planned at that time, to continue following her condition and to consider another CT scan within a few months, although he was "not sure what it would contribute at this point." *Id.* On September 16, 1992, Dr. Brown prescribed Bennaryl to help Plaintiff sleep. [R. 149]. One month later, Plaintiff was again seen by Dr. Brown who noted continuing complaints of back pain. [R. 149]. On October 20, 1992, Dr. Brown treated Plaintiff for bronchitis, noted chronic back pain and depression secondary to the back pain and other situational problems, prescribed Elavil, Bactrim and Percodan

and stated that he was giving her the number for "Grand Lake Mental Health Clinic." [R. 148]. On November 5, 1992, Dr. Brown reported that Plaintiff's back "had flared up some from moving" and that she hadn't yet been seen at the Grand Lake Mental Health Clinic. [R. 148]. On December 6, 1992, Dr. Brown saw Plaintiff again for back pain and noted that the Percodan was not helping the pain "as well as it used to." [R. 145]. He referred her to Harvey Blumenthal, M.D., a neurologist. [R. 145].

Dr. Blumenthal admitted Plaintiff to St. Francis Hospital for an MRI scan and electromyogram on December 30, 1992. [R. 113-116]. On that date, he wrote Dr. Brown an extensive letter, describing her multiple complaints, acknowledging receipt of Dr. Brown's clinical notes and Dr. Fell's reports and advising that he would send a follow-up report after the MRI and electromyogram. [R. 136-137]. The MRI scan found significant scar formation at L4-L5 and mild disk degeneration but no ruptured disc and no other abnormality. [R. 115-116]. Dr. Blumenthal's neurological assessment to Dr. Brown on February 23, 1993 concluded that Plaintiff had no organic neurological disease. He recommended symptomatic treatment of pain, muscle relaxers, pain medication and therapy and, perhaps, referral to a pain clinic, such as Meniger Clinic in Topeka. [R. 133].

Dr. Brown had continued to treat Plaintiff during January, February and March 1993, prescribing Percodan, then adding a prescription for Amitriptyline and reinstating Flexeril and Percocet. [R. 144]. He also wrote another "To Whom It May Concern" letter during this time, advising that, in his opinion, Plaintiff was totally disabled and not able to work. [R. 141]. On April 6, 1993, Dr. Brown examined

Plaintiff and noted that she had tried to clean her house, cleaning walls with a sponge mop and cleaning curtains, which exacerbated her back problems. [R. 143]. On April 12, 1993, Dr. Brown wrote the third "To Whom It May Concern" letter, stating:

At this point I would consider her totally disabled as she is not able to perform even light duties. At this point it is unknown whether this will or will not be a permanent condition.

[R. 140].

On July 30, 1993, Dr. Brown wrote the fourth "To Whom It May Concern" letter. [R. 172]. Dr. Brown repeated the history of Plaintiff's complaints and treatment, discussing the surgery by Dr. Fell and Dr. Blumenthal's inability to make an organic diagnosis and stated:

At this point, I would consider her totally disabled as she is not able to perform even light work, bending over, or spend a lot of time in a single position. It appears at this point, that her condition is most likely permanent and unlikely after this period of time, to have significant improvement in her condition.

[R. 172]. Dr. Brown saw Plaintiff regularly during the next six months and continued to record back pain, in varying degrees of severity. He prescribed pain medication and antidepressants throughout the remainder of the treatment period covered by his records, up to and including February 28, 1994. [R. 174-179].

Dr. Brown's fifth "To Whom It May Concern" letter was written February 28, 1994. [R. 171]. In it, he stated:

I continue in my assessment that the patient is still disabled from working and unable to perform even light work.

At the hearing, Plaintiff testified that she was still being treated by Dr. Brown and receiving prescriptions for pain medication. [R. 217, 240].

On April 26, 1994, Plaintiff was examined by Michael Karathanos, M.D., who reported to the State of Oklahoma Disability Determination Unit that Plaintiff's lumbosacral spine was not accessible to manipulation because Plaintiff "essentially refused to be examined because of severe pain and she cannot perform any consistent effort so that I could examine lumbosacral spine mobility." His impression was "chronic pain disorder" and "severe depressive reaction." [R. 182-183]. On the RFC evaluation form attached to his report, Dr. Karathanos noted that Plaintiff was able to bend "infrequently." [R. 185].

Thomas A. Goodman, M.D., examined Plaintiff for the Disability Determination Unit on May 13, 1994 and concluded that if Plaintiff could be properly withdrawn from narcotics and started on a different pain regimen, there was no reason why she could not become capable of performing work activities from a psychological standpoint. [R. 189-194].

The "Treating Physician Rule"

It is well established that the Secretary must give controlling weight to the opinion of a treating physician if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record, 20 C.F.R. §§ 404.1527 (d)(1) and (2); *Kemp v. Bowen*, 816 F.2d 1469 (10th Cir. 1987). A treating physician's opinion may be rejected if it is brief, conclusory and unsupported by medical evidence. However, good cause must be given for rejecting

the treating physician's views and, if the opinion of the claimant's physician is to be disregarded, specific, legitimate reasons for rejection of the opinion must be set forth by the ALJ, *Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987); *Byron v. Heckler*, 742 F.2d 1232, (10th Cir. 1984) .

Dr. Brown was Plaintiff's treating physician well before her back injury in November 1991. Dr. Fell performed Plaintiff's hemilaminectomy in February 1992 and followed her progress for approximately six months after the surgery. Dr. Fell reported on his treatment of Plaintiff to Dr. Brown. During that time, Plaintiff continued to be seen, evaluated and treated by Dr. Brown. Both Dr. Brown and Dr. Fell were Plaintiff's treating physicians for purposes of 20 C.F.R. §§ 404.1527(d)(1) and (2).

Clearly, Dr. Brown believed that Plaintiff was "totally disabled" and that her condition was progressive and permanent. The ALJ rejected Dr. Brown's medical opinion as "inconsistent with the remainder of the record, including the medical findings of specialists." The specialist, whose opinion the ALJ prefers to that of Dr. Brown's, is Dr. Fell. According to the ALJ, Dr. Fell determined that Plaintiff could perform light work when he released her from treatment in June 1992. However, in reviewing the treatment notes and reports that Dr. Fell made to Dr. Brown, it is abundantly clear that Dr. Fell believed Plaintiff would not be able to return to her previous work at Centrilift. [R. 125, 126]. Dr. Fell had discussed with Plaintiff her job at Centrilift and he advised Dr. Brown that he deemed it unwise for her to ever return to that job. [R. 125]. The ALJ relied upon a single phrase: "I am releasing you to light work duties effective this date..." in Dr. Fell's June 25, 1992 letter to Plaintiff, in

reaching his conclusion that Plaintiff could return to her former job as stacker. However, that statement taken alone, is inconsistent with Dr. Fell's treatment notes and reports to Dr. Brown that Plaintiff could not perform the duties required by her previous position. Moreover, Dr. Brown's first letter stating that Plaintiff is unable to work which "may or may not" be a permanent condition, was written fully six months after Plaintiff was released from Dr. Fell's post-surgical follow-up care. By the time Dr. Brown wrote the final letter stating unequivocally that Plaintiff is unable to work, he had seen and treated her for fully two years after Dr. Fell had performed his final post-surgical examination.

Plaintiff testified that her job as lam stacker at Centrilift required frequent bending. [R. 85, 212]. Dr. Fell advised Plaintiff to look for lighter work than the work she had performed at Centrilift and to avoid frequent bending. [R. 120, 125]. Dr. Karthanos's RFC noted that Plaintiff was able to bend "infrequently." [R. 185]. And, as discussed above, Dr. Brown believed Plaintiff unable "to perform even light work, bending over, or spend a lot of time in a single position." [R. 172].

The ALJ must give specific, legitimate reasons for disregarding the treating physician's opinion that a claimant is disabled. *Frey*, 816 F.2d at 513. In addition, the ALJ must consider the following specific factors to determine what weight to give any medical opinion: (1) the length of the treatment relationship and the frequency of examination; (2) the nature and extent of the treatment relationship, including the treatment provided and the kind of examination or testing performed; (3) the degree to which the physician's opinion is supported by relevant evidence; (4) consistency

between the opinion and the record as a whole; (5) whether or not the physician is a specialist in the area upon which an opinion is rendered; and (6) other factors brought to the ALJ's attention which tend to support or contradict the opinion. 20 C.F.R. § 404.1527(d)(2)-(6); *Goatcher v. United States Department of Health & Human Services*, 52 F.3d 288, 290 (10th Cir. 1995). Here, as in *Goatcher*, the ALJ had two treating physicians' opinions to weigh, a general practitioner who had been treating the claimant for a prolonged period of time, and a specialist, who performed surgery and short-term post-surgery follow-up care. Here, as in *Goatcher*, the ALJ gave "short shrift" to the opinion of Dr. Brown, the general practitioner who had rendered long term treatment. And, while specialists' opinions are generally accorded greater weight than nonspecialists' opinions, (see *Moore v. Sullivan*, 919 F.2d 901 (5th Cir. 1990)), the ALJ nonetheless must give more than a conclusory statement for rejection of the treating physician's opinion. *Goatcher*, 52 F.3d, p. 290.

Conclusion

The Court finds that the ALJ improperly weighed Dr. Brown's opinion that Plaintiff is disabled and his reasons for disregarding it are not legitimate. The ALJ did not give Dr. Brown's reports the detailed and specific review that the agency's own regulation requires. The Commissioner is directed, upon remand, to reconsider the medical evidence under the appropriate legal standards required by the regulations and case law.

In remanding this case, the Court does not dictate the result, nor does it suggest that the record is insufficient. Rather, remand is ordered to assure that a proper

analysis is performed and the correct legal standards are invoked in reaching a decision based on the facts of the case. *Kepler*, at 391.

REVERSED AND REMANDED this 28th day of MAY, 1997.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

ANNIE L. JONES,
SSN: 271-36-2227,

Plaintiff,

v.

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

Defendant.

CASE NO. 96-cv-130-M

FILED

MAY 28 1997

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

ENTERED ON DOCKET

DATE MAY 29 1997

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 28th day of MAY, 1997.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

MAY 28 1997

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

WANDA L. SUMTER

447-52-8402

Plaintiff,

vs.

JOHN J. CALLAHAN¹,
Acting Commissioner Social Security
Administration,

Defendant.

Case No. 96-CV-263-M

ENTERED ON DOCKET

DATE MAY 29 1997

ORDER

Plaintiff, Wanda L. Sumter, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.² In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Commissioner under 42 U. S. C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92

¹ President Clinton appointed John J. Callahan to serve as Acting Commissioner of Social Security, effective March 1, 1997, to succeed Shirley S. Chater. Pursuant to Fed.R.Civ.P. 25(d)(1) John J. Callahan is substituted as the defendant in this suit.

² Plaintiff's September 23, 1993 application for disability benefits was denied January 19, 1994 and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held September 22, 1994. By decision dated March 8, 1995 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on February 23, 1995. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991).

Plaintiff was born March 27, 1950 and was 44 years old at the time of the hearing. She claims to be unable to work since January 2, 1992 as a result of chronic back complaints and depression. On September 30, 1993 she suffered a fracture and subsequent nonunion of the right tibia and fibula which she claims further limited her ability to perform work related activities.

The ALJ determined that subsequent to September 30, 1993, Plaintiff met Listing of Impairment § 1.11:

fracture of the femur, tibia . . . with solid union not evidence on X-ray and not clinically solid, when such determination is feasible, and return to full weight-bearing status did not occur or is not expected to occur within 12 months of onset.

20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.11. The ALJ determined that Plaintiff was entitled to disability benefits as of September 30, 1993, but not before that time. He found that prior to September 30, 1993 Plaintiff had the residual functional capacity to perform her past relevant work as a packager, parts processor, and cabinet maker.

[R. 32]. The case was thus decided at step four of the five-step evaluative sequence for determining whether Plaintiff is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination that she was not disabled from January 1, 1992, her alleged date of onset, to September 30, 1993 is not supported by substantial evidence. Specifically, Plaintiff argues: (1) that the ALJ's finding that prior to September 30, 1993 Plaintiff did not have a significant back impairment was based on "significantly erroneous observations from the medical record" [Dkt. 7, p. 3]; and (2) the ALJ erroneously relied on the opinion of a consultative psychiatrist whose opinion was derived without benefit of reviewing pertinent medical records. The Commissioner argues that the court should decline to review the plaintiff's allegations because she did not first present them to the Appeals Council for administrative review in accordance with *James v. Chater*, 96 F.3d 1341 (10th Cir. 1996). For the reasons expressed below, the Court finds that the ALJ's decision is supported by substantial evidence and is therefore AFFIRMED.

APPLICATION OF JAMES v. CHATER

In *James* the Tenth Circuit announced "a **prospective** rule." *Id.*, 96 F.3d at 1341 [emphasis supplied]. "Henceforth, issues not brought to the attention of the Appeals Council on administrative review may, **given sufficient notice to the claimant**, be deemed waived on subsequent judicial review." *Id.* at 1344. [emphasis supplied]. The Tenth Circuit was clear that its pronouncement in *James* was to have prospective application only. The *James* opinion was issued on September 19, 1996, 18 months

after the ALJ's March 8, 1995 decision and 7 months after the Appeals Council Action. To apply *James* to the instant case would be to give the rule retroactive application, contrary to the express language in *James*.

Furthermore, the Court notes that the Court in *James* was unmistakably concerned that claimants be given notice that issues not raised may be deemed waived. The Court has examined the Notice of Decision dated March 8, 1995 which explains Plaintiff's administrative appeal rights and notes that it does not inform Plaintiff that failure to raise issues before the Appeals Council could result in a waiver. [R. 13-15]. Therefore, regardless of the question of retroactive application of the rule, the Court finds that the Commissioner failed to provide notice such that issues could be deemed waived under *James*.

The Court rejects the Commissioner's request that the *James* waiver rule be applied to this case.

ANALYSIS OF BACK IMPAIRMENT

The medical record documents Plaintiff's history of low back pain for which she received periodic chiropractic care from as early as 1978. The ALJ noted the existence of those records and her chiropractor's letter dated March 1994 which expressed the opinion that Plaintiff's low back condition had slowly progressed over the last 10-12 years until "she is essentially unable to labor as she has in the past." [R. 187]. The ALJ stated he was:

unable to accord any weight to the chiropractor's assessment that the claimant could not work. . . . The record is plain that he had not seen her for many years and

that there is no evidence showing a significant back impairment other than her repeated history to various examiners that she had fallen from a horse at age 15 and had complained of back pain ever since.

[R. 21-22]. Because the record reflects that Plaintiff had visited her chiropractor, Dr. Bogan, between 1979 and 1994 [R. 191], Plaintiff calls the ALJ's analysis a "gross mischaracterization of Dr. Bogan's medical records" which she argues casts doubt on both his rationale for rejecting Dr. Bogan's opinion and his credibility analysis. [Dkt. 7, p.3].

While it was not completely accurate to say that as of March 1994, Dr. Bogan had not treated Plaintiff for *many* years, his records reflect that he had seen her only twice in the 34 months preceding the letter. Dr. Bogan's records reflect that Plaintiff received chiropractic treatment for her back on only two dates relevant to the time frame at issue: 12/7/92 and 7/21/93. [R. 191].

Prior to Plaintiff's January 1992 alleged date of onset, Dr. Bogan completed a report in October 1991 which reflects that Plaintiff was referred to Charles Anderson, M.D. for "surgical intervention", although there is no reference to the referral in Dr. Bogan's contemporaneous treatment notes. [R. 188-192]. Dr. Charles Anderson, M.D. is a diagnostic radiologist. The only record from him is a report of a C.T. scan of Plaintiff's lumbar spine performed April 1, 1991. Dr. Anderson reports a *possible* small right lateral disc herniation of the L4-5 disc with stenosis of the right lateral canal. He states the stenosis is caused by degenerative spine and facet changes. He notes the remaining lumbar discs are negative. [R. 141].

In contrast to the 1991 C.T. scan, a September 30, 1993 emergency room report indicates that examination of Plaintiff's lower back shows mild tenderness in the lower lumbar region but "X-rays of the lumbar spine were an unremarkable." [R. 145]. The radiology report of X-rays taken of the lumbar spine reports: "No fractures are identified. The disc spaces are maintained and there is no loss of alignment." [R. 152].

