

Original

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

PAUL & KAREN BULL, as parents)
and next friend of their)
minor daughter, ANGELA)
RUSSELL; SHARON MEDICO-ROBB,)
as parent and next friend of)
her minor daughter, MELISSA)
ANN (ANNIE) MEDICO; JOE &)
LINDA DURHAM, as parents and)
next friend of their minor)
daughter, MARIE AMANDA)
(MANDY) DURHAM; JEROME &)
MARY DAWSON, as parents)
and next friend of their minor)
daughter, LESLIE JANEL DAWSON;)
STEVE & SHIRLEY GIDLEY, as)
parents and next friend of)
their minor daughter, ALLISON)
GIDLEY, and on behalf of all)
others similarly situated,)

Plaintiffs,

v.

INDEPENDENT SCHOOL DISTRICT)
NO. 1 OF TULSA COUNTY, a/k/a)
TULSA PUBLIC SCHOOLS;)
DR. JOHN W. THOMPSON,)
individually and in his)
official capacity as)
Superintendent; DR. WAYNE)
FOSTER, individually and in)
his official capacity as)
Director, Athletics and)
Activities; and Does 1)
through 50,)

Defendants.

ENTERED ON DOCKET
DATE JUN 10 1997

CONSENT DECREE

FILED
IN OPEN COURT

JUN 06 1997

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

Case No. CIV-96-C-0180H

CLASS ACTION

CONSENT DECREE

This Consent Decree is made between Paul and Karen Bull, as parents and next friend of their minor daughter, Angela Russell; Sharon Medico-Robb, as parent and next friend of her minor daughter, Melissa Ann (Annie) Medico; Joe and Linda Durham, as parents and next friend of their minor daughter, Marie Amanda (Mandy) Durham; Jerome and Mary Dawson, as parents and next friend of their minor daughter, Leslie Janel Dawson; Steve and Shirley Gidley, as parents and next friend of their minor daughter, Allison Gidley, individually and in their capacity as representatives of a class of individuals described as "all present and future female students enrolled at Tulsa Public Schools who participate, seek to participate, or are deterred from participating in interscholastic and other school-sponsored athletics at Tulsa Public Schools" ("the class"), and Defendants, Independent School District No. 1 of Tulsa County, a/k/a Tulsa Public Schools ("Tulsa Public Schools" or "District"); Dr. John W. Thompson, individually and in his official capacity as Superintendent; and Dr. Wayne Foster, individually and in his official capacity as former Tulsa Public Schools Director, Athletics and Activities.

This Decree settles all claims stated in the Complaint including those alleging gender discrimination in the accommodation of the athletic interests and abilities of the above-defined class, and individual and official capacity claims against Defendants Thompson and Foster. The Consent Decree applies only to members of the class as the class is described above.

The parties to this Decree agree that the School District is bound by the requirements of Title IX of the Education Amendments of 1972. This Consent Decree is a result of negotiation and compromise by all parties. Coverage of a topic in this Decree does not indicate admission of liability by the District as to a single high school or as to all high schools. The parties have, through joint efforts, constructed a Decree that

provides a comprehensive framework for applying Title IX's requirements in all Tulsa Public Schools High Schools.

**MATTERS COMMON TO
ALL TULSA SCHOOL DISTRICT HIGH SCHOOLS**

1. Female Sports Participation: The TPS High Schools shall make reasonable efforts to encourage increased female participation in school-sponsored sports. These efforts shall include: notifying female students of sports offered by each school; insuring that interested female students have information available regarding scheduled try-outs for school sports; public announcement of TPS's support for female athletics; and education of students regarding the District's Title IX athletic program obligations and the manner in which the procedure governing complaints can be accessed.

2. Softball Facilities: The District shall ensure that each high school which has a baseball field shall provide equivalent facilities to softball players. This may be accomplished by the construction of a separate field for softball, a combination field for softball and baseball, or by ensuring that both teams have access to comparable off-campus practice and/or game facilities for their respective sports. The District shall fully comply with the provisions of this paragraph on or before August 1, 1998, with an earlier target date of August 1, 1997, based on availability of bond money approved by electors in October 1996, construction crews, and similar variables affecting construction.

3. Facilities and Use of Gyms: Facilities must be available to student athletes without regard to gender differences that are not justified by the intended use or purpose of the facilities. All High Schools shall insure that preferential use of facilities, except in the case of dressing, locker, or restroom facilities, shall not be scheduled based on gender. Permissible considerations may include the sport in season, the relationship between a particular sport and a specific facility, and similar considerations that are gender

neutral. Accordingly, the High Schools shall insure that girls' and boys' teams have equitable access to large and small school gyms, and equivalent dressing and locker rooms considering the number of students served, unique aspects of various sports, the necessity of locker rooms, and similar gender neutral factors.

4. Locker Rooms: The designation of locker rooms shall take into consideration the needs of student athletes. For example, the Booker T. Washington field house shall include renovations which will provide for a designated girls' locker room that shall be comparable to locker rooms available to boys utilizing the field house.

5. Weight Rooms: High Schools are not required to establish a weight room for use by student athletes. However, when a school does establish a weight room, it must insure that females have access which is equivalent to their male counterparts. Schools may either establish separate weight rooms or may insure that scheduling permits equivalent access to a single weight room by female athletes. Weight rooms must include equipment appropriate for strength and conditioning training for female athletes. Weight rooms shall, in addition to other weights, include dumb bell weights in the following ranges: two, three, five, eight, ten, and fifteen pounds. The District shall establish a plan whereby coaches shall receive education regarding the benefits of strength and conditioning training for female athletes during the 1997-98 and 1998-99 school years. This is with the expectation that coaches shall take into consideration the benefits of this training to girls and shall include, to the extent reasonable, strength and conditioning instruction as a part of sports-related curriculum. The District shall insure that female athletes are aware of the benefits of strength and conditioning activities. For example, Memorial has two distinct weight rooms. Memorial is required to review the location and use of the weight rooms to insure that the rooms are either accessible to both genders or, if it desires, to designate a weight room for males and a separate weight room for females.

Equipment available to female students shall be equivalent to the equipment provided their male counterparts.

6. Volleyball Facilities: Each of the High Schools shall insure that appropriate volleyball standards are installed which are consistent with regulations governing volleyball competition. In addition, each school shall insure that permanent painted volleyball markings are included in the primary or main gym.

7. Volleyball Coaching Stipends: Compensation for coaching assignments is collectively bargained between the designated representatives of the school District and the Tulsa Classroom Teachers Association ("TCTA"), which represents the District's certified personnel. TCTA is not a party to this litigation. The District agrees to consider an increase in the coaching stipend payable to volleyball coaches for the 1997-98 school year. The District shall submit an item for negotiations pertaining to the review of the compensation payable to volleyball coaches as compared with coaches of male teams; shall propose an increase in the stipend paid to volleyball coaches to be effective with the 1997-98 volleyball season; and shall agree not to withdraw that issue from negotiation. The District shall propose that the salary increase be no less than \$200 for each head coach and no less than \$200 for each assistant coach.

8. Sixth Hour Sports: Tulsa Public Schools' High Schools are not required to establish sixth hour sports opportunities for student athletes. However, schools that do extend opportunities for sports or sports-related participation during sixth hour to students must do so on a gender neutral basis. Accordingly, TPS schools shall insure that to the extent sixth hour athletics are offered to any male athletes, equivalent opportunities for that benefit shall be made available to female athletes. Schools may, however, schedule sports after school when necessary to afford female students an opportunity to participate in more than one sport, when necessary because of competing coaching assignments, and

for other gender neutral reasons. School credit for participation shall be available to the student whether the student is in 6th hour or 7th hour athletics.

9. Coaching Positions: The District shall utilize gender neutral procedures for attracting and retaining coaches for female sports. The District's policies and procedures and applicable provisions of collective bargaining agreements shall guide publication of coaching vacancies. The parties acknowledge that the District's coaching vacancies are filled first by individuals who are employed by the District in a certified or classified position. Only in the event the District is unable to attract a qualified coach within its faculty does it consider the employment of a "lay" coach. A lay coach is an individual who is employed by the District to fill a specific coaching vacancy but who is not otherwise considered an employee of the school system. Plaintiffs seek through this provision to emphasize the importance of seeking experienced coaches for female sports and doing so in a manner which does not treat female and male sports differently because of the gender of the team members. TPS shall provide coaching to the teams of each gender in an equitable manner so that the teams of each gender have similar athlete-to-coach ratios. For example, if the boys' baseball team has three coaches, then the girls' softball team shall have three coaches, unless there are significantly fewer female softball players.

10. Coaching Assistants. Assistant coaches shall be assigned to teams on the basis of gender neutral considerations. In instances involving comparable sports such as boys' and girls' basketball (as well as others which have male and female teams), teams with comparable participation numbers shall have a similar level of paid coaching support.

11. Uniforms: TPS shall provide all female athletes with uniforms comparable to that which it provides to its male athletes. Uniforms for either gender shall not be replaced on a more frequent basis than the uniforms of the sports of the other gender unless the wear and tear on uniforms or other gender neutral factors clearly require such

replacement. The District may offer athletes an opportunity to purchase their uniforms if the athlete desires to keep the same uniform from season to season or following the completion of participation.

12. Equipment: Female athletes shall be provided with equipment required by their sports on a basis that is comparable to equipment provided to male athletes engaged in school-sponsored sports. Additionally, the District shall insure that replacement equipment is provided and/or existing equipment is reconditioned on an equitable basis.

Nothing in this section shall preclude the District from reducing the overall percentage of equipment funding provided to teams so long as such reduction is done on an overall basis affecting male and female athletes equivalently.

13. Scheduling of Gyms: Coaches for both genders shall coordinate use of facilities which permits female teams a substantially equal opportunity to utilize the District's available gyms. In instances where a school has more than one gym and one of the gyms is considered more desirable, the superior location shall be equally available to both teams. This may be accomplished by designation of a schedule that insures equal access to school gyms or through alternative means that insure that one team's use of a more desirable facility does not predominate over another team's use for reasons having to do with the gender of the team. It is permissible under this section for coaches to agree to use that may vary from a strictly proportionate use of the facility -- as long as any agreement is based on gender neutral factors. A coach or student athlete who feels that he or she has been denied equal opportunity to use the gym may file a grievance to challenge what the coach or student athlete may believe is unequal treatment based on the gender of the team.

14. Scheduling of Games and Practice Times: Conferences in which TPS High Schools participated during the 1996-97 school year have used a basketball schedule which

commenced with the junior varsity boys and concluded with the varsity girls. For the 1997-98 school year the schedule shall commence with the junior varsity girls and conclude with the varsity boys competition. Thereafter, the Tulsa High Schools, in arriving at their schedule of games for boys' and girls' teams, may continue with the every other year scheduling described above. Alternatively, the schools may arrive at a different schedule which may involve playing girls' and boys' games on separate nights, alternating the schedule from one game night to another game night as between the scheduling of girls' and boys' games, or may select a schedule that has varsity or junior varsity girls play prior to varsity or junior varsity boys' games. In any event, the scheduling of games and practices must be based on gender neutral factors and shall consider the best interests of the respective teams.