The ALJ took note of the September 1991 C.T. Scan findings and the normal September 1993 lumbar X-rays as well as "the daily activities and employment activities in which she is [sic] participated since the alleged early onset" and found them to be "markedly inconsistent with significant back impairment." [R. 22]. Plaintiff testified that during her period of alleged disability, January 1992 to September 1993, she engaged in such activities as insulating an attic, building a storage building, building a swimming pool deck, roofing a house, constructing fencing, doing yard work, and painting. [R. 49-52].

The Court finds that the ALJ did not make a "gross mischaracterization" of Dr. Bogan's medical records, nor does the Court find that the ALJ was laboring under a "significant misunderstanding" concerning the nature of the objective findings relative to Plaintiff's back condition. Rather, the Court finds that the ALJ was presented with what might be construed as conflicting medical evidence: a C.T. scan report of a *possible* small disc herniation in 1991; and unremarkable X-ray of the lumbar spine in 1993. In the face of Plaintiff's reported activities which are inconsistent with the

existence of disabling back pain, the ALJ appropriately exercised his duty to resolve that conflict. *See Richardson v. Perales*, 402 U.S. 389, 399 (1971).

The Court finds that the ALJ's conclusion concerning Plaintiff's back impairment, her credibility, and Dr. Bogan's opinion are supported by substantial evidence.

ANALYSIS OF MENTAL IMPAIRMENT

Plaintiff alleged a mental impairment dating back to October 1991 when she was voluntarily hospitalized for treatment of stress and depression after she was accused of stealing at work and lost her long-time employment at McDonnell Douglas. Following Plaintiff's discharge from the hospital, she was followed in counseling for about one year. The hearing record reflects that Plaintiff's counsel was surprised to find out that Plaintiff had been hospitalized for mental problems. [R. 56]. The ALJ permitted Plaintiff's counsel two weeks to submit those additional records, and "anything else he would like to submit." [R. 59]. In addition, at the end of the hearing the ALJ stated:

It does appear in this case that there is a -- there are two distinct periods here, September 30th of '93 and following, and before that. If you believe the record supports disability before September 30th of 1993, I would especially like to see your -- a short brief on those issues. [R. 71].

Following the hearing Plaintiff submitted a short cover letter and 25 pages of medical records from Laureate Psychiatric Clinic and Hospital for the period of time covering October 19, 1991 through October 28, 1991. [R. 289-315]. No brief was

submitted. On appeal Plaintiff asserts error in the agency proceedings based on the fact that Plaintiff was referred to Dr. Rick Jones for additional therapy when she was discharged from Laureate and those records were not before the ALJ and were not available to the consultative psychiatrist, Dr. Goodman, to review. Plaintiff argues that Dr. Goodman's opinion that her depression was in remission cannot constitute substantial evidence without comparison to the missing records.

Concerning the opinion of the consultative psychiatrist, Dr. Goodman, the history portion of his report reflects his knowledge of Plaintiff's inpatient psychiatric treatment at Laureate and her subsequent counseling. [R. 233].

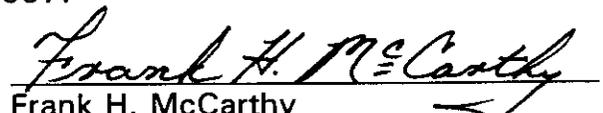
Although Plaintiff argues that the record is incomplete and the ALJ's conclusion erroneous without the records of Dr. Rick Jones, the Court notes that Plaintiff was represented by counsel throughout the administrative process. The ALJ invited Plaintiff to submit additional records and a brief to specifically address her condition prior to September 1993. [R. 71]. In addition, the Notice of Decision advised Plaintiff that she "should submit any new evidence you wish to the Appeals Council to consider with your request for review." [R. 14]. Plaintiff submitted the Laureate medical records to the ALJ post hearing but did not submit either a brief or the records of Dr. Jones. In her brief to this Court Plaintiff argues that the ALJ failed in his duty to investigate the issues and speculates that Dr. Goodman's consultative opinion would be outweighed by some unspecified information that may be contained in the treatment notes of Dr. Jones. However, Plaintiff fails to provide any information as to how Dr. Jones' records would have effected the ALJ's analysis.

Although the ALJ has a basic obligation to ensure that an adequate record is developed during the disability hearing consistent with the issues raised, it is not the ALJ's duty to become the claimant's advocate. *Henrie v. United States Dept. of Health and Human Servs.*, 13 F.3d 359, 360-61 (10th Cir. 1993). Under the facts of this case, if there was significant additional information relevant to Plaintiff's mental condition which pre-dated September, 1993, it was the obligation of Plaintiff and her counsel to bring that information either to the attention of the ALJ or the Appeals Council. Alternatively, Plaintiff could have sought the agency's assistance in obtaining the records, if necessary. In the absence of any showing of prejudice, the Court declines to order a remand for further development of the record. See *Hawkins v. Chater*, ___ F.3d ___ (10th Cir. 1997), 1997 WL 249150, *6 (intimating that a claimant should be required to show prejudice when reversal sought for ALJ's failure to obtain existing evidence, citing *Shannon v. Chater*, 54 F.3d 484, 488 (8th Cir. 1995)).

CONCLUSION

The Court finds that the ALJ's conclusion that between January 1, 1992 and September 30, 1993 Plaintiff could perform her past relevant work as a packager, parts processor, and cabinet maker is supported by substantial evidence in the record. Accordingly the decision of the Commissioner is AFFIRMED.

SO ORDERED this 28th day of May, 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

MAY 28 1997

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

WANDA L. SUMTER,)
SSN: 447-52-8402,)

Plaintiff,)

v.)

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

Defendant.)

CASE NO. 96-cv-263-M

ENTERED ON DOCKET

DATE MAY 29 1997

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 28th day of MAY, 1997.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

MAY 27 1997 *rw*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN RE:)
)
MARGARET J. LOWERY,)
I.D. #360-38-8751,)
)
)
MARGARET J. LOWERY,)
)
Plaintiff,)
)
vs.)
)
)
MeTROPOLITAN COMPANIES)
FEDERAL CREDIT UNION; et al.)
)
Defendants.)

Bankry. Case No. 96-00626-R
(Chapter 13)

FILED ON DOCKET
MAY 28 1997
DATE _____

U.S. Bankruptcy Ct. for the N.D.
Okla. Adv. Pro. No. ~~97-C-470-B~~

N.D. OKLA. CASE NO.
97-CV-470-B (M) ✓

**ORDER OF AUTOMATIC REFERENCE TO
BANKRUPTCY COURT**

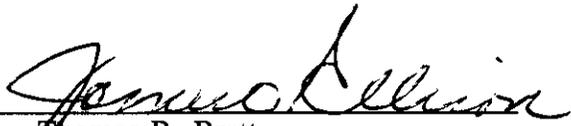
NOW ON THIS 27th day of May, 1997, there comes before the Court the Motion of defendant MeTropolitan Companies Federal Credit Union ("MTC"), requesting that this Court automatically refer this cause to the United States Bankruptcy Court for the Northern District of Oklahoma under the terms of this Court's District Court Rules for Bankruptcy Practice and Procedure, Order dated April 11, 1985, under Misc. No. M-128, Rule B-5 and 28 U.S.C. § 157 (a).

The Court finds that this case is automatically referred to the United States Bankruptcy Court for the Northern District of Oklahoma under the terms of this Court's

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District Court Rules for Bankruptcy Practice and Procedure, Order dated April 11, 1985, under Misc. No. M-128, Rule B-5 and 28 U.S.C. § 157 (a).

IT IS THEREFORE ORDERED that this cause is referred to the United States Bankruptcy Court for the Northern District of Oklahoma under this Court's District Court Rules for Bankruptcy Practice and Procedure, Order dated April 11, 1985, under Misc. No. M-128, Rule B-5 and 28 U.S.C. § 157 (a), and that further proceedings in this case shall be conducted in said Bankruptcy Court.

for 
Thomas R. Brett
UNITED STATES DISTRICT JUDGE

Submitted by:

Carol Wood English, OBA #10532
ENGLISH & WOOD, P.C.
15 West Sixth Street, Suite 1610
Tulsa, Oklahoma 74119-5410
(918) 582-1564

ATTORNEYS FOR DEFENDANT
MeTROPOLITAN COMPANIES
FEDERAL CREDIT UNION

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

FILED
MAY 27 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT E. PAUL,

Plaintiff,

v.

ST. JOHN MEDICAL CENTER, INC.,
an Oklahoma non-profit corporation,

Defendant.

Case No. 96-CV-755-E

FILED ON DOCKET
MAY 28 1997

ORDER OF DISMISSAL WITH PREJUDICE

This matter comes before the Court on the Joint Stipulation of Dismissal with Prejudice by the parties. The parties represent to the Court they have entered into an agreement for the entry of this Order of Dismissal with no finding of employment discrimination, retaliation or constructive discharge on the part of St. John Medical Center Inc.

IT IS THEREFORE ORDERED that this matter is dismissed with prejudice with no finding of employment discrimination, retaliation or constructive discharge on the part of St. John Medical Center, Inc. Each party shall bear their own attorney's fees and costs.

JUDGE OF THE DISTRICT COURT

A

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

FILED

MAY 22 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES HENRY MAXWELL,)

Plaintiff,)

vs.)

Case No. 96-CV-1174 B

FORTIS BENEFITS INSURANCE)

COMPANY,)

Defendant.)

ENTERED ON DOCKET

MAY 23 1997

DATE

JOINT STIPULATION OF DISMISSAL

Plaintiff Deanna Maxwell, for James Henry Maxwell, by and through her attorney of record, Jeff Steen, and the Defendant Fortis Benefits Insurance Company, by and through its attorneys of record, Crowe & Dunlevy, jointly stipulate and agree that this action should be and is hereby dismissed with prejudice, each side to bear its own costs, attorneys' fees and expenses.

Respectfully submitted,

Madalene A. B. Witterholt *Jeff Steen*

Madalene A. B. Witterholt, OBA # 10528
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Oklahoma City, Ok 73102

ATTORNEY FOR PLAINTIFF
DEANNA MAXWELL, FOR JAMES
HENRY MAXWELL

ATTORNEYS FOR DEFENDANT
FORTIS BENEFITS INSURANCE COMPANY

CLS

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

MAY 22 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT E. PAUL,

Plaintiff,

v.

ST. JOHN MEDICAL CENTER, INC.,
an Oklahoma non-profit corporation,

Defendant.

Case No. 96-CV-755-E ✓

ENTERED ON DOCKET

DATE MAY 23 1997

**JOINT STIPULATION OF
DISMISSAL WITH PREJUDICE**

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereto stipulate that the Plaintiff shall dismiss with prejudice this matter in its entirety including Plaintiff's allegations of discrimination, retaliation, and/or constructive discharge.

WHEREFORE, the parties request the Court enter the Order of Dismissal with Prejudice, attached hereto as Attachment 1, and require each party to bear their respective attorneys' fees and costs.

Robert E. Paul

Robert E. Paul, Plaintiff

Cheryl Bisbee

Cheryl Bisbee
P. O. Box 701110
Tulsa, Oklahoma 74170
Attorney for Plaintiff

26

OKT



Charles S. Plumb

Doerner, Saunders, Daniel &
Anderson

320 South Boston Avenue
Suite 500

Tulsa, Oklahoma 74103-3725
(918) 582-1211

Attorneys for Defendant
St. John Medical Center, Inc.

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

F I L E D

MAY 23 1997

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

DONALD R. NICHOLS and VIRGINIA
NICHOLS, Husband and Wife;
CHARLES BUCK; JEFF TSAY and
NORA TSAY, Husband and Wife; AL
BRYSON and MARY BRYSON; and
HOWARD COLLINS,

Plaintiffs,

v.

Case No. 95-C-1126-H /

G. DAVID GORDON; IRA RIMER; JOEL
HOLT; PROGRESSIVE CAPITAL
CORPORATION, an Oklahoma
corporation; STRUTHERS INVESTMENT
ENTERPRISES; R.A. DEISON; GEORGE
GORDON; SAMUEL LINDSAY, JR.;
JAMES E. TURNER; BETTY ROSE
TURNER; GLYN TURNER; PATTERSON
ICENOGL, INC., an Oklahoma
corporation; DOUG NELSON;
NORTHERN OHIO ENGINEERING CO.,
a foreign corporation; ROBERT L.
MILLER; HENSHAW, KLEND, GORDON
& GETCHELL, P.C., an Oklahoma
professional corporation; and
BAGGET, GORDON & DEISON a
partnership,

Defendants.

EOD 5/23/97

ORDER

The Court has for its consideration the Joint Application to Magistrate Judge
McCarthy for Continuance of Settlement Conference. Upon consideration of the
Joint Application, and for good cause shown, it is hereby

ORDERED that the Settlement Conference currently set for June 2, 1997 at
1:15 p.m. is stricken, to be reset upon application of the parties.

DATED this 22nd day of May, 1997.

Frank H. McCarthy
FRANK A. MCCARTHY
UNITED STATES MAGISTRATE JUDGE

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

ROBERT B. REICH, Secretary of)
Labor, United States Dept.)
of Labor¹,)

Plaintiff,)

vs.)

SKYLINE TERRACE, INC. d/b/a)
SKYLINE TERRACE NURSING)
CENTER,)

Defendant.)

No. 95-C-676-K

FILED
MAY 22 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE MAY 23 1997

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

The above-styled case was tried to the Court without a jury, and evidence was presented from October 23, 1996 through October 25, 1996. Post-trial briefing was completed February 10, 1997. After considering the pleadings, the testimony and exhibits admitted at trial, all of the briefs and arguments presented by counsel for the parties, and being fully advised in the premises, the Court enters the following Findings of Fact, Conclusions of Law and Judgment, in accordance with Rule 52 F.R.Cv.P., as follows:

FINDINGS OF FACT

1. This is an action brought by the Secretary of Labor against defendant nursing home pursuant to 29 U.S.C. §660(c)(2),

¹Mr. Reich is no longer Secretary of Labor, but held that office during the trial of this action.

alleging defendant discharged an employee, Rosemary Cook, because she filed a complaint with the Oklahoma State Department of Health and the Occupational Safety and Health Administration ("OSHA"), which contended safety and health hazards existed at her place of employment.

2. Rosemary Cook ("Cook") resides in Broken Arrow, Oklahoma, which is in the Northern District of Oklahoma.

3. Skyline Terrace, Inc. d/b/a Skyline Terrace Nursing Center ("Skyline Terrace"), is an Oklahoma corporation having an office and a place of business in Tulsa, Oklahoma, which is in the Northern District of Oklahoma.

4. At all relevant times, Cook was employed by Skyline Terrace and was an "employee" employed by an "employer" as those terms are defined in 29 U.S.C. §652(5) and (6). (Pretrial Order, II. 2).

5. Skyline Terrace regularly employs licensed nursing personnel to provide necessary care to all residents. There are three shifts per day, every day, for its nursing care personnel. The shifts are 7 a.m. to 3 p.m. ("7-3"), 3 p.m. to 11 p.m. ("3-11"), and 11 p.m. to 7 a.m. ("11-7").

6. Among the levels of care provided by Skyline Terrace are an infirmary unit, a Medicare skilled nursing unit and a "secure" unit which provides special care to certain residents who might wander off and place themselves at risk of harm. Many patients sleep through the night but require periodic checking to change soiled or wet briefs or "turning" to prevent bedsores.

7. Skyline Terrace is licensed by the Oklahoma State Department of Health, which also conducts on-site surveys periodically for licensing. From time to time, Skyline Terrace is also surveyed based on complaints made to the State Health Department. These inspections are unannounced.

8. At the time a Health Department inspector arrives for the investigation, site administrators are made aware of the nature of the complaint during the opening conference. A copy of the findings is available after the investigation is complete if site administrators request the information by mail. The investigator is required not to reveal the identity of the complainant.

9. Cook made application to Skyline Terrace for employment as a nurse just after she completed her nursing education at Tulsa Junior College (now "Tulsa Community College") in May, 1994.

10. Cook obtained an interview in June, 1994, with Linda Lyons Coyle, the director of nurses at Skyline Terrace.

11. Cook had no previous experience as a supervisor at the time she was interviewed by the director of nursing for the Skyline Terrace job, although she had done a "management rotation" in nursing school. (Tr. 30.23-25).

12. She was offered a job during the interview and was hired as an at-will employee for a probationary period, commencing June 11, 1994. Cook did not perceive any reservations on Coyle's part about hiring Cook. (Tr. at 39.14-21).

13. Cook was hired as House Supervisor on the 11-7 shift, and it was Cook's understanding she would also assume the

responsibilities of "charge nurse" for the infirmary room and the Medicare room. (Tr. at 38.8-18).