15. Salary Schedule Applicable to Athletic Assignments: The District shall review its salary schedule with respect to salaries applicable to male and female sports. For example, the District, prior to the beginning of the 1996-97 school year, submitted the issue of compensation applicable to extra duty athletic assignments to collective bargaining with the employee organization which represents the District's certified employees. As a consequence of an agreement reached with the employee representatives, softball and baseball salaries were equalized for all of the District's high schools. During the bargaining session for the 1997-98 school year the District shall submit the issue of salaries assigned to volleyball coaches and shall compare those salaries with salaries allocated to male sports such as wrestling, with a view to increasing salaries for volleyball coaches. The parties acknowledge that coaches of one sport may be paid at a higher rate than coaches of another sport -- if based on nondiscriminatory factors such as the length of the season or other gender neutral factors. The gender of the team may not be the basis for the distinction in pay. Salaries for all coaches shall be gender-neutral.

16. Publicity: To the extent that TPS or any of its employees contacts the media regarding the results of school-sponsored athletic competition, the School District and its employees shall equitably provide such assistance and information for the sports of both genders. Similarly, in instances where media guides and other information are prepared for the media or other organizations, the District shall provide such items for the teams of both genders in a similar format and comparable size. When public address systems are used to announce upcoming athletic events, the District shall insure that comparable announcements are made regarding the upcoming events of both genders. The District is not required to print and/or pay for the publication of competitive schedules. However, to the extent that schedules are printed or paid for by TPS, booster clubs, or others, they shall be provided on a comparable basis to the teams of both genders.

17. Training and Medical Services: When TPS elects to provide training and/or medical services, it shall ensure that such services are provided equitably to the teams and athletes of each gender, taking into consideration the nature of the sport and the necessity for these services. For example, Booker T. Washington shall, prior to the beginning of the 1997-98 school year, ensure that its training room shall be remodeled in a manner that extends to girls access to the training room without the necessity of walking through the boys' locker room.

18. Contributions: TPS relies heavily on the contributions of time, money, equipment, and supplies that come from individual donors, organizations such as Booster Clubs, businesses, parents, and others. The District desires to retain the enormous benefits provided by private as well as public donors. However, the School District shall not permit an infusion of non-school monetary and non-monetary contributions to result in programs which are unequal. The School District has a responsibility to monitor contributions and the effect contributions have on school-sponsored sports. Plaintiffs have

a responsibility to support and promote their sport or sports of choice. Both parties seek to avoid creation of a financial support system which lacks the personal involvement of supporters. Similarly, the parties seek to avoid the creation of a system which penalizes athletes and their fans and supporters who actively seek financial and non-financial contributions to improve equipment, facilities, and other benefits for participants. In pursuit of a balanced approach to assistance for sports and in recognition of the benefits of outside involvement with teams and sports, the parties agree that:

a. The District shall, with the beginning of the 1997-98 school year, establish information resources which shall be available to girls' teams who desire to learn how to engage in fund-raising, create organizational support, and otherwise work for the benefit of a particular sport.

b. The District shall publish for all sports a list of fund raising obligations and, where necessary, opportunities which shall be related to the projected ability of the sport to raise funds which can be used for that sport. The expectations for individual sports shall take into consideration the ability of the sport to attract fans, the ability to obtain gate revenues, the reasonable opportunities for the participants and their families or supporters to engage in fund-raising, efforts made by athletes to raise funds, the monetary needs of the sport, and similar factors.

c. The District shall publish guidelines indicating what the District shall contribute to each sport such as travel expenses, uniforms, equipment, official fees, and similar costs. The District shall also indicate what the respective team or sport shall be responsible for raising through booster clubs, fund raisers, parental or other third party contributions, or through similar non-school mediums. Guidelines developed by the District, and resulting fund raising obligations, shall be gender neutral. Participants shall be permitted to decide whether they wish to assess participants to meet fund-raising

requirements, to approach third parties (corporate or personal), to invite parental contributions, or some combination of efforts in order to fund items or opportunities which the District does not provide.

d. The District may establish a listing of items which are not provided by the school which may be provided through fund-raising efforts, parental or private contributions or like types of non-school support. For example, softball and baseball teams may desire to install batting cages or press boxes. Where these do not currently exist or where sports would like to install their own batting cages or press boxes, they could look to outside funding sources. Similarly, other sports may enhance their programs through donations of time, money, resources, or materials.

e. School District employees as well as student participants shall have access to the District's Title IX Grievance Procedure to challenge expenditures which are believed to result in unequal benefits or treatment for student participants or programs.

19. Treatment of Contributions Which May Result in a Gender Disparity: To the extent donations are received by a program for the benefit of one team and the donation is one which is not unique to the particular sport, the respective high school's athletic director shall have the following options: (1) accept the gift and ensure that the District or the private donor makes a comparable gift to the other gender; (2) accept the gift with the condition that the same gift shall also be given by the donor to the other gender; or (3) reject the gift because its acceptance would result in a disparate treatment or benefit for one gender over the other. This is illustrated by the following example: A basketball coach is contacted by an athletic shoe manufacturer. The manufacturer offers to provide the coach with 30 pairs of shoes for his/her basketball team. Students are normally required to purchase their shoes. The coach in this instance could accept the donation of shoes, in which case the District is obligated through school funds or through

an alternate outside donor to obtain the same number and quality of shoes for the girls' basketball team. Alternatively, the coach could condition his/her acceptance of the shoe donation on either the agreement to provide a comparable number of shoes to the girls' team or to split the original offer of thirty pairs of shoes between girls' and boys' teams (15 pairs of shoes for each team). Finally, the coach could reject the offer because of the inability to obtain a comparable benefit for boys and girls. The parties agree that it is acceptable in such a case for the school district, rather than rejecting a donation, to accept it and hold the donation to be used at such future time as the use shall not result in unequal treatment or benefit to either gender.