14. Cook was initially trained by Judy O'Brien, the "weekend option RN supervisor." (Tr. at 41.18-25).

15. Cook received eight days of training, the final day of training being June 22, 1994. (Tr. at 42.12-17).

16. O'Brien showed Cook how to take water temperatures in the facility, but O'Brien (who was serving as 11-7 House Supervisor at the time) told Cook that O'Brien had never taken the water temperatures. (Tr. at 44.23-45.2).

17. O'Brien did not emphasize that the taking of water temperatures was an important part of the job, or even why water temperatures were taken. (Tr. at 45.24-46.3).

18. Linda Lyons Coyle did not tell Cook why the taking of water temperatures needed to be done. (Tr. at 46.7-11).

19. Cook was not told during training that one of her duties was to train or orient new nurse aides and did not receive a check list to do so. (Tr. at 46.15; 46.24-47.4).

20. Any documents or forms, including "report to administration" forms, which Cook filled out had to be slipped under the front office door because Cook did not have a key. (Tr. at 47-48).

21. Cook testified that she had to respond to "incidents" (e.g., conflicts between patients and employees) almost every night. (Tr. at 56.16). If an 11-7 employee did not appear for work, it was Cook's responsibility to ask a 3-11 employee to stay

over. (Tr. at 57.3-5).

22. Cook described the 11-7 shift as "extraordinarily busy". (Tr. at 66.13). She met with Linda Lyons Coyle on June 22, 1994 and discussed Skyline Terrace's glove policy. Coyle related that gloves were only to be worn when the nurse saw visible blood. Cook stated that Cook wished to wear gloves whenever she might come in contact with bodily fluids, and Coyle granted permission. (Tr. at 75.25-76.4).

23. Cook described arriving at work on June 27, 1994 and finding no protective gloves for the staff.² (Tr. at 77). On that evening, the staff used the personal glove supply of Jennifer Zewalk, a nurse aide, and ultimately used the special facility supply of expensive sterile gloves. (Tr. at 77-78). Cook submitted a "report to administration" form relating the lack of gloves. (Tr. at 78.3-5).

24. On the next morning, June 28, 1994, Cook orally reported the incident to "[e]verybody I ran into." (Tr. at 79.7).

25. Again, no regular use latex gloves were present in the facility on June 28, 1994. Again, Cook submitted a written report to the administrative office and an oral report to the nurses. (Tr. at 79-80).

26. Upon Cook's arrival at work on June 29, 1994, she again found no regular use latex gloves. A note had been placed on the nurses' station. (Tr. at 80.24-25). The note, (Plaintiff's

²The transcript at 77.4 refers to "June the 22nd", but in context it is clear that June 27 was intended by the questioner.

Exhibit 9), stated in part that medical supplies should only be ordered once a week. Further, that "an extremely large quantity of gloves³ is being requested. Please use your gloves as directed, only. Thanks, Sandy". Sandy was identified as a secretary in the front office. Cook used her own gloves which she had purchased and again sterile gloves were used. (Tr. at 82.10-13). The nursing staff was upset at the lack of gloves. (Tr. at 82.16).

27. When Cook arrived at work June 30, 1994, she was informed by Pat Hilton that Jennifer Zewalk had quit. Only two other employees, Sharon Deaver and Maxine Love, were present. (Tr. at 84.4-6).

28. Cook called Linda Lyons Coyle to report the "critical staffing shortage". (Tr. at 84.16). Cook called Coyle other times during the night. (Tr. at 85.6;85.17). Cook estimated four or five such calls were made. (Tr. at 88.6). Linda Lyons Coyle told Cook the next day that Cook had done a "fantastic job". (Tr. at 89.20).

29. On July 7, 1994, a nurse aide at Skyline Terrace named Tichelle Hunt had a "hypoglycemic episode". (Tr. at 90.3-4). Cook, unaware of the nature of Hunt's medical condition, called Linda Lyons Coyle. (Tr. at 94.13). Coyle told Cook to instruct Hunt to leave the premises. (Tr. at 94.24). Cook did so, but Hunt did not leave. (Tr. at 95). Cook called Coyle again, who instructed Cook to call the police, (Tr. at 96.4), which Cook did

³The transcript at 81.14 mistakenly substitutes the word "drugs" for "gloves".

(Tr. at 96.19). The police obtained Hunt's driver's license, which contained a medical restriction. Cook then tested Hunt's blood sugar and, upon discovering hypoglycemia, administered orange juice and milk. (Tr. at 100.16). Hunt thereupon recovered from the episode. Linda Lyons Coyle again told Cook she had done a "good job" regarding the incident. (Tr. at 102.21).

30. Cook continued to be concerned about the glove supply at Skyline Terrace (Tr. at 103.3-6), and on July 5, 1994, she notified the Oklahoma State Department of Health and OSHA. (Tr. at 103.10-13).

31. The seven specific allegations made by Cook are set forth on the first page of Plaintiff's Exhibit 2. The remaining pages of that Exhibit contain the findings of Karel Putman, the Health Department investigator.

32. Putman visited Skyline Terrace, unbeknownst to Cook, on July 13 and 14, 1994. (Tr. at 154.16).

33. Cook worked the night of July 14, 1994, did not work July 15 and 16, and returned to work July 17, 1994. (Tr. at 112-13).

34. When Cook came in the night of July 17, she found a note from Linda Lyons Coyle, asking Cook to call Coyle the next morning. Upon calling, Cook was told to attend a meeting with Coyle, which she did. (Tr. at 113).

35. At the meeting, Coyle told Cook she was terminated, and gave three reasons: (1) ten nurse aides had quit since Cook had been hired and that showed she had poor management skills; (2) Cook had not recorded water temperatures in the building; (3) Cook had

not followed behind her nurse aides to insure they completed their work. (Tr. at 114).

36. Coyle provided no documents, and requested no response from Cook. (Tr. at 114.21). Cook also testified Coyle had never previously raised concerns about any of these purported reasons. (Tr. at 115.1-12).

37. Soon after termination, Cook learned the State Department of Health had inspected Skyline Terrace days before her termination.⁴ (Tr. at 115.25).

38. Cook was out of work from July 18, 1994 until September 19, 1994. (Tr. at 118.20). She obtained work at a hospital in Paris, Texas, where she is presently employed. She incurs expenses for commuting from Broken Arrow to Paris, and for food. (Tr. at 119-121).

39. During her testimony, Coyle attempted to deny any knowledge that Cook was the complainant. Despite the testimony of Putman that she read and discussed the complaint with Coyle on the second day of the investigation (Tr. at 155), Coyle attempted to establish that Putman had only discussed at most four or five of the complaint items with her. However, upon review of Putman's report, Coyle admitted that Putman discussed all of the allegations in Cook's complaint with Coyle. (Tr. at 355-56).

40. Sue West testified that she told Coyle in June, 1994 that

⁴The thoroughness of the inspection is somewhat suspect. Putman testified that, faced with an allegation that a nurse at Skyline Terrace had Hepatitis B, she satisfied herself by inquiring of the director of nurses. (Tr. at 196-97).

Cook was concerned about the lack of gloves at Skyline Terrace. (Tr. at 574-75).

41. Suggesting why she did not see the requests for gloves, Coyle testified that the "reports to administration" forms were cut up and each portion sent to the appropriate department. (Tr. at 311-313). On cross-examination, Coyle admitted that several of the reports to administration entered as exhibits in this case had notations in the maintenance portion and had not been cut up. (Tr. at 390-392).

42. Coyle suggested that Sandy Simmons, the receptionist, had the authority to write and distribute a note regarding glove usage throughout the facility without management's knowledge or approval. (Tr. at 403-404).

43. The two documents created by nurses Lisa Spanberger and Glenda Burkhart to allegedly document the conditions of their patients on the morning of July 14, 1994, are not credible. Burkhart was the charge nurse on the 7-3 shift for the infirmary ward at the time. She testified that she arrived at work the morning of July 14, 1994 and discovered Cook's favorable evaluation (Plaintiff's Exhibit 27; Defendant's Exhibit 10) of Tammy Davis, a nurse aide employed at Skyline Terrace.

44. Burkhart testified that she became "frustrated" (Tr. at 438.20) upon seeing the evaluation because Burkhart believed Davis "really wasn't doing her work". (Tr. at 439.2). Burkhart created Defendant's Exhibit 8 in response to the Cook evaluation of Davis. (Tr. at 439.23--440.1). Burkhart testified that Exhibit 8

represents her assessment of the patients on the floor that morning. For example, next to patient names are the following entries: "bed and diaper completely soaked[.] Lashaun said she thought diaper was marked 10:15--no initials"; "last change 11:55 PM--soaked. . . "; "last change 11 PM--bed and diaper completely soaked"; "last change 11 PM--bed and diaper soaked." Asked why she had never made a written record of the poor care provided by Cook and Davis until July 14, 1994, Burkhart replied "I just didn't". (Tr. at 443.12).

45. Lisa Spanberger was the house supervisor on the 7-3 shift in July, 1994. Spanberger testified that she created Defendant's Exhibit 9 because Burkhart had shown Spanberger the favorable evaluation of Davis written by Cook. (Tr. at 492.7-15). Defendant's Exhibit 9 also lists patients' names and their conditions. Four separate entries state that a patient had an unchanged diaper which had been marked "2320" and initialed "T.D." (When a diaper was changed, the nurse aide was to write the time of the change and initial the diaper).⁵

46. Tammy Davis, the subject of their comments, was never fired or even reprimanded, and continued working at Skyline Terrace

⁵Spanberger also created Plaintiff's Exhibit 26, a note to Linda Lyons Coyle dated July 15, 1994. Spanberger lists two asserted transgressions by Cook: (1) writing down the wrong name for an employee who called in sick that morning and (2) making no attempt to find a replacement for an employee who called in sick July 9, 1994, almost one week before the note was written. Listing the second incident, in particular, smacks of collecting all negative information for the inevitable termination. In rebuttal, Cook testified that the incident regarding the clogged tube recorded in Defendant's Exhibit 8 actually took place July 5, 1994. (Tr. at 629.6-8).

until mid-September of 1994. Davis as a witness made a highly persuasive attack upon the authenticity of the documents by pointing out that she always recorded the time on patients' briefs in military time and even had a watch set in military time to assist her. (Tr. at 592, 603, 625-26). Thus, Davis testified, she never would have made an entry such as "11:55 PM" (Tr. at 603.23). Davis also stated that she would record the exact time on a brief, and thus Spanberger's notes which indicated that all the diapers were marked "23 20" must be incorrect. (Tr. at 601; Defendant's Exhibit 9).

47. Defendant's purported reason for termination that "Skyline Terrace hired and lost a record ten nurse aides on Ms. Cook's shift" utterly fails. Coyle testified she did not ask a single nurse aide why she quit and no one told her that any quit because of Cook. (Tr. at 406-08). Evidence was presented of consistent high turnover among aides at Skyline Terrace, and the testimony further indicated Cook was well liked and respected by the nurse aides.

48. Coyle contended another reason for terminating Cook was that Cook pulled aides from the North wing to help Cook with patient care on the Infirmary and Medicare wings. (Tr. at 321). Sharon Deaver testified that other supervisors had pulled aides off the North wing. (Tr. at 417). Tammy Davis testified she was pulled off the North wing even after Cook was terminated. (Tr. at 593).

49. The records from Interim Health Care do not support

defendant's assertion that, during Cook's tenure, Skyline Terrace was forced to obtain temporary nurse aides for the first time in the facility's history. (Plaintiff's Exhibit 30, p.4). The Court does not find credible Coyle's explanation that she filled nurse aide positions with more expensive LPNs during this time.

50. Tichelle Hunt testified that she had informed Coyle less than one week prior to the hypoglycemia incident of Hunt's medical condition. (Tr. at 541-42). Hunt testified she never told Cook she was a diabetic. (Tr. at 545). The Court finds Cook's account of the Hunt incident to be credible.

51. Although Cook did not take the water temperatures, the evidence indicates that other individuals who had failed to take water temperatures had not been fired and that taking water temperatures was not a high priority at Skyline Terrace.

52. The purported increase in "skin breakdowns" during Cook's tenure is not supported by the evidence.

To the extent that any of these Findings of Fact constitute Conclusions of Law, they should be so considered.

CONCLUSIONS OF LAW

1. This is a civil action arising under the Occupational Safety and Health Act, 29 U.S.C. §651 et seq ("the Act"). The Court has subject matter jurisdiction under 29 U.S.C. §660(c)(2).

2. The Court has personal jurisdiction over the parties and

venue is proper under 28 U.S.C. §1391(b).

3. In a case of alleged retaliation, the plaintiff must first make a prima facie case by showing (1) participation in a protected activity, (2) a subsequent adverse action by the employer, and (3) some evidence of a causal connection between the protected activity and the subsequent adverse action. Once the plaintiff has established a prima facie case, the burden shifts to the employer to articulate an appropriate non-discriminatory reason for its action. Finally, if the employer satisfies this burden, the plaintiff must then demonstrate that the proffered reason is pretextual. Reich v. Hoy Shoe Co., Inc., 32 F.3d 361, 365 (8th Cir.1994).

4. Defendant conceded at trial the first two elements of the prima facie case. (Tr. at 245.8-9). Defendant was correct, for the complaint to the state agency was "protected activity" pursuant to 29 C.F.R. §1977.9(b), and Cook suffered adverse employment action. Upon defendant's motion for directed verdict, the Court found a prima facie case had been established, describing in detail the evidence from which an inference of the third element, "causal connection" could be made. (Tr. at 258-60). The Court hereby adopts that discussion by reference. To summarize the discussion, the brief time period of four days between state inspection and Cook's termination, coupled with the allegations in the complaint from which Cook could have been identified, were more than sufficient to support a conclusion of causation.

5. Skyline Terrace has met its burden of articulating an

appropriate non-discriminatory reason for its action. Defendant contends Cook was terminated for poor work performance, and its witnesses testified as to numerous examples of such conduct.

6. Moving to the third stage of the inquiry, the Court concludes the reasons offered by defendant were a pretext for its true retaliatory motive. This conclusion is based upon the Court's finding that Cook was a highly credible witness, while the defendant's major witnesses were faced with contradictions, described above, which were not overcome. Plaintiff has met its ultimate burden of proving retaliatory discharge.

7. Plaintiff has declared she does not seek reinstatement. The general range of damages under the Act includes an injunction to prohibit the employer from violating the Act in the future, back pay, and prejudgment and postjudgment interest. Cf. Reich v. Cambridgeport Air Systems, Inc., 26 F.3d 1187, 1190 (1st Cir.1994); Donovan v. George Lai Contracting, Ltd., 629 F.Supp. 121 (W.D.Mo.1985).

8. Defendant presented no evidence contradicting the evidence presented by Cook that her back pay and costs total \$17,917.20. Relying upon the Reich decision, the government argues that this amount should be doubled. In Reich, the First Circuit found that "all appropriate relief" under §660(c)(2) could include an award of exemplary damages. 26 F.3d at 1194.

9. The district court in Reich had doubled the damages award because the conduct of the defendant had been "consistently brash", (i.e., justifying exemplary damages) and also to vaguely cover

"additional damages plus prejudgment interest." Id. at 1190. The appellate court upheld the award, equally vaguely, finding such an award could be appropriate as "additional compensation" and as "deserved punitive or exemplary damages." Id.

10. This Court is uncertain what "additional compensation" the First Circuit had in mind, but declines to double this award on such a nebulous basis. Regarding punitive damages, defendant has again not addressed the issue. This Court agrees with the Reich court that punitive damages are available under appropriate circumstances. Under the facts of this case, namely defendant's blatant retaliation against Cook and, more egregiously, its apparent after-the-fact creation of "negative" evaluations of Cook, the Court finds this is such a case. Punitive damages in the amount of \$5,000 are awarded.

11. Neither party has addressed the appropriate rate for the award of prejudgment interest. The Court will employ the rate dictated by 28 U.S.C. §1961, (i.e., the same rate applicable to postjudgment interest). Calculated from the filing of the complaint, July 21, 1995, until date of judgment, a total of \$19,907 is obtained.

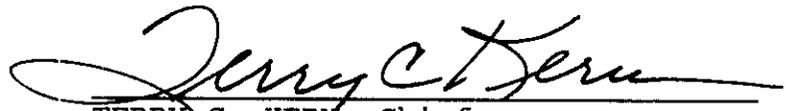
12. Defendant shall also be enjoined from any additional violations of §660(c).

To the extent that any of these Conclusions of Law constitute Findings of Fact, they should be so considered.

It is the Order of the Court that judgment be entered in favor of the plaintiff and against the defendant.

Still pending before the Court are the motion in limine of plaintiff (#75) and the motion in limine of the defendant (#76), which the Court took under advisement. The Court has not considered the evidence sought to be excluded in reaching its decision, and therefore these motions are declared moot.

ORDERED this 22 day of May, 1997.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

4

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

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

Plaintiff,)

vs.)

SKYLINE TERRACE, INC. d/b/a)
SKYLINE TERRACE NURSING)
CENTER,)

Defendant.)

ENTERED ON DOCKET

DATE MAY 23 1997

No. 95-C-676-K ✓

FILED *SK*

MAY 22 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This action came on for bench trial before the Court, Honorable Terry C. Kern, District Judge, presiding, and the decision having been duly rendered,

IT IS THEREFORE ORDERED that the Plaintiff, on behalf of complainant Rosemary Cook, recover from the Defendant the sum of \$24,903.00, with post-judgment interest thereon at the rate of 6.06 percent as provided by law.

ORDERED this 22 day of May, 1996.

Terry C. Kern
TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

83

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

DAN MEADOR, KENNEY F. MOORE,)
COLLEEN MOORE, and WAYNE)
RICHARD GUNWALL,)

Plaintiffs,)

v.)

H. DALE COOK, SAM JOYNER,)
STEPHEN C. LEWIS, NEAL)
KIRKPATRICK, FRANK H. McCARTHY,)
TRACY FOSTER, and JOHN & JANE)
DOE 1-20,)

Defendants.)

Case No. 97-CV-33-H

FILED
MAY 22 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE MAY 23 1997

ORDER

This matter comes before the Court on Defendants' Motion to Dismiss All Claims with Brief in Support Thereof and Motion for Sanctions with Brief in Support Thereof.

This matter apparently stems from the indictment of Plaintiffs Kenney F. Moore, Colleen Moore and Wayne Richard Gunwall on charges of conspiracy. These three Plaintiffs entered a plea of guilty to this charge on January 8, 1997. Plaintiff Dan Meador was indicted for obstruction of justice and was found guilty after a jury trial ending January 10, 1997.

I.

To the extent that Plaintiffs are suing federal Defendants in their official capacities and are seeking money damages against them, the suit is tantamount to an action against the United States. See Dugan v. Rank, 372 U.S. 609 (1963). The United States, however, cannot be sued absent a waiver of sovereign immunity. United States v. Testan, 424 U.S. 392, 399 (1976). Plaintiffs claims under various civil rights statutes and directly under the Constitution are not maintainable because these various provisions do not provide a waiver of sovereign immunity from suits for money damages. See United States v. Murdock Mach. & Eng'g Co., 81 F.3d 922, 929-30 (10th Cir. 1996). Therefore, the Court lacks subject matter jurisdiction over Plaintiffs' money damage claim against the United States.

c/m 5/25

II.

Judges are protected by absolute immunity for acts undertaken within their role as judges. Mireles v. Waco, 502 U.S. 9, 11 (1991) (*per curiam*); Van Sickle v. Holloway, 791 F.2d 1431, 1435-36 (10th Cir. 1986). Defendants United States District Judge Cook and United States Magistrate Judges Joyner and McCarthy have been sued in this matter for actions taken in their roles as judges. Therefore, Judge Cook and Magistrate Judges Joyner and McCarthy are entitled to absolute immunity in this case. The Court hereby grants Defendants' motion to dismiss with regard to Judge Cook, Magistrate Judge Joyner and Magistrate Judge McCarthy.

III.

Acts undertaken by a government lawyer in the course of his or her role as an advocate are cloaked in absolute immunity. Buckley v. Fitzsimmons, 509 U.S. 259 (1993). Government attorneys are absolutely immune if (1) the actions complained of are intimately associated with the judicial phase of the advocacy process, and (2) the attorney had a duty to bring such prosecution. Christensen v. Ward, 916 F.2d 1462, 1465, 1474 (10th Cir. 1990). In the instant case, Plaintiffs have named as Defendants United States Attorney Stephen C. Lewis and Assistant United States Attorney Neal Kirkpatrick. Plaintiffs allege no more than Mr. Lewis' and Mr. Kirkpatrick's roles as government attorneys. Both Mr. Lewis and Mr. Kirkpatrick are absolutely immune from Plaintiffs' lawsuit because their conduct was "intimately associated with the judicial phase of the criminal process." Imbler v. Pachtman, 424 U.S. 409 (1976). Therefore, the Court hereby grants Defendants' motion to dismiss with regard to Mr. Lewis and Mr. Kirkpatrick.

IV.

Under the facts alleged in this matter, Internal Revenue Service ("IRS") employees are absolutely immune for acts within the scope of their employment. See Christensen v. Ward, 916 F.2d 1462, 1475-76 (10th Cir. 1990). All acts complained of by Plaintiffs with respect to IRS Agent Tracy Foster are within the scope of her official duties and responsibilities. Thus,

Defendant Tracy Foster is immune from suit for these actions. The Court hereby grants Defendants' motion to dismiss with regard to Ms. Foster.

V.

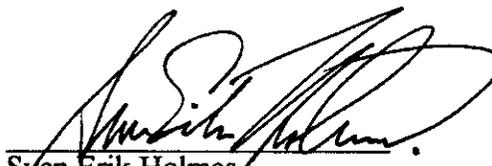
The only remaining question in this case is Defendants' motion for sanctions. The Court has conducted a careful review of all the filings in this matter. The Court finds the filings by Plaintiffs to be substantially incoherent. The issues and allegations presented by Plaintiffs are frivolous and the filing of these pleadings is vexatious and harassing in nature.

The filings by Plaintiffs fully support sanctions. If Defendants wish to pursue sanctions, the Court directs that they file a supplemental pleading setting forth with particularity a proposed sanction. Such supplemental pleading will be due two weeks from the file date of this order. If Defendants choose to file a supplemental pleading, then Plaintiffs response will be due within ten days of the file date of the supplemental pleading.

Further, the Court hereby strikes the case management conference scheduled for May 23, 1997. By virtue of this order, all other pending motions in this matter are hereby dismissed as moot.

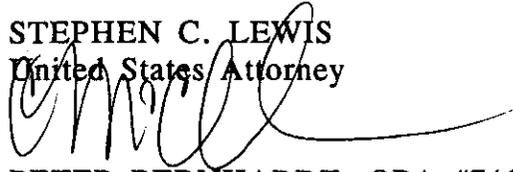
IT IS SO ORDERED.

This 21st day of May, 1997.


Sven Erik Holmes
United States District Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in black ink, appearing to read 'S. Lewis', is written over the printed name and title of Stephen C. Lewis.

PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 W. Fourth St., Suite 3460
Tulsa, OK 74103-3809

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

FILED

MAY 22 1997

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

VICKI PERPICH,

Plaintiff,

v.

JOHN J. CALLAHAN, Acting
Commissioner of the Social Security
Administration,

Defendant.

CASE NO. 96-cv-145-M

ENTERED ON DOCKET

DATE MAY 23 1997

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 22nd day of MAY, 1997.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

(12)

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

FILED ON DOCKET

5-22-97

MANNY BORGES FERREIRA and ROBERT)
JOHN FERREIRA, individually,)

Plaintiffs,)

v.)

Case No. 96-CV-805-K ✓

TMG LIFE INSURANCE COMPANY,)

Defendant/
Third-Party Plaintiff,)

F I L E D

MAY 22 1997

v.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARCIA V. FERREIRA, a/k/a Marcia)
Berren,)

Third-Party Defendant.)

ORDER OF DISMISSAL WITH PREJUDICE

For good cause having been shown, the parties, Plaintiffs, Manny Borges Ferreira and Robert John Ferreira, individually, and Defendant/Third-Party Plaintiff, TMG Life Insurance Company, and Third-Party Defendant, Marcia V. Ferreira, by and through their attorneys of record, having stipulated to the entry by this Court of an order of dismissal with prejudice of any and all claims which have been asserted, or which might have been asserted, as a result of the matters described in the Plaintiffs' Complaint, and/or the Third-Party Complaint of the Defendant and Third-Party Plaintiff, it is hereby ordered that the above-captioned action be dismissed with prejudice.

DATED this 22 day of May, 1997.


JUDGE, UNITED STATES DISTRICT COURT

140624

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

ENTERED ON DOCKET
DATE 5-22-97

FILED
MAY 22 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DESIGN HOMES, INC.,)
)
Plaintiff,)
)
vs.)
)
ASSURANCE COMPANY OF AMERICA,)
)
Defendant.)

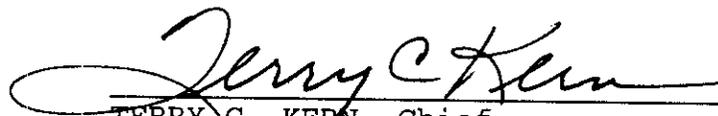
No. 96-C-702-K

ORDER

Before the Court is the joint application of the parties for order of dismissal. The parties represent that they have entered into a settlement agreement and desire a dismissal with prejudice.

It is the Order of the Court that the joint application for order of dismissal is hereby GRANTED. This action is dismissed with prejudice.

ORDERED this 22 day of May, 1997.



TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

2

FILED

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

MAY 21 1997

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

ST. PAUL FIRE AND MARINE)
INSURANCE COMPANY,)
)
Plaintiff,)
)
vs.)
)
INDEPENDENT SCHOOL DISTRICT)
NO. 30 OF WASHINGTON COUNTY,)
OKLAHOMA, RICHARD THOMPSON,)
THOMAS PROCTOR, ROBERT BONNER,)
EMERY PITZER, SIGRID WILLIAMS,)
CONNIE ELLIS, MARTA MANNING,)
MARK MILLER, DENNIS PANNELL,)
MARY PONDER, JOHN SCROGGINS,)
and JOANN WARD,)
)
Defendants.)

Case No. 95-C-1003-BU

ENTERED ON DOCKET
MAY 22 1997
DATE _____

ADMINISTRATIVE CLOSING ORDER

Based upon representations of Plaintiff's counsel that 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 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 20th day of May, 1997.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

LESTER L. SIMS,
SS# 448-66-7572

Plaintiff,

v.

JOHN J. CALLAHAN, Acting Commissioner
of Social Security Administration,^{1/}

Defendant.

MAY 21 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

328
No. 96-C-439-J

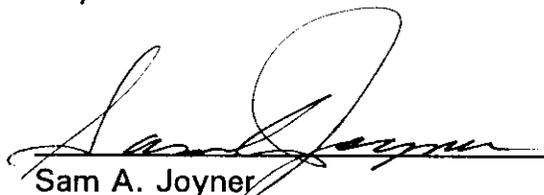
ENTERED ON DOCKET

DATE MAY 22 1997

JUDGMENT

This action has come before the Court for consideration and an Order remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 21 day of May 1997.


Sam A. Joyner
United States Magistrate Judge

^{1/} Effective March 1, 1997, President Clinton appointed John J. Callahan to serve as Acting Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), John J. Callahan, Acting Commissioner of Social Security, is substituted for Shirley S. Chater, Commissioner of Social Security, as the Defendant in this action.

25

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 21 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LESTER L. SIMS,)
SS# 448-66-7572)
)
Plaintiff,)
)
v.)
)
JOHN J. CALLAHAN, Acting)
Commissioner of Social Security,^{1/})
)
Defendant.)

No. 96-C-328-J

ENTERED ON COURT
DATE

ORDER

On April 3, 1997, this Court remanded the above-captioned case to the Administrative Law Judge ("ALJ") for further administrative proceedings. Plaintiff filed a Motion for an award of attorney's fees and other expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412 on May 5, 1997. [Doc. No. 21-1]. Defendant filed a response on May 19, 1997 stating that he has no objection to Plaintiff's motion for attorney's fees. The Court therefore **GRANTS** Plaintiff's motion [Doc. No. 21-1] and awards Plaintiff's counsel \$2,727.00 for attorney's fees and costs.

If attorney's fees are also awarded under 42 U.S.C. § 406(b)(1) of the Social Security Act, Plaintiff's counsel shall refund the smaller award to Plaintiff pursuant to Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir. 1986).

^{1/} Effective March 1, 1997, President Clinton appointed John J. Callahan to serve as Acting Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), John J. Callahan, Acting Commissioner of Social Security, is substituted for Shirley S. Chater, Commissioner of Social Security, as the Defendant in this action.

24

Dated this 21 day of May 1997.


Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
KENNETH E. ROBERTSON aka)
KENNETH ROBERTSON aka KEN)
ROBERTSON aka GENE ROBERTSON)
aka KENNETH EUGENE ROBERTSON;)
LENNIS G. ROBERTSON aka LENNIS)
GAIL ROBERTSON; STATE OF)
OKLAHOMA ex rel OKLAHOMA TAX)
COMMISSION; QR-92, LIMITED)
PARTNERSHIP; CITY OF BROKEN)
ARROW, Oklahoma; COUNTY)
TREASURER, Tulsa County, Oklahoma;)
BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)

FILED
IN OPEN COURT

MAY 21 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE MAY 22 1997

Civil Case No. 96CV 152BU

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 21st day of May, 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 February 24, 1997, pursuant to an Order of Sale dated December 4, 1996, of the following described property located in Tulsa County, Oklahoma:

Lot Twenty-eight (28), Block Seven (7), SILVERTREE, an Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded Plat thereof. thereof.

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Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, **Kenneth E. Robertson; Lennis G. Robertson; State of Oklahoma, ex rel. Oklahoma Tax Commission; QR-92, Limited Partnership; City of Broken Arrow, Oklahoma; County Treasurer, Tulsa County, Oklahoma; and Board of County Commissioners, Tulsa County, Oklahoma**, and to the purchase of the property, **Ty-Kait, Inc.**, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

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

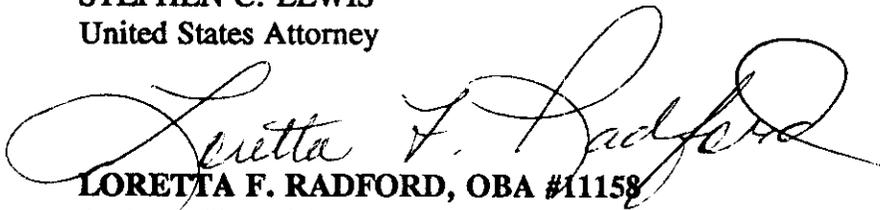
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, **Ty-Kait,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

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


UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney

3460 U.S. Courthouse

Tulsa, Oklahoma 74103

(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 96CV 152BU

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

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

BRENDA PITTS BAGNELL,)
)
Plaintiff,)
)
vs.)
)
CUNA MUTUAL INSURANCE GROUP,)
a/k/a CUNA MUTUAL GROUP, a/k/a)
CUNA MUTUAL INSURANCE SOCIETY,)
a foreign insurance company,)
)
Defendant.)

Case No. 96-CV-1076-BU

ENTERED ON DOCKET
DATE MAY 22 1997

ORDER

This matter comes before the Court upon Defendant, CUNA Mutual Insurance Group's First Motion for Summary Judgment. Plaintiff, Brenda Pitts Bagnell, has responded to the motion and Defendant has replied thereto. Upon due consideration of the parties' submission, the Court makes its determination.

Plaintiff originally commenced this action against Defendant in the District Court of Tulsa County, Oklahoma. Defendant removed the action to this Court on the basis of diversity jurisdiction, 28 U.S.C. § 1332. Plaintiff's amended petition alleges two claims against Defendant, namely, breach of contract and breach of the implied covenant of good faith and fair dealing.

The following facts are undisputed. On May 4, 1995, Plaintiff was employed as a nurse's aide at a nursing home in Miami, Oklahoma. On that date, a wheelchair ran over Plaintiff's left foot. The fourth toe of Plaintiff's left foot was injured. Plaintiff's toe was examined and treated by a physician. The physician had significant concerns about Plaintiff's injury because

(11)

Faxed 5/21

she was a diabetic. Plaintiff was given medication for her injury and directed to elevate her foot. Plaintiff's foot was re-evaluated on May 8, 1995, at which time Plaintiff was given additional medication. After failing outpatient therapy, Plaintiff was admitted into Miami Baptist Hospital on May 10, 1995. The physician diagnosed cellulitis to the left foot and adult onset diabetes mellitus which complicated the cellulitis. Plaintiff was treated and subsequently discharged on May 15, 1995.

On May 16, 1995, Plaintiff was admitted to Claremore Indian Hospital, with chief complaints of abdominal pain, nausea and vomiting. Plaintiff additionally complained of severe pain in her left foot. On May 25, 1995, Plaintiff's left fourth toe was amputated due to gangrene.