20. Sports Banquets: Schools are not required to have sports banquets. However, if schools permit or encourage banquets then all sports should have access to a banquet or a comparable opportunity to acknowledge sports participation and accomplishment. This can be achieved through having one sports banquet for all sports; a fall and a spring banquet which would involve two banquets designed to cover all sports during the course of the year; or an alternative opportunity selected by athletes and coaches and approved by the District. If a school elects to have individual sports banquets, the opportunity for all sports to fund a comparable banquet shall be made available.

21. Travel, Meals, Lodging: Female athletes shall be treated in the same manner as male athletes, in their related sport, with respect to travel, meals, and lodging. This means that females who have opportunities, based on team achievement, to participate in out-of-state tournaments shall be given the same consideration as males who have that opportunity. When females are presented with opportunities for out-of-state or overnight travel, the arrangements for travel shall be the same as those available to males in connection with the same or similar sports. Local travel arrangements involving games, practices, or both shall be handled in a manner which is gender neutral. Travel arrange-

ments may be affected, positively or negatively, by the availability of transportation, the competition for a limited number of buses or vans, the number traveling, the distance involved in traveling, the timing of travel arrangements, and an assortment of other factors. However, gender shall not be a determining factor in travel arrangements, food, or lodging available to student athletes.

22. Signage: The District shall avoid language that appears to identify a facility, such as a gym, as a boys' or girls' facility, except in those instances where the District has established comparable facilities for both genders.

23. Middle School Sports: Tulsa Public Schools does not offer middle school level school-sponsored sports for female or male students. Nevertheless, the parties agree that an introduction, at the middle school level, to sports offered by the District at the secondary level may stimulate the interest of female students in sports which may be available to them as they progress in Tulsa Public Schools. In order to provide middle school students an introduction to school-sponsored sports, the District shall utilize its middle school physical education classes to introduce school-sponsored sports to students and to promote and develop student awareness of the basic rules and fundamentals of the sport. How this is to be accomplished, the time which will be allocated to each sport, and the manner in which the education will be conducted is left to the District's discretion. However, the parties agree that the education afforded students will include active participation in these sports.

The Court's review of Tulsa Public Schools high school athletic facilities demonstrated time and time again that a critical factor in encouraging sports participation is the effort, enthusiasm and commitment of individual coaches. Periodic visits by coaches with students at the middle school level will increase the likelihood that students will be aware of opportunities for participation in athletics and will choose to participate in the District's

secondary sports program. Accordingly, TPS through its Athletic Directors and others, as determined by the School District, will strongly encourage (if not require) that coaches establish and maintain contact with students in middle schools which serve as feeder schools to secondary school athletic programs. The contact intended is that which is sufficient to identify for the interested middle school student the sports offered at the secondary level, the manner in which the student can obtain information regarding sports participation, practical information related to try-outs, and similar information. This provision is not intended to conflict with athlete recruiting rules established by Tulsa Athletic Board of Control ("TABOC").

**RESPONSIBILITIES OF DISTRICT'S COMPLIANCE COORDINATOR
WITH RESPECT TO ATHLETIC PROGRAMS**

24. Tulsa Public Schools has designated an employee of the District as its Title IX Coordinator ("Coordinator"). The Coordinator or, at the option of the District, a special compliance director with responsibility for athletic programs, shall be responsible for ensuring the District's compliance with Title IX, the Regulations, and the binding Policy Interpretations applicable to school-sponsored sports. The Coordinator shall also have other specific duties.

25. These duties shall include the periodic survey of student interest in sports participation. Student interest surveys, as designed by the District, shall be conducted once every three years. These district-wide high school surveys shall begin with the 1997-98 school year. The summary of results, by school, shall be made available to any person for inspection within five (5) business days after a written request for the same, as long as the request is received after the Summary has been prepared. The Summary shall be made available to any person who pays the District its normal and customary copy expense. The survey shall involve sports which are offered or which reasonably

could be offered by the District if sufficient participation interest existed. The District's survey of interest may be based on a specific survey of sports interest of students. In addition, the District may consider numbers of students involved in try-outs, information obtained from coaches or parents regarding student interest, student enrollment, and other relevant considerations involving student sports interest.

26. The Coordinator shall compile and retain for inspection financial data about Tulsa's school-sponsored sports programs which details all revenues produced sport-by-sport and expenditures made in connection with each sport. This financial accounting shall include revenues as previously defined. The financial accounting shall include expenditures pertaining to equipment, coaching, travel, supplies, facilities and any other factors listed in 34 C.F.R. § 106.41(c). The data shall be compiled annually and shall be available for inspection following the end of each school fiscal year, within five (5) business days after a request for the same. A copy of the data shall be made for any person who pays the District its normal and customary copy expense.

27. The Coordinator shall oversee annual educational seminars for Tulsa high school teachers and administrators which explain the mandates of Title IX with respect to athletic programs. The seminar(s) for employees shall occur during the first semester of the 1997-98 and 1998-99 school years. Additionally, the Coordinator shall be responsible for insuring that interested parents or guardians are provided an opportunity to understand the application of Title IX to the District's athletics program. This may be accomplished through mailings, seminars, student handbooks, or in other ways calculated to educate interested parents or guardians regarding the District's programs and legal mandates in this area.

28. The Coordinator shall arrange student education regarding Title IX and its relationship to student participation in sports, through the school's physical education

classes. This instruction shall be provided in 1997-98 and 1998-99. After 1998-99, it is sufficient to include information related to Title IX in student handbooks.