Despite the amputation to the fourth toe, Plaintiff's diabetic condition continued to hinder the healing of Plaintiff's left foot. On June 13, 1995, Plaintiff was re-admitted to Claremore Indian Hospital. Her third and fifth toes were amputated on June 19, 1995.

On July 3, 1995, Defendant received an enrollment form from Plaintiff, dated June 1, 1995, for accidental death and dismemberment insurance. As a member of the NEO Federal Credit Union, Plaintiff obtained information in the mail regarding the availability of group accidental death and dismemberment insurance.

On September 29, 1995, the second toe of Plaintiff's left foot was amputated at Claremore Indian Hospital.

Defendant issued a Certificate of Insurance, No. D6651052, evidencing coverage for Plaintiff under an accidental death and dismemberment policy. The coverage had an effective date of October 1, 1995. The Certificate of Insurance provides that "[w]hile this Certificate is in effect, Insured Persons are covered 24 hours a day, 365 days a year against accidents in the course of business or pleasure." It specifically provides for the payment of benefits if an "Insured Person sustains a loss within 365 days of an accident." "Loss" is defined under the Certificate of Insurance as:

[I]njury which results in Loss of Life or bodily injury of an Insured Person and occurs while the Policy is in force. Loss with reference to hand or hands, foot or feet, means severance at or above the wrist or ankle joint.

"Injury" is defined as:

[A]ny bodily harm caused by an accident occurring while the Policy is in force as to the Insured Person and resulting directly and independently of all other causes of Loss.

On January 17, 1996, Plaintiff's left leg was amputated below the knee. Thereafter, on January 23, 1996, Plaintiff's attorney notified Defendant that Plaintiff would assert a claim for the loss of her left leg below the knee. Plaintiff then submitted an accidental hospital confinement and dismemberment claim form, which was received by Defendant on March 11, 1996. Subsequently, Defendant denied Plaintiff's claim for benefits.

In its motion, Defendant contends that Plaintiff is not entitled to recover any benefits under the accidental death and dismemberment policy because the wheelchair accident did not occur

during the policy period. According to Defendant, the language in the "Benefits" section of the policy indicates that the policy only protects against accidents occurring while the policy is in effect. Additionally, Defendant asserts that the definition of "injury" provides support that the policy only protects against accidents during the policy period. Defendant maintains that the undisputed facts show that Plaintiff's accident at the nursing home occurred on May 4, 1995. As the policy was not in effect until October 1, 1995, Defendant contends that Plaintiff's claim is not covered under the policy.

Defendant further argues that Plaintiff's claim is not covered by the policy because the below-the-knee amputation did not result directly and independently of all other causes of loss as required by the policy. Defendant argues that Plaintiff's loss resulted due to the complications of her underlying diabetic condition. Because Plaintiff's loss was not directly and independently caused by the wheelchair accident, Defendant contends that Plaintiff is not entitled to any coverage.

Plaintiff, in response, admits that the wheelchair accident occurred outside the policy period and that the diabetes contributed to the amputation. However, she contends that Defendant's motion should be denied because disputed issues of material fact exist. Plaintiff contends that she had a reasonable expectation of coverage for her dismemberment from both the contract and the brochure she relied upon in making the purchase of insurance. According to Plaintiff, the brochure described "9 big

benefits" and benefit number five stated that "this plan insures you against dismemberment." Plaintiff argues that she enrolled under the assumption that the policy would cover any dismemberment and not necessarily an accidental dismemberment. Plaintiff also asserts that the policy was just not an accident policy as suggested by Defendant but was a dismemberment policy. Plaintiff argues that the dismemberment occurred during the policy period, and therefore, she should be covered.

Plaintiff additionally argues that the definition of "injury" is ambiguous and that this ambiguity leaves a material issue of fact that is disputed by the parties. Specifically, Plaintiff asserts that the definition does not indicate that the accident must occur during the policy period. Also, she asserts that there is no limitation as to the independently caused injuries. According to Plaintiff, this definition could preclude any claim as long as anything, no matter however insignificant, intervened in the cause of the injury.

Furthermore, Plaintiff argues that there is an issue of material fact as to Defendant's good faith in entering into the contract with Plaintiff. Plaintiff asserts that Defendant never conducted a medical examination of Plaintiff and never inquired into her medical history until she filed a claim. Plaintiff states that if Defendant had made an inquiry into medical history, her diabetes would have been noted. Instead, Defendant issued insurance and accepted payments under the policy. Therefore, Plaintiff asserts that Defendant did not act in good faith in

contracting with her.

Under Oklahoma law, unambiguous insurance contracts are construed, as are other contracts, according to their terms. Max True Plastering Company v. United States Fidelity and Guaranty Company, 912 P.2d 861, 869 (Okla. 1996). The interpretation of an insurance contract and whether it is ambiguous is determined by the court as a matter of law. Id. Insurance contracts are ambiguous only if they are susceptible to two constructions. In interpreting an insurance contract, the court may not make a better contract by altering a term for the party's benefit. Id. The construction of an insurance policy should be a natural and reasonable one, fairly constructed to effectuate its purpose, and viewed in the light of common sense so as not to bring about an absurd result. Dodson v. St. Paul Insurance Company, 812 P.2d 372, 376 (Okla. 1991) (quoting Wiley v. Travelers Ins. Co., 534 P.2d 1293, 1295 (Okla. 1974)). Neither forced nor strained construction will be indulged, nor will any provision be taken out of context and narrowly focused upon to create and then construe an ambiguity so as to import a favorable consideration to either party than that expressed in the contract. Id.

Mindful of the rules of construction, the Court finds that the Certificate of Insurance is clear and unambiguous. The Court finds that the insurance policy covers dismemberment caused by an accident. The plain terms of the Certificate of Insurance as well as the brochure reveal that the dismemberment must be from an accident. Plaintiff's construction of the Certificate of

Information and the brochure, in the Court's view, is strained and would produce an absurd result. In addition, upon review of the Certificate of Insurance and the brochure, the Court finds that coverage applies to injuries from accidents occurring during the policy period. Because the accident at issue occurred prior to the effective date of the policy, the Court finds that Plaintiff is not entitled to coverage. Other courts construing similar policies have concluded that the policy does not provide coverage for accidents occurring prior to its effective date. Bronstein v. INA Life Insurance Company of North America, 566 N.E.2d 484 (Ill. App. 1990), appeal denied, 571 N.E.2d 146 (Ill. 1991). Moreover, the Oklahoma Supreme Court has noted that "[i]t is fundamental that [accident] insurance policies do not apply to acts which have already occurred, but they are contracts based upon some contingency or act to occur in the future." Clardy v. Grand Lodge of Oklahoma, A.O.U.W., 269 P. 1065, 1066 (Okla. 1928).

Even if the Court were to find that the policy covers injuries from accidents occurring prior to its effective date, the Court concludes that Defendant is still entitled to summary judgment on the issue of coverage. Under the clear terms of the policy, specifically, the definition of "injury," Plaintiff must show that the amputation of her left leg "result[ed] directly and independently of all other causes." The Oklahoma Supreme Court and the Tenth Circuit, in construing similar language in insurance policies, have followed the rule that where the insured is afflicted with a disease or infirmity which substantially

contributes to injury, the injury is not within the coverage of a policy which insures against injury by accidental means, direct and independent of other causes. Vowell v. Great American Insurance Co., 428 P.2d 251 (Okla. 1966); Hume v. Standard Life and Accident Ins. Co., 365 P.2d 387 (Okla. 1961); Bewley v. American Home Assurance Company, 450 F.2d 1079 (10th Cir. 1971). As previously stated, Plaintiff concedes that her diabetes was a contributing factor to the loss of her foot. Given Plaintiff's concession and the lack of any evidence to show that Plaintiff's injury resulted "directly and independently of all other causes," the Court finds that Plaintiff has failed to raise a genuine issue of fact as to entitlement of benefits under the policy.

The Court specifically rejects Plaintiff's argument that summary judgment is inappropriate because she had a reasonable expectation that Defendant would insure for her dismemberment. The "reasonable expectations" doctrine, adopted by the Oklahoma Supreme Court in Max True Plastering Company, supra., is limited to situations in which the insurance policy contains an ambiguity or to contracts containing unexpected exclusions arising from technical or obscure language or which are hidden in the insurance policy's provisions. Id., 912 P.2d at 870. In the instant case, the Court finds that the policy is unambiguous. The Court also concludes that the policy contains no unexpected exclusions which are masked by technical or obscure language or which are hidden in the policy's provisions. The Court, therefore, finds that the "reasonable expectations" doctrine does not apply to the

interpretation of the policy at issue.

The Court additionally rejects Plaintiff's argument in regard to her claim of breach of the implied covenant of good faith and fair dealing. Plaintiff's claim that Defendant acted in bad faith in contracting with her is foreclosed by the Tenth Circuit's recent decision in Hays v. Jackson National Life Insurance Company, 105 F.3d 583 (1997). In that case, the Tenth Circuit held that a tort of bad faith breach of an insurance contract must be based upon "an insurer's wrongful denial of a claim; it cannot be based upon the conduct of the insurer in selling and issuing the policy." Id. at 590.

The Court further finds that Plaintiff does not have a cognizable bad faith claim for wrongful denial of coverage. An "insurer does not breach the duty of good faith by refusing to pay a claim or by litigating a dispute with its insured if there is a 'legitimate dispute' as to coverage or amount of the claim, and the insurer's position is 'reasonable and legitimate.'" Thompson v. Shelter Mut. Ins., 875 F.2d 1460, 1462 (10th Cir. 1989) (quoting Manis v. Hartford Fire Ins. Co., 681 P.2d 760, 762 (Okla. 1984)). An insurer will not be liable for the tort of bad faith if it "had a good faith belief, at the time its performance was requested, that it had a justifiable reason for withholding payment under the policy." McCoy v. Oklahoma Farm Bureau Mutual Ins. Co., 841 P.2d 568, 572 (Okla. 1992). A cause of action for bad faith will not lie "where there is a legitimate dispute." Manis, 841 P.2d at 572. From the record in this case, the Court finds that a reasonable

jury could not conclude that Defendant did not have a reasonable good faith belief for withholding payment of Plaintiff's claim. The Court concludes that a legitimate and reasonable dispute existed between the parties concerning coverage.

Based upon the foregoing, the Court **GRANTS** Defendant's First Motion for Summary Judgment (Docket Entry #7). Judgment shall issue forthwith.

ENTERED this 21st day of May, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

MAY 21 1997

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

BRENDA PITTS BAGNELL,)
)
Plaintiff,)
)
vs.)
)
CUNA MUTUAL INSURANCE GROUP,)
a/k/a CUNA MUTUAL GROUP, a/k/a)
CUNA MUTUAL INSURANCE SOCIETY,)
a foreign insurance company,)
)
Defendant.)

Case No. 96-CV-1076-BU ✓

ENTERED ON DOCKET
DATE MAY 22 1997

JUDGMENT

This action came before the Court upon the First Motion for Summary Judgment filed by Defendant, CUNA Mutual Insurance Group, a/k/a CUNA Mutual Group, a/k/a CUNA Mutual Insurance Society, a foreign insurance company, and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment is entered in favor of Defendant, CUNA Mutual Insurance Group, a/k/a CUNA Mutual Group, a/k/a CUNA Mutual Insurance Society, a foreign insurance company, and against Plaintiff, Brenda Pitts Bagnell, on Plaintiff's claims and that Defendant is entitled to recover its costs of action.

Dated at Tulsa, Oklahoma, this 21st day of May, 1997.


MICHAEL BURRAGE
UNITED STATES DISTRICT

JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 21 1997

Phil Longo, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA)
)
 Plaintiff,)
)
 vs.)
)
 MIGUEL A. FIGUEREDO,)
)
 Defendant.)

CIVIL ACTION NO. 97CV 201BU ✓

ENTERED ON DOCKET
DATE MAY 22 1997

AGREED JUDGMENT

This matter comes on for consideration this 21st
day of May, 1997, the Plaintiff, United States of
America, by Stephen C. Lewis, United States Attorney for the
Northern District of Oklahoma, through Loretta F. Radfordr,
Assistant United States Attorney, and the Defendant, Miguel A.
Figueredo, appearing pro se.

The Court, being fully advised and having examined the
court file, finds that the Defendant, Miguel A. Figueredo,
acknowledged receipt of Summons and Complaint on April 25, 1997.
The Defendant has not filed an Answer but in lieu thereof has
agreed that Miguel A. Figueredo is indebted to the Plaintiff in
the amount alleged in the Complaint and that judgment may
accordingly be entered against Miguel A. Figueredo in the
principal amount of \$1,118.69, plus administrative costs in the
amount of \$21.00, plus accrued interest in the amount of \$28.35,
plus interest thereafter at the rate of 5% per annum until
judgment, plus a surcharge of 10% of the amount of the debt in
connection with the recovery of the debt to cover the cost of
processing and handling the litigation, plus filing fees in the

2

amount of \$150.00, plus interest thereafter at the current legal rate until paid, plus the costs of this action.

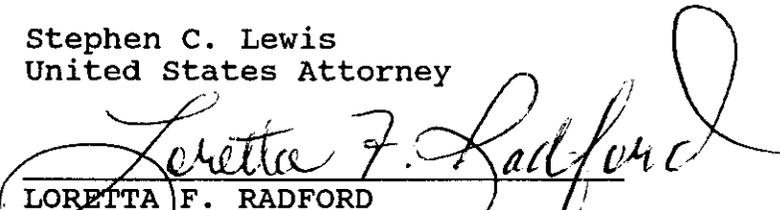
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the defendant in the principal amount of \$1,118.69, plus administrative costs in the amount of \$21.00, plus accrued interest in the amount of \$28.35, plus interest thereafter at the rate of 5% per annum until judgment, plus a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation, plus filing fees in the amount of \$150.00, plus interest thereafter at the current legal rate until paid, plus the costs of this action.

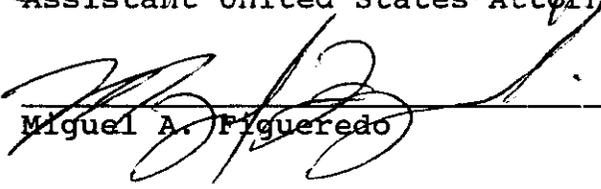

UNITED STATES DISTRICT JUDGE

APPROVED;

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney


LORETTA F. RADFORD
Assistant United States Attorney


Miguel A. Figueredo

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

FILED

MICHAEL RAY PHILLIPS,)
)
Plaintiff,)
)
vs.)
)
ESCORT TRAILER CORPORATION,)
a foreign corporation,)
)
Defendant.)

Case No. 96-C-1014-BU

MAY 21 1997

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

ENTERED ON DOCKET
DATE MAY 22 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 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 21st day of May, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

MAY 21 1997

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

COLONIA INSURANCE COMPANY,)
)
Plaintiff,)
)
vs.)
)
JULIE ANN SUMMERS, and)
SHIRLEY ANN HOLTER, CO-PERSONAL)
REPRESENTATIVES of the estate)
of KENNETH RAY SUMMERS,)
Deceased, for and on behalf)
of JULIE ANN SUMMERS, SHIRLEY)
ANN HOLTER, and KRISTINA)
SUMMERS, CASEY SUMMERS, and)
KENNETH SUMMERS, JR., minors,)
)
Defendants.)

Case No. 96-C-1077-BU

ENTERED ON DOCKET
DATE MAY 22 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 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 21st day of May, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

RECORDED ON DOCKET
5-22-97

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

TIMOTHY LYNN BARKUS,)
)
 Petitioner,)
)
 v.)
)
 KEN KLINGER,)
)
 Respondent.)

Case No: 96-C-1069-K ✓

FILED

MAY 22 1997

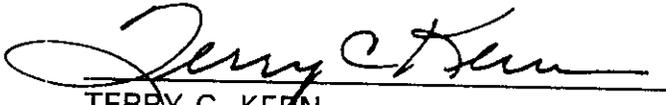
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ORDER

Phil Lombardi, Clerk
U.S. DISTRICT COURT

This case is dismissed without prejudice for failure to prosecute.

Dated this 21 day of May, 1997.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

F I L E D

MAY 21 1997

Paul Lombardi, Clerk
U.S. DISTRICT COURT
OKLAHOMA

CASS FILHIOL, an individual,)
)
Plaintiff,)
)
vs.)
)
LYNN HICKEY MITSUBISHI,)
)
an Oklahoma corporation,)
)
Defendant.)