29. The Coordinator shall insure distribution of the District's grievance procedure related to claims of discrimination or a summary of the procedure to District employees, parents and students in a manner designed to achieve widespread notice. A summary of the Consent Decree shall be published in a regular publication of the Tulsa School District, such as the "Superintendent's Bulletin," at least once in the 1997-98 school year.

INDIVIDUALLY-NAMED DEFENDANTS

Plaintiffs have named Dr. John Thompson and Dr. Wayne Foster in their official capacities and in their individual capacities. Plaintiffs agree, as a part of this Consent Decree, to promptly dismiss Dr. Thompson and Dr. Foster with prejudice to the refiling of any claims against them, upon approval and entry of this Decree by the Court.

COURT'S INVOLVEMENT

This Consent Decree is approved by and entered as an order and judgment of the Court and shall be subject to the full enforcement powers of the Court. All claims against individually-named Defendants shall be dismissed with prejudice upon the approval and entry of this Decree by the Court. In the event a party believes that there has been a default of an obligation created by this Consent Decree, such party shall take its complaint through the District's Title IX Grievance Procedure.

COSTS AND ATTORNEY FEES

The parties have agreed to submit the issue of attorney fees and costs to the Court for resolution. The parties' agreement regarding payment of reasonable attorney fees and

costs or the Court's decision, in the absence of the parties' agreement, shall be included as an addendum to the Consent Decree.

ENTERED this 6TH day of JUNE, 1997.


UNITED STATES DISTRICT JUDGE
SVEN ERIK HOLMES

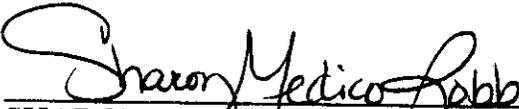
READ AND AGREED TO:



PAUL BULL



KAREN BULL



SHARON MEDICO-ROBB



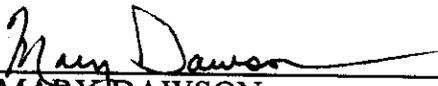
JOE DURHAM



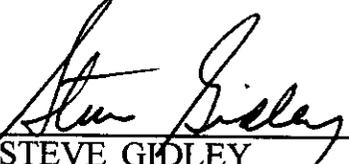
LINDA DURHAM



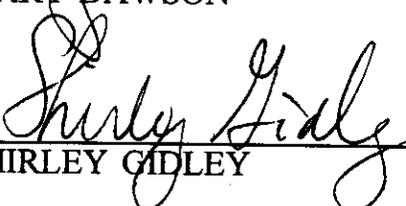
JEROME DAWSON



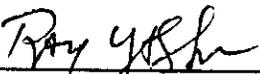
MARY DAWSON



STEVE GIDLEY



SHIRLEY GIDLEY



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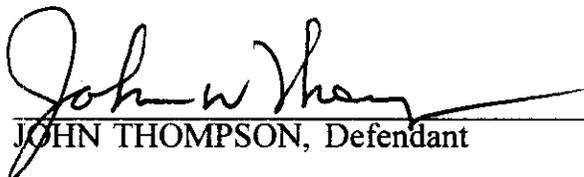
Of Counsel:

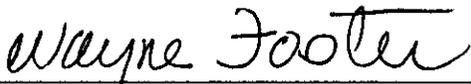
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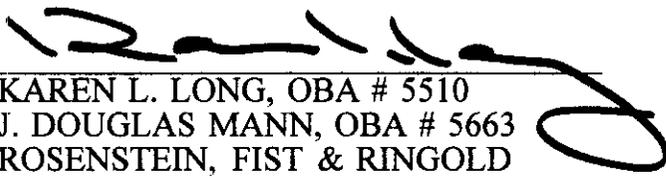
READ AND AGREED TO:

DEFENDANT TULSA INDEPENDENT
SCHOOL DISTRICT NO. I-1, a/k/a
TULSA PUBLIC SCHOOLS

By 
CATHY NEWSOME, President of the
Board of Education of Tulsa School
District No. I-1, a/k/a Tulsa
Public Schools


JOHN THOMPSON, Defendant


WAYNE FOSTER, Defendant


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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
CLERK'S OFFICE

PHIL LOMBARDI
Clerk

UNITED STATES COURT HOUSE
333 West Fourth Street, Room 411
Tulsa, Oklahoma 74103-3881

(918) 581-7796
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June 9, 1997

ENTERED ON DOCKET
DATE JUN 10 1997

TO: Counsel/Parties of Record

RE: Case No. 95-C-417-C, Tulsa Energy v. Oklahoma Oil & Gas Management, et al.

This is to advise you that the Honorable H. Dale Cook entered the following Minute Order this date in the above case:

This case is referred back to the Bankruptcy Court for determination of attorney fees pursuant to 52 O.S. § 570.14.

Very truly yours,

PHIL LOMBARDI, CLERK

By: 

Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN - 9 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VALERIE COMAN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,
substituted for Paul A. Comeau,

Defendant.

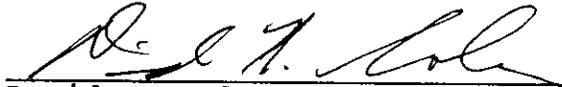
No. 97-CV-118-K

ENTERED ON CLERK'S

DATE JUN 10 1997

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

The parties acknowledge a compromise settlement of all claims having been concluded, hereby stipulate that the above-styled action be dismissed with prejudice to the bringing of any further action.



David H. Cole, OBA #1776
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(405) 272-0322

and

Peter Bernhardt
Assistant United States Attorney
333 West Fourth Street, Suite 3460
Tulsa, OK 74103-3809

Attorneys for Defendant



Samuel J. Schiller, OBA #16067
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(918) 482-5942

Attorney for Plaintiff

off.

14

F I L E D

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA** JUN - 9 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

EVA HILL,

Plaintiff,

vs.

**INDEPENDENT SCHOOL DISTRICT
NO. 1 OF TULSA COUNTY,**

Defendant.

Case No. 96-CV-807B

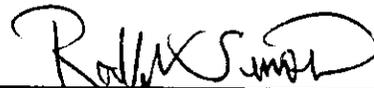
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DATE JUN 10 1997

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

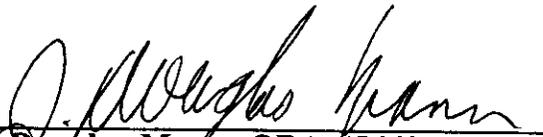
The plaintiff, Eva Hill, and the defendant, Independent School District No. 1 of Tulsa County, Oklahoma, advise the court of a settlement agreement between the parties and pursuant to Rule 41(a)(1)(ii), FED. R. CIV. P., jointly stipulate that the plaintiff's action against the defendant, Independent School District No. 1 of Tulsa County, Oklahoma, be dismissed with prejudice, the parties to bear their respective costs, including all attorney's fees and expenses of this litigation.

Dated this 4 day of June, 1997.



**Ralph Simon, OBA #8254
403 South Cheyenne, Suite 1200
Tulsa, Oklahoma 74103
(918) 582-9339**

Attorney for Plaintiff



**J. Douglas Mann, OBA #5663
ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 300
Tulsa, OK 74103
(918) 585-9211**

Attorneys for Defendant

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

FILED
JUN - 9 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

MURREL JEAN JARREAU and)
JOSEPH MOZART JARREAU,)
husband and wife)
Plaintiffs,)

vs.)

CASE NO. 96-CV-738B ✓

ORAL ROBERTS UNIVERSITY and)
VICTORY CHRISTIAN CENTER, INC.,)
Defendants.)

ENTERED ON DOCKET
JUN 10 1997

SPECIAL ADMINISTRATIVE CLOSING ORDER

ON THIS 9th day of June, 1997, upon being advised by the parties hereto that an agreed, unconditional settlement has been reached between the parties and that alleged subrogation interests exist herein and that additional time will be required to close out the matter and prepare the necessary documents, including a Stipulation For Dismissal With Prejudice, all as set forth in the Joint Application submitted herewith, the Court finds and orders as follows:

IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the pretrial conference scheduled in this matter for Friday, June 6, 1997, and the trial scheduled to commence Monday, July 21, 1997, are stricken.

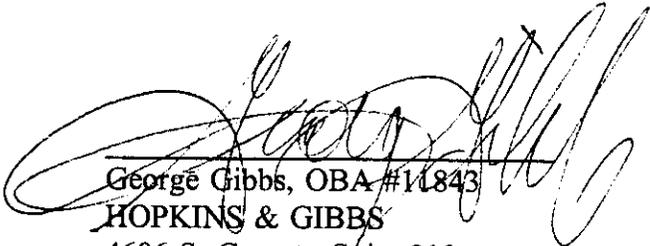
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that this action is hereby dismissed without cost and without prejudice to the right, upon good cause shown, within sixty (60) days, to reopen the action if the settlement requires enforcement.

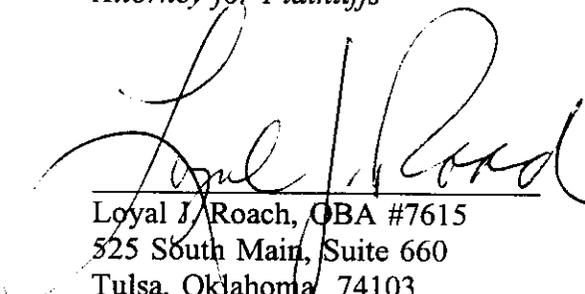
IT IS FURTHER ORDERED by the Court that within thirty (30) days the alleged subrogees, Gulf South Health Plans (through their representative, Health Cost Controls) and Medicare (through their representative, TriSpan Health Services), are to communicate to counsel .

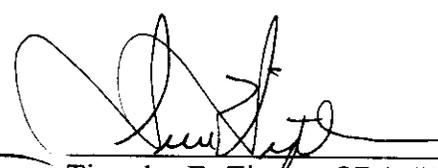
for plaintiffs their position with respect to the waiver or reduction of their alleged subrogation interests, and, failing which, the Court reserves the right to require said parties to show good cause for their refusal.


UNITED STATES DISTRICT JUDGE


Charest Thibaut, III, OBA #12730
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Telephone: (918) 583-7129
Attorney for Defendants

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

FILED

JUN - 9 1997

GREG BENNETT,

Petitioner,

v.

RON WARD and THE
ATTORNEY GENERAL OF THE
STATE OF OKLAHOMA,

Respondents.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-C-425-B

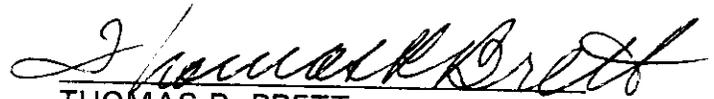
ENTERED ON DOCKET

DATE JUN 10 1997

ORDER

FOR GOOD CAUSE SHOWN, this case is dismissed with prejudice.

Dated this 9th day of June, 1997.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN - 9 1997

UNITED STATES OF AMERICA,

Plaintiff

v.

LARRY G. VANBEBER,

Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Action No. 97CV0243B

FILED ON DOCKET

DEFAULT JUDGMENT

~~JUN 10 1997~~

This matter comes on for consideration this 9th day of June, 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, Larry G. Vanbeber, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Larry G. Vanbeber, was served with Summons and Complaint on March 20, 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.