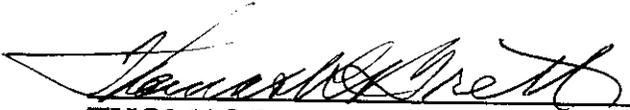
Case No. 96-CV-909-B

ENTERED ON DOCKET
DATE MAY 22 1997

JUDGMENT

In keeping with this Court's Order granting Defendant's Motion for Summary Judgment, the Court hereby enters Judgment in favor of Defendant Lynn Hickey Mitsubishi and against Plaintiff Cass Filhiol.

IT IS SO ORDERED this 21ST day of May, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED
MAY 21 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
OKLAHOMA

CASS FILHIOL, an individual,)
)
Plaintiff,)
)
vs.)
)
LYNN HICKEY MITSUBISHI,)
)
an Oklahoma corporation,)
)
Defendant.)

Case No. 96-CV-909-B

FILED ON DOCKET
DATE MAY 22 1997

ORDER

Before the Court for consideration is Defendant Lynn Hickey Mitsubishi's Motion for Summary Judgment (Docket # 5). After careful consideration of the record and applicable legal authorities, the Court is of the opinion Defendant's Motion should be, and is hereby, **GRANTED**.

UNCONTROVERTED MATERIAL FACTS

1. Plaintiff is a resident of the City of Tulsa, County of Tulsa, State of Oklahoma.
2. Lynn Hickey Mitsubishi is a business, licensed and incorporated in the State of Oklahoma, with its principal place of business in the City of Broken Arrow, Oklahoma.
3. On or about June 6, 1996, Plaintiff and his wife visited Lynn Hickey's business premises.
4. Plaintiff told the several salespeople who greeted him and his wife that they

(the Filhiol's) were just looking. Plaintiff's Brief, Exhibit A, Deposition of Cass Filhiol, p. 21, lines 3-4.

5. Plaintiff asked a Lynn Hickey salesperson if Lynn Hickey could beat Don Carlton Mitsubishi's price on the same make and model (a Mitsubishi Eclipse), and the salesperson reported Lynn Hickey could beat Don Carlton's price. Plaintiff's Brief, Exhibit A, Deposition of Cass Filhiol, p. 22, lines 9-10, p. 53, line 13.

6. Plaintiff and his wife test drove a Mitsubishi Eclipse from the lot of Lynn Hickey Mitsubishi. Plaintiff's Brief, Exhibit A, Deposition of Cass Filhiol, p. 53, lines 1-17.

7. Plaintiff filled out an insurance verification card at Lynn Hickey Mitsubishi as a condition to test driving the vehicle. Defendant's Brief, Exhibit 5, Deposition of Cass Filhiol, p. 56, line 20.

8. Cass Filhiol partially completed a credit application provided by Lynn Hickey Mitsubishi.¹ Plaintiff's Brief, Exhibit A, Deposition of Cass Filhiol, p. 27, lines

¹The Court finds it interesting that Plaintiff claims he did not sign or return the partially completed credit application to Lynn Hickey Mitsubishi, yet Defendant's Exhibit 3 contains a partially completed credit application with Cass Filhiol's signature appearing at the bottom. Defendant's Exhibit 3 also contains the words "Lynn Hickey Auto World" in the upper right corner of the page.

Plaintiff's Exhibit C is an unsigned, partially completed credit application and contains no indicia of the source of the application. Plaintiff does not contend Exhibit C is the credit application provided him by Lynn Hickey.

It appears Plaintiff expects this Court to believe that Lynn Hickey Mitsubishi somehow, through guesswork or otherwise, knew enough information about Plaintiff to obtain a credit report. This the Court declines to do.

The Court notes neither credit application is dated next to the signature line at

3-9.

9. Lynn Hickey Mitsubishi obtained a credit report on Cass Filhiol. Defendant's Brief, Exhibit 21.

10. Cass Filhiol did not purchase the Mitsubishi Eclipse from Lynn Hickey.

SUMMARY JUDGMENT STANDARD

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

The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that

the bottom of the application. In the event it is Plaintiff's argument the credit application was not "signed" because it was not signed *and* dated, the Court dismisses such argument as frivolous.

Finally, the Court takes note of Plaintiff's Undisputed Fact # 11, which reads:

11. Although the Defendant maintains that it has a signed credit application that the Plaintiff's gave to it, it has failed to produce a copy of it to the Plaintiff or has otherwise failed to attach it to its Motion for Summary Judgment in support of its statement.

The Court directs Plaintiff's attention to Defendant's Brief, Exhibit 3.

there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination. . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative." . . .

A movant is not required to provide evidence negating an opponent's claim. . . . Rather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (citations omitted). *Id.* at 1521.

DISCUSSION

Plaintiff alleges Lynn Hickey Mitsubishi violated the Fair Credit Reporting Act ("the Act"), 15 U.S.C. §1681 *et seq.*, when Lynn Hickey obtained a credit report on

Plaintiff during a visit to Lynn Hickey's place of business. Specifically, Plaintiff contends Lynn Hickey violated §§ 1681(b), (n), (o), and (q) of the Act.

The Act applies to “consumer reporting agencies” and “users of consumer reports.” See Williams v. Amity Bank, 703 F.Supp. 223 (U.S.D.C. 1988). 15 U.S.C. § 1681(b) details the circumstances under which a “consumer reporting agency” may furnish a credit report. Plaintiff does not contend, nor does the record show, Lynn Hickey is a “credit reporting agency” as defined by 15 U.S.C. § 1681a(f).² Rather, the Court believes Lynn Hickey is merely a recipient of consumer information. As Lynn Hickey is not a “consumer reporting agency,” it is not subject to liability under 15 U.S.C. § 1681(b). See Bolton v. Keystone Chevrolet, No. 93-C-797-B (N.D.Okla. 1994) (unpublished opinion) (citing Ippolito v. WNS, Inc., 864 F.2d 440 (7th Cir. 1988)); Frederick v. Marquette National Bank, 911 F.2d 1, 2 (7th Cir. 1990); Rush v. Macy's New York, Inc., 775 F.2d 1554, 1557 (11th Cir. 1985); DiCarlo v. Maryland Automobile Insurance Fund, 855 F.Supp. 823, 824 (D.Md. 1994); Wiggins v. Philip Morris, Inc., 853 F.Supp. 470, 476-77 (U.S.D.C. 1994); Williams v. Amity Bank, 703

²15 U.S.C. § 1681a(f) states:

The term “consumer reporting agency” means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

F.Supp. at 226.

Similarly, Plaintiff cannot show Lynn Hickey is a “user of consumer reports” as defined by 15 U.S.C. § 1681(m).³ To be a “user of consumer reports” it is fundamental one must have denied credit to a consumer or have charged the consumer an increased price for credit on the basis of a consumer report. Plaintiff cannot contend Lynn Hickey is a “user of consumer reports” as Plaintiff claims he never applied for credit with Lynn Hickey. See Response to Defendant's Uncontroverted Fact No. 15(e). Consequently, Plaintiff could not have been denied credit or charged an increased amount for credit by Lynn Hickey. Thus, the Court finds Lynn Hickey is not a “user of consumer reports.”

15 U.S.C. §§ 1681(n) and (o) form a basis for civil liability for willful and negligent noncompliance with 15 U.S.C. § 1681(m), respectively. See Rush, 775 F.2d at 1557; Dobson v. Holloway, 828 F.Supp. 975, 977 (M.D.Ga. 1993); Williams, 703 F.Supp. at 226. These statutes expressly restrict their application to “consumer reporting

³15 U.S.C. § 1681(m) states, in relevant part:

Requirements on users of consumer reports.

(a) Whenever credit or insurance for personal, family, or household purposes, or employment involving a consumer is denied or the charge for such credit or insurance is increased either wholly or partly because of information contained in a consumer report from a consumer reporting agency, the user of the consumer report shall so advise the consumer against whom such adverse action has been taken and supply the name and address of the consumer reporting agency making the report.

agencies” and “users of information.” See 15 U.S.C. §§ 1681(n) and (o) (“Any consumer reporting agency or user of information which...”). The Court has previously found Lynn Hickey is not a credit reporting agency. Whether a “user of information” is a “user of consumer reports” under the Act is a question that need not be decided here. If such terms are synonymous, the Court’s earlier pronouncement Lynn Hickey is not a “user of consumer reports” entitles Lynn Hickey to judgment as a matter of law on Plaintiff’s claims of violation of 15 U.S.C. §§ 1681(n) and (o). See Rush, 775 F.2d at 1558; Williams, 703 F.Supp. at 226.

If such terms do not share the same meaning, Lynn Hickey is still entitled to judgment as a matter of law on said claims. There is not one shred of evidence in the record that Lynn Hickey willfully or negligently failed to comply with any requirement imposed under the Act. Plaintiff’s claim Lynn Hickey obtained the consumer report against his express wishes does not show noncompliance with the Act under these facts. The Court believes Lynn Hickey had a legitimate business interest in determining the credit worthiness of Plaintiff once Plaintiff inquired whether Lynn Hickey could beat another dealer’s price on a \$24,000.00 vehicle, test drove the vehicle, and partially completed a credit application. See Anderson v. Ray Brandt Nissan, Inc., 1991WL211627 (E.D.La.) (not reported in F.Supp.).

15 U.S.C. § 1681(q) provides for criminal liability if a consumer report is knowingly and willfully obtained from a consumer reporting agency under false

pretenses. That statute reads:

Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined not more than \$5,000 or imprisoned not more than one year, or both.

Plaintiff's Complaint and Response Brief are silent as to how Lynn Hickey, through its unknown salesperson, violated this statute. Plaintiff's claim Lynn Hickey obtained the consumer report against his express wishes does not show Lynn Hickey requested the consumer report under false pretenses. Rather, the credit report was obtained for a legitimate business purpose. Lynn Hickey is entitled to judgment as a matter of law on Plaintiff's claim it violated 15 U.S.C. § 1681(q). See DiCarlo, 855 F.Supp. at 824.

Defendant's Motion for Summary Judgment is GRANTED.

It is truly a sad day when judicial resources must be spent on cases such as this when a simple reading of the statutes involved and/or minimal legal research would have clearly shown a cause of action is not warranted by existing law. Further, Plaintiff's claim for damages because he was embarrassed and "probably looked like a fool" in front of the Lynn Hickey employees who saw his credit report, even though there was nothing in particular he was embarrassed about on the credit report, merely highlights the patently frivolous nature of this suit. See Response Brief, Exhibit A, Deposition of Cass Filhiol, p. 48, lines 9-21.

The Court notes Plaintiff has a similar case in this District against another local automobile dealer alleging violations of the Fair Credit Reporting Act, Case No. 96-CV-

910-C.

Costs of this action and a reasonable attorneys fee are hereby awarded in favor of Lynn Hickey Mitsubishi if applied for pursuant to N.D.LR 54.1 and 54.2 on or before June 10, 1997.

IT IS SO ORDERED this 21st day of May, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

DAVID K. HOEL,)
)
 Plaintiff,)
)
 v.)
)
 DONALD B. ATKINS, T. BRETT SWAB,)
 TODD W. SINGER, DAN MURDOCK,)
 LAWRENCE A.G. JOHNSON, BROWN J.)
 AKIN, III, LAURIE E. AKIN, J. PETER)
 MESSLER, and BRADFORD GRIFFITH,)
)
 Defendants.)

No. 96-C-268-E

FILED
MAY 21 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE MAY 22 1997

**ORDER GRANTING DISMISSAL OF DEFENDANT
MURDOCK WITH PREJUDICE**

THIS MATTER having come before the Court on the agreed motion of Plaintiff David K. Hoel ("Hoel") and Defendant Dan Murdock ("Murdock"), for voluntary dismissal, with prejudice, of all claims in this action against Murdock, the motion is hereby GRANTED. It is therefore

ORDERED, ADJUDGED, AND DECREED that Murdock is hereby dismissed from this action, and that all claims in this action against Murdock are hereby dismissed with prejudice to any refiling. Upon remand of the appeal pending in this cause, the Court will entertain an application by Murdock for the entry of a final judgment for Murdock.

DONE this 20th day of May, 1997.


UNITED STATES DISTRICT JUDGE

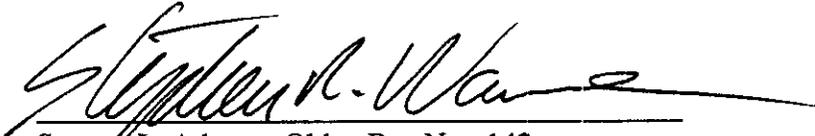
APPROVED FOR ENTRY:

44



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PLAINTIFF, PROCEEDING PRO SE



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ATTORNEYS FOR DEFENDANT, DAN MURDOCK

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

F I L E D
MAY 21 1997 *mu*

JOHN F. DUSCH and ELLEN M. DUSCH,)
)
 Plaintiffs,)
)
 vs.)
)
 UNITED STATES OF AMERICA,)
)
 Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-C-796-C ✓

ENTERED ON DOCKET
DATE MAY 22 1997

ORDER

Currently pending before the Court is the motion filed by the government, seeking dismissal of the instant action or, in the alternative, summary judgment.

On August 30, 1996, plaintiffs, appearing pro se, filed the present action against the government, seeking a refund of part of the income tax which plaintiffs remitted to the Internal Revenue Service (IRS), pursuant to 28 U.S.C. § 1346(a)(1). On March 25, 1997, the government filed its motion to dismiss or, in the alternative, motion for summary judgment, citing the applicable statute of limitations.

On February 27, 1991, plaintiffs filed their personal income tax return for the 1990 tax year with the IRS. On the tax return, plaintiffs included as gross income \$23,000 from a settlement which plaintiffs now claim was non-taxable income. This amount was paid by Amoco Corporation to plaintiff, Ellen Dusch, in settlement of her employment discrimination claim. Amoco withheld taxes on the settlement proceeds, and Amoco included the settlement on Ellen Dusch's W-2 as Wages, tips, and other compensation. On their tax return, plaintiffs reported their "total tax" in the amount of \$9,963.19. On August 20, 1993, plaintiffs received a notice from the IRS of

proposed changes for the 1990 tax year. The IRS assessed plaintiffs an additional \$693 plus interest in the amount of \$152, totaling \$845, for failure to report \$1,709 of pension income. Plaintiffs remitted said amount to the IRS on September 20, 1993. On June 28, 1994, plaintiffs submitted an amended tax return for the 1990 tax year, alleging that the correct tax liability for 1990 was \$4,429, and seeking a refund in the amount of \$6,227, plus interest. Plaintiffs sought the return of the \$693 plus interest as well as the tax withheld on the \$23,000 settlement. Plaintiffs claim that the \$23,000 settlement represents non-taxable income, pursuant to 26 U.S.C. § 104(a)(2). On September 13, 1994, the IRS sent plaintiffs a notice partially disallowing their request for a refund, but allowing a refund in the amount of \$693 plus interest. Plaintiffs filed the present action to recover the remaining \$5,534, plus interest, pursuant to 28 U.S.C. § 1346(a)(1) and 26 U.S.C. § 7422.

The government does not address the issue of whether the \$23,000 settlement is or is not taxable income. Rather, the government's sole argument is that plaintiffs are time-barred from requesting a refund. The government relies on 26 U.S.C. § 6511(a), which provides, in part, that a claim for a refund of an overpayment of any tax for which a return is required to be filed shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever is later. Section 6511(b)(1) provides that no refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a). Section 6511(b)(2)(B) provides that if the claim is not filed within three years of the filing of the return, the amount of refund is limited to the portion of tax paid during two years immediately preceding the filing of the claim. The Supreme Court has held that "unless a claim for refund of a tax has been filed within the time limits imposed by § 6511(a), a suit for refund, regardless of

whether the tax is alleged to have been 'erroneously,' 'illegally,' or 'wrongfully collected,' §§ 1346(a)(1), 7422(a), may not be maintained in any court." U.S. v. Dalm, 494 U.S. 596, 602 (1990).

Section 6513(a) of the Internal Revenue Code provides that, for the purposes of § 6511, any return filed before the last day prescribed for the filing thereof shall be considered as filed on such last day. Hence, plaintiff's 1990 tax return is deemed filed on April 15, 1991. As noted, plaintiffs' amended return was submitted on June 28, 1994, and filed on July 5, 1994. The amended return was clearly filed more than three years after the filing of the original return. As such, § 6511(b)(2)(B) controls and limits the amount of refund to the portion of the tax paid during the two years immediately preceding the filing of the claim. This permits a claim for the refund of only the amount plaintiffs paid on September 20, 1993, but it prohibits a claim for the refund of tax paid with the original 1990 return. Consequently, the tax withheld on the \$23,000 settlement cannot be refunded as such tax was deemed paid on April 15, 1991. 26 U.S.C. § 6513(b)(1).

In an effort to evade the limitations period, plaintiffs argue that the tax withheld on the \$23,000 settlement is a deposit rather than a payment, thereby removing the issue from the limitations imposed under § 6511. Plaintiffs maintain that the \$5,534 which plaintiffs seek is a deposit for which there is no time bar on claim for recovery. The Court disagrees.

Most damaging to plaintiffs' argument is plaintiffs' original 1990 tax return itself. The return shows that plaintiffs figured their total tax to be \$9,963.19 for the 1990 tax year, based on wages in the amount of \$71,055.12. Further, the return shows that \$11,441.80 was withheld under the "payments" section, and that such amount constituted plaintiffs' "total payments."

Plaintiffs indicated that they overpaid their taxes in the amount of \$1,478.61, for which they sought a refund. Hence, the tax return tends to reveal plaintiffs' intent that the amount withheld was, in fact, a payment.

Moreover, § 6513(b)(1) specifically provides that any tax withheld at the source shall be deemed to have been paid on April 15. Hence, the amount which plaintiffs included as "Federal income tax withheld" on their return was deemed to be paid by plaintiffs on April 15, 1991. See also, Gabelman v. Commissioner of Internal Revenue, 86 F.3d 609, 611-612 (6th Cir.1996) (it logically follows that remittances accompanying income tax returns are automatically considered payments). In the present case, it is clear that when plaintiffs filed their 1990 tax return, they believed that they owed \$9,963.19 in income tax. The fact that an amount greater than the total tax was withheld, and that plaintiffs were not therefore required to actually write a check in the amount of the total tax, does not alter the Court's finding that the taxes withheld on the \$23,000 settlement constitute a payment rather than a deposit. It would certainly be anomalous to treat differently a remittance paid by the source via withholding and those personally paid by the taxpayer when the return is filed. The return reveals that plaintiffs believed their total tax to be \$9,963.19, that \$11,441.80 had already been paid, and that they had overpaid \$1,478.61, for which they claimed a refund. This is no different than if nothing had been withheld and plaintiffs had actually written a check on April 15, 1991, in the amount of \$9,963.19 in order to pay what they believed to be their tax liability for the 1990 tax year. It is clear that plaintiffs and the IRS treated the amounts withheld as a payment of income taxes for the 1990 tax year. Since plaintiffs overpaid their taxes during 1990, plaintiffs and the IRS agreed that plaintiffs were entitled to a refund of that part of the amount withheld in excess of the total tax due. The facts and

circumstances of this case certainly do not suggest that plaintiffs were making a deposit when they filed their 1990 return; rather, the facts and circumstances suggest an oversight on the part of plaintiffs which they subsequently attempted to correct.

Plaintiffs argue that § 6501(e) is applicable to the present case, thereby affording plaintiffs with six years in which to claim a refund. That section provides that if the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, a proceeding to collect such tax may be instituted within six years. The Court has much trouble understanding how this section could possibly benefit plaintiffs. Even through strained interpretation, the Court simply cannot find that this section affords plaintiffs six years in which to claim a refund. Clearly, this section was not meant to negate the limitations contained in § 6511, and this section was not intended to grant an extended period in which a taxpayer may file a claim for a refund.

Plaintiffs additionally argue that § 6532(b) is applicable. However, the plain language of that section only applies to suits by the government for recovery of erroneous refunds. Hence, that section is clearly inapplicable to this case.

Lastly, plaintiffs argue that § 6511 is subject to equitable tolling. However, the Supreme Court recently held that “Congress did not intend the ‘equitable tolling’ doctrine to apply to § 6511’s time limitations.” U.S. v. Brockamp, 117 S.Ct. 849, 853 (1997). The Supreme Court noted that “Congress decided to pay the price of occasional unfairness in individual cases (penalizing a taxpayer whose claim is unavoidably delayed) in order to maintain a more workable tax enforcement system. . . . Congress would likely have wanted to decide explicitly whether, or just where and when, to expand the statute’s limitations periods, rather than delegate to the courts

a generalized power to do so wherever a court concludes that equity so requires." Id. at 852.

Hence, plaintiffs' argument on this point must fail.

Accordingly, since § 6511 bars plaintiffs' claim for a refund, the present suit for refund may not be maintained in this Court. Dalm, 494 U.S. at 602. As such, the Court hereby GRANTS the government's motion to dismiss pursuant to F.R.C.P. 12(b)(1).

IT IS SO ORDERED this 21st day of May, 1996.


H. Dale Cook
United States District Judge

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

F I L E D

MAY 21 1997 *ml*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORYX ENERGY COMPANY,)

Plaintiff,)

v.)

UNITED STATES DEPARTMENT OF THE)
INTERIOR,)

Defendant.)

Civil No. 92-C-1052 E /

MAY 22 1997
DATE

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

ORYX ENERGY COMPANY,)

Defendant.)

Civil No. 93-C-265 E
(Consolidated)

JUDGMENT

In accord with the Order filed November 21, 1996, granting the United States Department of the Interior's motion for summary judgment and denying Oryx Energy Company's motion for summary judgment, and thereby upholding the decision of the Department of the Interior's Assistant Secretary for Land and Minerals Management dated March 26, 1992, the Court hereby enters judgment in favor of the plaintiff United States of America and against the defendant Oryx Energy Company in Case No. 93-C-265 E of these consolidated cases. Oryx is ordered to comply with the Assistant Secretary's decision and pay the principal amount of \$24,716 in unpaid royalties, together with all interest thereon at the rate applicable under 30 U.S.C. 1721(a).

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IT IS SO ORDERED this 20th day of May, 1997.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

CERTIFICATE OF SERVICE

The foregoing Motion for Entry of Judgment in Case No, 93-C-265 E was served upon Oryx Energy Company by mailing a true copy thereof to its attorneys this 8th day of May, 1997, as follows:

Jerry E. Rothrock
AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
1333 New Hampshire Ave., N.W., Suite 400
Washington, D.C. 20036,

Patrick D. O'Connor
MOYERS, MARTIN, SANTEE, IMEL & TETRICK
320 South Boston Building, Suite 920
Tulsa, Oklahoma 74103

Paul R. Miller

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

BETTY ROBERTS,

Plaintiff,

v.

MONUMENTAL LIFE INSURANCE
COMPANY,

Defendant.

MONUMENTAL LIFE INSURANCE
COMPANY,

Third Party Plaintiff,

v.

TRAVEL PLUS, INC., an Oklahoma
corporation,

Third Party Defendant.

FILED

MAY 22 1997

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

Case No. 96-CV-500H ✓

ENTERED ON DOCKET

DATE MAY 22 1997

JUDGMENT

Pursuant to Fed.R.Civ. P. 55(b)(1) and Local Rule 55.1(B), judgment is hereby entered in favor of Monumental Life Insurance Company and against Travel Plus, Inc., in the amount of \$24,170.00, plus post judgment interest at the statutory rate of 6.06%. In entering this judgment the court clerk specifically finds that the motion and affidavit submitted by Monumental Life Insurance Company, as well as the amended third party complaint, established that the claim of Monumental Life Insurance Company is for a particular sum certain.

Entered this 21st day of MAY, 1997.


UNITED STATES COURT CLERK JUDGE

20

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

FILED

MAY 22 1997

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

ROLLIE A. PETERSON, an)
individual, and SUSAN P.)
PETERSON, an individual,)

Plaintiff,)

vs.)

No. 93-C-399-B

NANCY VALENTINY, HUGH V.)
RINEER, C. MICHAEL ZACHARIAS,)
SHARON L. CORBITT, N. SCOTT)
JOHNSON, RINEER, ZACHARIAS &)
CORBITT, a partnership, JEAN)
A. HOWARD, MARIAN B. HOWARD,)
SHARON DOTY, ROBERT W. BLOCK,)
M.D., and UNIVERSITY OF)
OKLAHOMA,)

Defendants.)

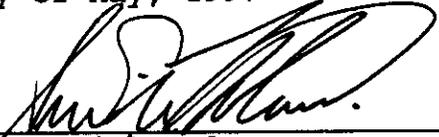
ENTERED ON DOCKET

DATE MAY 22 1997

ORDER OF DISMISSAL WITH PREJUDICE

Upon application of Plaintiffs and for good cause shown,
it is hereby ordered that Plaintiffs' Complaint be and is
hereby dismissed with prejudice.

ORDERED this 21st day of May, 1997


Sven Erick Holmes
United States District Judge

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

IN RE:)
MARICOPA FOUNDATION FOR)
AFFORDABLE HOUSING,)
)
Debtor.)
)
)
UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
MARICOPA FOUNDATION FOR)
AFFORDABLE HOUSING,)
CARNES BROS. CONSTRUCTION)
COMPANY, and CITADEL MANAGEMENT,)
INC.,)
)
Defendants.)

Case No. 94-03669-C

FILED

MAY 22 1997

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

Adversary Case No. 96-0059-C

Case No. 97-CV-24-H ✓

ENTERED ON DOCKET

DATE MAY 22 1997

ORDER

This matter comes before the Court on the United States' Motion for Withdrawal of Proceeding (Docket #2).

Pursuant to Title 28 U.S.C. § 157(d), withdrawal of a proceeding is mandatory "if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce."

The Court hereby applies the standard articulated by the district court in Federated Department Stores v. United States Environmental Protection Agency, 189 B.R. 142, 144 (E.D. Oh. 1995). In Federated Department Stores the Court stated "[t]he consideration of non-bankruptcy federal law must be substantial and material before Section 157(d) compels withdrawal. . . . A substantial and material consideration involves more than mere rote application of the provisions of the federal law. Substantial and material consideration entails a significant interpretation of non-bankruptcy federal law." Id. at 144 (citations omitted).

Although the Court finds that there is a nexus between the allegations raised in the adversary proceeding and the issuance of bonds along with a project mortgage insured under Section 221(d)(3) of the National Housing Act, 12 U.S.C. § 17151(d)(3), this nexus involves relatively limited aspects of the bankruptcy proceedings. Moreover, to the extent that Section 221(d)(3) is relevant, it does not address the question of ultimate liability in the instant case. Therefore, the Court finds that mandatory withdrawal is not compelled.

Therefore, the Court hereby denies the United States' Motion for Withdrawal of Proceeding (Docket #2).

IT IS SO ORDERED.

This 21st day of May, 1997.



Sven Erik Holmes
United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY 21 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CITY OF SAPULPA,)
a Municipal Corporation,)
)
Plaintiff,)

vs.)

Case No. 97 CV-35 K ✓

THE UNITED STATES OF AMERICA,)
KENNETH PAUL BEVENUE and Spouse,)
if any, LEONARD LEWIS BEVENUE and)
ALICE BEVENUE, GWENYTH JEAN)
PAHSETOPAH and Spouse, if any,)
FANNIE LOU BEVENUE and Spouse, if)
any, VIRGINIA NADINE RANGEL and)
Spouse, if any, RAYMOND NEWMAN)
BEVENUE and Spouse, if any, DONNIE)
BEVENUE and Spouse, if any, RONNIE)
BEVENUE and Spouse, if any, and)
CHARLES WAYNE BARNETT and Spouse,)
if any, PATRICIA L. LASARGE and Spouse,)
if any, JERILYN K. FREEMAN and Spouse,)
if any,)

Defendants.)

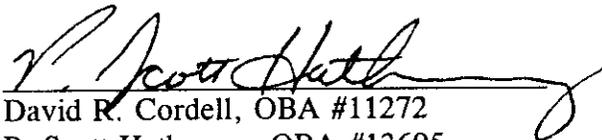
ENTERED ON DOCKET
DATE 5-22-97

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereto stipulate to a dismissal with prejudice of the above captioned and numbered case in its entirety, the parties to bear their own costs and attorneys' fees.

20

(to)



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P. Scott Hathaway, OBA #13695
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(918) 586-5711
(918) 586-8547 (facsimile)

OF COUNSEL:

CONNER & WINTERS
2400 First Place Tower
15 East Fifth Street
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Attorneys for Plaintiff,
City of Sapulpa



Cathryn McClanahan, OBA #14853
Assistant U. S. Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

Attorney for The United States of America

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

FILED

MAY 21 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MANNY BORGES FERREIRA and ROBERT JOHN FERREIRA, individually,)

Plaintiffs,)

v.)

TMG LIFE INSURANCE COMPANY,)

Defendant/)

Third-Party Plaintiff,)

v.)

MARCIA V. FERREIRA, a/k/a Marcia Berren,)

Third-Party Defendant.)

Case No. 96-CV-805-K ✓

ENTERED ON DOCKET
DATE 5-22-97

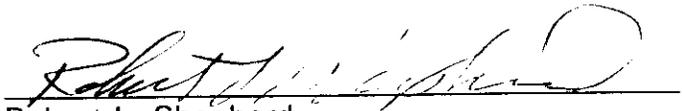
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiffs, Manny Borges Ferreira and Robert John Ferreira, individually, and Defendant/Third-Party Plaintiff, TMG Life Insurance Company, and Third-Party Defendant, Marcia V. Ferreira, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby jointly stipulate to the dismissal of all claims which have been asserted, or which might have been asserted, as a result of the matters described in Plaintiffs' Complaint and/or the Third-Party Complaint of the Defendant and Third-Party Plaintiff, with prejudice.

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

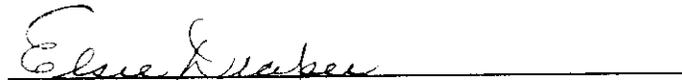
DATED: MAY 20, 1997.

Respectfully submitted,



Robert L. Shepherd
222 West 8th Street
Tulsa, Oklahoma 74119

ATTORNEY FOR THE PLAINTIFFS



Elsie Draper, OBA No. 2482
Patricia Ledvina Himes, OBA No. 5331
GABLE GOTWALS MOCK SCHWABE
KIHLE GABERINO
2000 Boatmen's Center
15 West 6th Street
Tulsa, OK 74119-5447

ATTORNEYS FOR THE DEFENDANT/
THIRD-PARTY PLAINTIFF,
TMG LIFE INSURANCE COMPANY



Monty C. Pritchett
Pritchett & Jeffers, P.C.
112 N. Main
P. O. Box 325
Wagoner, OK 74477-0325

ATTORNEYS FOR THE THIRD-PARTY
DEFENDANT

5-22-97

FILED

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA MAY 21 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff

v.

JIMMIE M. STINNETT,

Defendant.

Civil Action No. 96CV1180K ✓

DEFAULT JUDGMENT

This matter comes on for consideration this 19 day of May, 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, Jimmie M. Stinnett, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Jimmie M. Stinnett, was served with Summons and Complaint on March 11, 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.

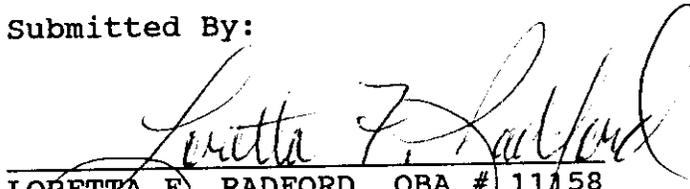
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Jimmie M. Stinnett, for the principal amount of \$724.80, plus accrued interest of \$765.66, plus administrative charges in the amount of \$34.49, plus interest thereafter at the rate of 7 percent per

6

annum until judgment, a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 6.06 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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

SEARCHED ON DOCKET
5-22-97

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

RANDY D. GRIFFIN,)
)
 Plaintiff,)
)
 vs.)
)
 STEELTEK, INC., an Oklahoma)
 corporation,)
)
 Defendant.)

No. 97-C-136-K ✓

FILED
MAY 21 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of the Defendant Steeltek, Inc.'s Motion for Summary Judgment¹ pursuant to *Fed. R. Civ. P.* 56. The issues having been duly considered and a decision having been rendered in accordance with the Order filed on May 19, 1997, the Court finds summary judgment is appropriate in favor of Defendant Steeltek, Inc.

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

ORDERED this 21 day of May, 1997.


TERRY C. KEEN, CHIEF
UNITED STATES DISTRICT JUDGE

¹ As both parties have relied on information and evidence outside of the initial pleadings, the Defendant's motion, initially titled as a motion to dismiss, was properly converted into a Motion for Summary Judgment pursuant to *Fed. R. Civ. Pro.* 12(b).