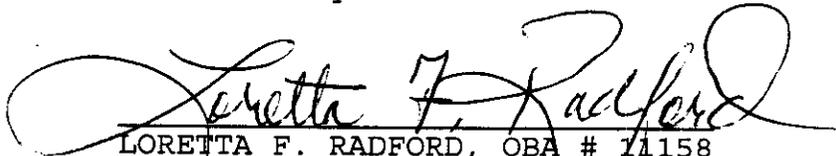
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Larry G. Vanbeber, for the principal amount of \$10,344.86, plus accrued interest of \$4,817.93, plus interest thereafter at the rate of 10 percent per annum until judgment, a surcharge of 10% of the amount

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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

LFJ/jmo

THE UNITED STATES DISTRICT COURT
DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

6-9-97

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

ENTERED ON DOCKET

6-9-97

CHARLES FITZGERALD GOUDEAU,)

Petitioner,)

vs.)

STATE OF OKLAHOMA, et al.,)

Respondents.)

No. 97-CV-327-K ✓

FILED

JUN 09 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Petitioner, a state prisoner appearing *pro se*, has filed a petition for a writ of habeas corpus. On April 28, 1997, the Court entered an Order denying Petitioner's motion for leave to proceed *in forma pauperis*, and allowing Petitioner thirty (30) days to either pay the \$5.00 filing fee or show cause in writing for failure to do so. Petitioner was advised that failure to cure the deficiencies within the time specified would result in the dismissal of this action without prejudice and without further notice. A review of the file indicates that, as of this date, Petitioner has not submitted the proper \$5.00 filing fee or shown cause in writing for his failure to do so as directed by this Court on April 28, 1997.

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ACCORDINGLY, IT IS HEREBY ORDERED:

That the petition for writ of habeas corpus be **dismissed without prejudice** for failure to pay the filing fee. See Local Rule 5.1(F).

SO ORDERED THIS 6 day of June, 1997.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

JUN - 6 1997 *fw*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BOB D. MAGUIRE,)
)
 Plaintiff,)
)
 vs.)
)
 BOEING NORTH AMERICAN, INC.,)
)
 Defendant.)

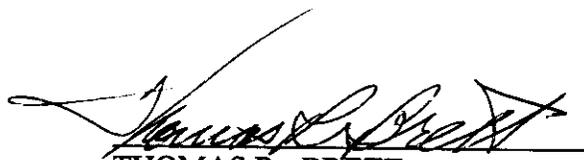
No. 96-C-634-B ✓

ENTERED ON DOCKET
DATE JUN 9 1997

JUDGMENT

In accord with the Order filed this date granting summary judgment to Defendant, the Court hereby enters judgment in favor of Defendant, Boeing North American, Inc., and against Plaintiff, Bob D. Maguire. Costs may be paid upon proper application. The parties are to pay their own attorney's fees, if any.

Dated, this 6th day of June, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

fw

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

FILED
JUN - 6 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

BOB D. MAGUIRE,)
)
 Plaintiff,)
)
 vs.)
)
 BOEING NORTH AMERICAN, INC.,)
)
 Defendant.)

No. 96-C-634-B ✓

ENTERED ON DOCKET
DATE JUN 09 1997

ORDER

Before the Court is the motion for summary judgment filed by defendant Boeing North American, Inc. (hereinafter referred to as "Rockwell")¹ (Docket No. 18). Plaintiff Bob D. Maguire ("Maguire") filed this action alleging that he was laid off from his job at Rockwell due to his age and health in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 et seq., and the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 et seq. Rockwell moves for summary judgment on the following grounds: (1) Maguire cannot establish a prima facie case of age discrimination under the ADEA because he can show no direct or circumstantial evidence of discriminatory animus in Rockwell's decision to lay him off; (2) even if Maguire could establish a prima facie case, he cannot meet his burden to show that the legitimate business reasons for Rockwell's layoff decision were pretextual; and (3) Maguire cannot establish that he had a disability under the ADA; (4) or that his layoff was motivated by the disability.

In 1995 Rockwell laid off 20 employees in a "company wide" layoff to reduce operational

¹Boeing North American, Inc. was substituted as defendant for Rockwell International Corporation ("Rockwell") as a result of Boeing's purchase of Rockwell's aerospace and defense divisions on December 6, 1996.

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costs. Three out of the ten Buyer Specialists in Department 953 were laid off, Maguire was one of them. Maguire had worked for Rockwell since March 6, 1984. At the time of the layoff, Maguire was 46 years old, and all but one of the ten Buyer Specialists in Dept. 953 were 40 years of age or older. Of the seven buyer specialists who were not laid off, three were older than Maguire, and all but one had more company seniority than Maguire.

Rockwell contends that in determining who would be laid off in their department, Dan Laughlin ("Laughlin"), Director, and Kay Haymore ("Haymore"), Manager, of Dept. 953 were guided by Rockwell's written layoff policy which directed that an employee's demonstrated performance and potential for contributing to the present and future of the business are the prime criteria for retention, although other factors, such as length of service, are considered. Laughlin and Haymore ranked each buyer specialist in order of demonstrated performance; Maguire was ranked 6th. Laughlin and Haymore then assessed each buyer specialist's potential for contributing to the present and future needs of the business. As a result of this assessment, Laughlin and Haymore determined that Maguire should be laid off because he was assigned to the purchase of production hardware which had been effectively outsourced to Tri-Star Aerospace as a result of Rockwell's implementation of the JIT (Just in Time) purchasing method. ("JIT" is an electronically transmitted "materials upon request" method of purchasing from a subcontractor which eliminates the need for requisitions or purchase orders or warehousing of parts.) Given the outsourcing of production hardware purchases, Laughlin and Haymore determined that Pam Dunbar, the Small Claims Administrator for the department (who was over 50 years old and had more company seniority than Maguire), could assume Maguire's residual duties.