10

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

ENTERED ON DOCKET
DATE 5-21-97

RON RANDOLPH, et al.,)
)
 Plaintiffs,)
)
 vs.)
)
 OWASSO PUBLIC SCHOOLS, et al.,)
)
)
)
)
 Defendants.)

No. 96-C-105-K ✓

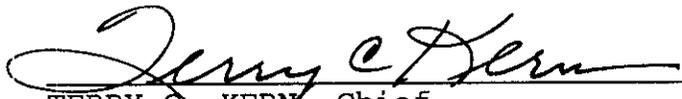
FILED
MAY 21 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

In accordance with the order filed contemporaneously herewith,
awarding plaintiffs attorney fees and litigation expenses,

IT IS THEREFORE ORDERED that the Plaintiffs recover from the
Defendants the sum of \$32,941.00, with post-judgment interest
thereon at the rate of 6.06 percent as provided by law.

ORDERED this 21 day of May, 1997.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

The final paragraph of the consent decree states that defendants shall pay the "reasonable costs and attorneys fees" of plaintiffs' counsel. The parties were unable to agree on what constituted a "reasonable" sum, and the present motion was filed. 42 U.S.C. §1988(b) permits the Court, in its discretion, to award fees to the prevailing party in a Title IX action, and the Court will use the principles applicable to such an award in civil rights cases.

First, the Court will address plaintiff's request for enhanced fees. The Tenth Circuit has made clear such an enhancement is not to be routinely granted. "[W]e believe that bonuses or multipliers of the normal fee because of the extraordinary skill of counsel should rarely be awarded, and should be confined to cases in which the bulk of the work was done by a single attorney who exhibits extraordinary skill or to cases in which the work was done well in a relatively short time given the complexity of the task." Ramos v. Lamm, 713 F.2d 546, 557 (10th Cir.1983). For reasons detailed in the Court's general discussion below, the Court is not persuaded that this is one of the rare cases in which an "exceptional success" enhancement is justified.

Plaintiffs' counsel also mentions the unpopularity of the case, citing one negative editorial in an Owasso newspaper. Again, the Tenth Circuit has diminished this factor in civil rights cases. "[N]o real stigma remains associated with these cases. . . [A] bonus for the social stigma assumed by a lawyer participating in civil rights litigation should rarely be given." Ramos, 713 F.2d

at 557-58. Similarly, plaintiffs' argument based on a contingency fee arrangement fails. "We reaffirm our position that an enhancement for a contingency must be viewed with caution, and indeed, we believe that it is appropriate only in 'exceptional cases.' We believe that an 'exceptional case' is one in which prior to the litigation, the attorney for the prevailing party was confronted with a 'real risk of not prevailing.'" Homeward Bound, Inc. v. Hissom Memorial Center, 963 F.2d 1352, 1360 (10th Cir.1992) (citations omitted). Plaintiffs have made no showing that they ran such a risk when applying recognized Title IX principles to the Owasso school system.

The Tenth Circuit has also not looked favorably upon the "preclusion of other employment" factor cited by plaintiffs. See Ramos, 713 F.2d at 558 n.10. Such factors as "novelty and complexity of issues" and "results obtained", also relied upon by plaintiffs, are generally subsumed within the lodestar and do not justify an enhancement. Homeward Bound, 963 F.2d at 1355. In sum, although plaintiffs were provided excellent representation, the Court is not convinced this case falls within the narrow range justifying fee enhancement. If anything, the notoriety of this case has benefitted counsel's employment, as they have filed similar cases in this and other jurisdictions.

The district court has discretion in determining the amount of a fee award. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). The fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly

rates. Id. The benchmark for the award is that the attorney's fee must be reasonable. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 562 (1986). The lodestar figure--reasonable hours times reasonable rate--is the mainstay of the calculation of a reasonable fee. Anderson v. Secretary of Health and Human Services, 80 F.3d 1500, 1504 (10th Cir.1996).

Plaintiffs' burden in an application for attorney fees is to "prove and establish the reasonableness of each dollar, each hour, above zero." Jane L. v. Bangerter, 61 F.3d 1505, 1510 (10th Cir.1995) (citation omitted). The prevailing party must make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary. Id. The district court has a corresponding obligation to exclude hours not "reasonably expended" from the calculation. Malloy v. Monahan, 73 F.3d 1012, 1018 (10th Cir.1996). The court may make a general reduction in hours claimed to achieve what the court perceives to be a reasonable number. Carter v. Sedgwick County, 36 F.3d 952, 956 (10th Cir.1994). The second half of calculating an appropriate fee award is multiplying the hours by a reasonable rate. A reasonable rate is the prevailing market rate in the relevant community. Malloy, 73 F.3d at 1018.

Plaintiff's counsel Ray Yasser seeks compensation for 132 hours at \$175 per hour for a subtotal of \$23,100.00. In addition, he seeks \$126.00 for mileage (360 mi. at 35 cents per mile), for a total of \$23,226.00. Defendants have not objected to the mileage figure, and it is established that reasonable out-of-pocket

expenses normally charged to clients are recoverable as attorney fees under civil rights and other fee-shifting statutes. Cf. Pinkham v. Camex, 84 F.3d 292, 294-95 (8th Cir.1996).

Defendants object to Yasser's proposed hourly rate, relying upon Beard v. Teska, 31 F.3d 942 (10th Cir.1994). That litigation, brought pursuant to the Individuals with Disabilities Education Act ("IDEA"), sought the reform of conditions and treatment of severely handicapped patients at an Oklahoma residential facility. The district court awarded fees to plaintiffs' lead counsel at a rate of \$200 per hour. The Tenth Circuit reduced the rate to \$125 per hour. Defendants argue Beard has thus established the appropriate hourly rate for all civil rights cases in the Northern District of Oklahoma. This is not necessarily true, as the opinion makes clear that specific factors were at work in the court's decision. For example, plaintiffs' counsel in Beard, while experienced in civil rights litigation, had no background in the IDEA. Id. at 957. Further, the evidence before the district court as to a \$125/hour rate was "uncontradicted". Id. Therefore, the Beard decision does not bind this Court in the manner defendants suggest.

A reasonable hourly rate comports with "those prevailing in the community for similar services by lawyers of reasonably competent skill, experience, and reputation." Blum v. Stenson, 465 U.S. at 896 n.11 (1984). In setting an hourly rate, a court should establish, from information provided to it and from its own analysis of the level of performance, a rate based on the norm for comparable attorneys in private firms. Ramos, 713 F.2d at 555. "A

district judge may turn to [his or] her own knowledge of prevailing market rates as well as other indicia of a reasonable market rate." Metz v. Merrill Lynch, 39 F.3d 1482, 1493 (10th Cir.1994). The relevant community is the place of trial. Ramos, 713 F.2d at 555. The Court has taken into account the increases in billing rates in the past few years and the Court's own knowledge of billing rates in this community.

Yasser is employed as a full professor at the University of Tulsa College of Law, and has been at the institution since 1975. He is a specialist in "Sports Law", of which Title IX is a part. He has participated in some litigation to the present time, but the extent of his active involvement is unclear. See pages 16-17 of plaintiffs' brief in support of class action certification, in which Yasser sets forth his credentials. In a recent case, Saladin v. Turner, 94-C-702-K, this Court awarded prevailing plaintiffs' counsel a rate of \$175.00, the rate Yasser requests. Plaintiffs' counsel in the Saladin case were civil rights specialists and experienced litigators. While Yasser's expertise is unquestioned, the Court is not convinced his litigation experience justifies the higher rate. Plaintiffs' counsel in Beard, whose hourly rate the Tenth Circuit reduced to \$125, was a highly experienced civil rights litigator. Upon careful consideration, the Court will compensate Yasser at the rate of \$150 per hour. Co-counsel Samuel Schiller will be awarded his requested rate of \$125/hour.

Defendants also object to the number of hours counsel seeks, citing two broad proposed exclusions: (1) time spent on public

relations activities and, primarily, (2) unnecessary duplication of effort with co-counsel. The Court does not view the nine hours billed by plaintiffs' counsel in relation to press interviews and news releases as excessive. Enforcement of Title IX involves vast changes in the structure of a school's athletic programs and is a matter of public interest within the area. Plaintiffs' counsel did not abuse their right to explain the plaintiffs' position through the media.

Defendants have raised more valid objections in the area of duplication. While consultation with plaintiffs and between co-counsel is a necessary part of litigation, the Owasso School District has identified 79.5 hours by Schiller and 75.75 hours by Yasser that mirror each other. Further, Schiller spent 12.25 hours drafting and reviewing the complaint to initiate this action, and Yasser spent 12 hours drafting the same complaint. While this may be the first action of this type filed in Oklahoma, it is surely not the first action of this type filed in the United States. In other words, complaints on file were available to be used as models. If plaintiffs' counsel chose to "reinvent the wheel", defendant should not be required to pay the full amount of time spent in invention.¹ Vague entries on billing records such as "legal research" and "conferences" are generally not fully compensable either. Cf. H.J. Inc. v. Flygt Corp., 925 F.2d 257,

¹In this regard, the Court assumes plaintiffs' counsel will not seek similar amounts for drafting and conferences if and when they seek attorney fees in the other Title IX actions they have filed in the Northern District of Oklahoma and elsewhere.

260 (8th Cir.1991). Finally, counsel seeks compensation for acts they performed, such as filing pleadings, which could have been performed by a paralegal or clerk, for example.

Plaintiffs properly note that defendants initially opposed class action certification, and much time was spent in preparation which could have been avoided. It was also obviously necessary for the parties to tour the Owasso facilities. Defendants request that the total hours of the lodestar be reduced by 40%. The Court believes 20% is a more appropriate figure.

Defendants also object to requests for \$525 from Judith Appelbaum and \$500 from Deborah Brake, both of the National Women's Law Center, who provided a few hours of advice to plaintiffs' counsel in preparation of this case. Appelbaum also requests compensation at \$175 per hour. The Court has already found this is not the prevailing market rate in Tulsa, and reduces Appelbaum's rate to \$150 per hour.

Finally, plaintiffs ask the Court to establish a \$5,000 fund for compensable legal work to insure compliance with the Consent Decree. "Fees are also available to the prevailing party for post-judgment monitoring of a consent decree." Joseph A. v. Dept. of Human Services, 28 F.3d 1056, 1059 (10th Cir.1994). However, the Consent Decree in this case establishes a procedure for assuring compliance. The position of Compliance Officer is created, and a grievance procedure is established. If the parties are unable to resolve a grievance after the established procedure, they may resort to the Court. At that time, a supplemental request for

attorney fees will be entertained. The Court will not establish a special fund for the purpose at this time.

It is the Order of the Court that the motion of the plaintiffs for awarding of attorney fees is hereby GRANTED in the amount of \$32,941.

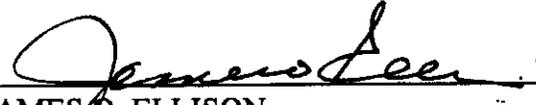
ORDERED this 21 day of May, 1997.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

days from the date of entry of this order, or by June 6, 1997.

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

SO ORDERED THIS 20th day of May, 1997.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

F I L E D

MAY 20 1997 *rw*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT GENE HAMILTON,)
)
Plaintiff,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Defendant.)

No. 96-CV-1064-E

ENTERED ON DOCKET
MAY 21 1997
DATE _____

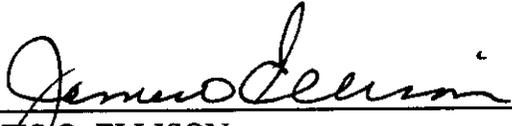
ORDER

Plaintiff has submitted a civil rights complaint and motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 (docket #2). Plaintiff was directed to cure deficiencies in these documents as set out in an order entered December 30, 1996 (docket #3). Plaintiff has failed to cure the deficiencies as ordered by the Court or to otherwise respond.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for leave to proceed in forma pauperis [docket #2] is **denied**.
2. The instant action is **dismissed without prejudice** at this time. The Court may reopen Plaintiff's action if he submits to the Court within thirty (30) days a complaint and motion in compliance with the Court's instructions.
3. The Clerk shall **return** all extra papers to the Plaintiff.

SO ORDERED THIS 20th day of May, 1997.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
DATE MAY 21 1997

T.E.I.C.P., C.A.,)
Plaintiff,)

vs.)

Case No. 97-CV-473-B ✓

JAMES KEITH CUNNINGHAM)
and REDI-DRILL, INC.,)
Defendants.)

FILED

MAY 21 1997

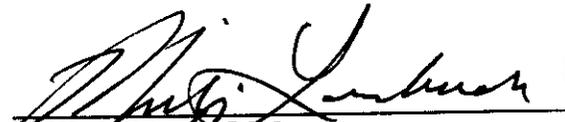
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ADMINISTRATIVE ORDER

The above styled case was sent inadvertently to the United States District Court for the Northern District of Oklahoma from the Southern District of Texas, Houston Division. The correspondence addressed the matter to the Bankruptcy Court in the Northern District of Oklahoma. The United States District Court Clerk's office opened the case, assigned a number and only later realized that this matter should have been transferred to the Bankruptcy Court for the Northern District of Oklahoma.

IT IS THEREFORE ORDERED that the above styled case be transferred to the Bankruptcy Court for the Northern District of Oklahoma as originally intended.

ORDERED the 21 day of May, 1997.


PHIL LOMBARDI
CLERK

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
5-21-97 ✓

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD L. REAVIS aka RICHARD
LEE REAVIS; DONNA F. REAVIS aka
DONNA REAVIS aka DONNA FAYE
REAVIS; STATE OF OKLAHOMA ex rel
OKLAHOMA TAX COMMISSION;
COUNTY TREASURER, Rogers County,
Oklahoma; BOARD OF COUNTY
COMMISSIONERS, Rogers County,
Oklahoma,

Defendants.

FILED
IN OPEN COURT

MAY 21 1997

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

Civil Case No. 96CV 153K

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 21st day of May, 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 February 26, 1997, pursuant to an Order of Sale dated October 3, 1996, of the following described property located in Rogers County, Oklahoma:

Lot 12 in Block 2 of Battenfield Acres Fourth Addition, a Subdivision in Section 34, Township 21 North, Range 15 East of the I.B. & M., according to the recorded plat thereof, Rogers County, Oklahoma.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Richard L. Reavis; Donna F. Reavis, State of Oklahoma, ex rel. Oklahoma Tax Commission; County Treasurer, Rogers County, Oklahoma; Board of County Commissioners, Rogers County, Oklahoma; and

Richard G. and Sonja K. Lundy Trust of March 1, 1995, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Claremore Progress, a newspaper published and of general circulation in Rogers County, Oklahoma, and that on the day fixed in the notice the property was sold to the **Richard G. and Sonja K. Lundy Trust of March 1, 1995**, 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 **Richard G. and Sonja K. Lundy Trust of March 1, 1995**, a good and sufficient deed for the property.

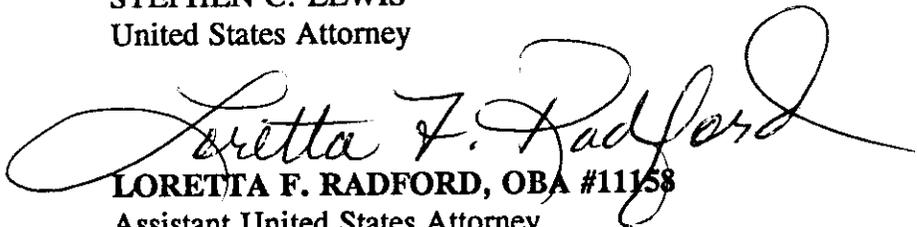
It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/Sam A. Joyner
U.S. Magistrate

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

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

LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney

3460 U.S. Courthouse

Tulsa, Oklahoma 74103

(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 96CV 153K

Oklahoma; and Board of County Commissioners, Tulsa County, Oklahoma and to the purchaser of the property, Ty-Kait, Inc, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

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

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

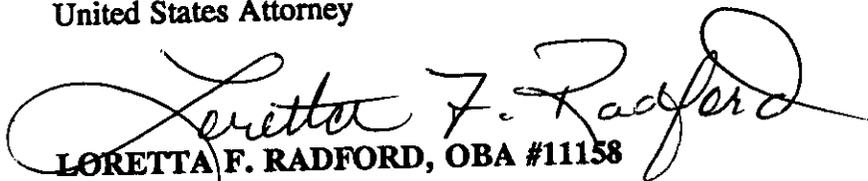
It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/Sam A. Joyner
U.S. Magistrate

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

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

LORETTA F. RADFORD, OBA #11158

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

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 96CV 154K