Maguire contends that he was laid off because of his age and health problems and thus

Rockwell's articulated reason for layoff is pretextual. Maguire states that he was told by Laughlin on September 9, 1994 that Human Resources had placed Maguire on Rockwell's layoff list because of his "health and age." Maguire contends that his ADD, chronic ulcers, high blood pressure and a stroke substantially impaired his ability to perform a major life activity, thereby rendering him disabled and/or causing Rockwell to regard him as disabled under the ADA.

STANDARD OF REVIEW

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

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

477 U.S. at 322.

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

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

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

475 U.S. 574, 585 (1986).

In essence, the inquiry for the Court is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson*, 477 U.S. at 250. In its review, the Court must construe the evidence and inferences therefrom in a light most favorable to the nonmoving party.

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

ANALYSIS

1. ADEA claim

To establish a prima facie case of age discrimination in a reduction in force situation, Maguire must show that he was (1) within the protected age group; (2) doing satisfactory work (qualified for the position); (3) laid off; and (4) that Rockwell intended to discriminate against him because of his age in reaching its decision to lay him off. *Jones v. Unisys Corp.*, 54 F.3d 624, 630 (10th Cir. 1995); *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1454 (10th Cir. 1994); *Branson v. Price River Coal Co.*, 853 F.2d 768, 770-71 (10th Cir. 1988). The fourth element “may be established through circumstantial evidence that the plaintiff was treated less favorably than younger employees during the reduction-in-force.” *Branson*, 853 F.2d at 771. If Maguire establishes his prima facie case, the burden shifts to Rockwell to show a “legitimate, nondiscriminatory reason” for laying Maguire off. *Jones*, 54 F.3d at 630; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If Rockwell meets this burden of production, Maguire must then offer evidence that Rockwell’s proffered reason(s) were a pretext for age discrimination. *Jones*, 54 F.3d at 630. Thus, to avoid summary judgment, Maguire must establish “both a prima facie case and evidence supporting a finding that ‘defendant’s alleged nondiscriminatory reasons for the employment decisions are pretextual.’” *Id.*

(quoting *Ingels v. Thiokol Corp.*, 42 F.3d 616, 622 (10th Cir. 1994).

It is undisputed that Maguire has established the first three elements of his prima facie case. Rockwell, however, contends that Maguire has not established the fourth element by producing direct or circumstantial evidence from which a fact-finder might reasonably conclude that Rockwell had a discriminatory animus in deciding to lay Maguire off. *Jones*, 54 F.3d at 630; *Branson*, 853 F.2d at 771. Further, Rockwell argues that Maguire cannot meet his burden in showing that Rockwell's legitimate business decision for laying him off was pretextual.

Maguire argues that he has established the fourth element of his prima facie case with the undisputed fact that a younger employee, Dept. 953 Buyer Specialist, Russell Mirt ("Mirt"), was not laid off and Mirt was 38 years old at the time of the layoff. The Court disagrees. Although the Tenth Circuit has held that "[e]vidence that an employer fired qualified older employees but retained younger ones in similar positions is sufficient to create a rebuttable presumption of discriminatory intent and to require the employer to articulate reasons for its decisions," *Branson*, 853 F.2d at 771, the Court does not find such a presumption applicable here. It is undisputed that at the time of the layoff, nine out of ten of the Buyer Specialists in Dept. 953 were over forty; Mirt was the only Buyer Specialist under forty. Given that six of the Buyer Specialists who were not laid off were over forty and three of the six were older than Maguire, the retention of Mirt alone does not adequately support a reasonable inference that Rockwell intended to discriminate based on age in its decision to lay off Maguire.

However, even if Maguire were entitled to a rebuttable presumption of discriminatory intent to establish his prima facie case, the Court concludes that Maguire has not produced enough evidence to allow a reasonable jury to conclude that Rockwell's proffered reason to lay him off was pretextual.

As noted above, Rockwell claims that a company wide layoff was required to reduce operational costs in early 1995 and that Haymore and Laughlin were directed to layoff three Buyer Specialists from their department. *Haymore Affidavit* ¶8, *Laughlin Affidavit* ¶11, *Exs. C & D to Defendant's Summary Judgment Motion*. Laughlin and Haymore ranked each Buyer Specialist in order of their demonstrated performance; Maguire ranked sixth. *Haymore Affidavit* ¶9, *Laughlin Affidavit* ¶¶12-13. Consistent with Rockwell's policy, Laughlin and Haymore then assessed each Buyer Specialist's potential for contributing to present and future needs of the department. *Id.* They concluded that Maguire's potential was less than other Buyer Specialists because most of his job duties had been outsourced to Tri-Star Aerospace and his remaining duties could be assumed by Pam Dunbar, who had more seniority than Maguire and who had prior experience in purchasing production hardware; also, the other Buyer Specialists were more diversified. *Haymore Affidavit* ¶¶10-13, *Laughlin Affidavit* ¶¶12-15, 18.

To show these reasons were pretextual, Maguire offers only his affidavit² in support of his contentions that (1) his demonstrated performance and potential for contributing to the business were not accurately assessed by Laughlin and Haymore; (2) an employee who was ranked lower than he was retained; (3) Rockwell subsequently transferred three employees and hired a temporary worker, all of whom were under forty, to perform Maguire's duties; and (4) he was told by Laughlin on September 9, 1994 that Human Resources had placed him on Rockwell's layoff list because of his "age, health and tenure" and that Laughlin had "no say in the matter." Maguire's testimony on these points without more is insufficient to create a genuine issue of material fact. Haymore and Laughlin

²Maguire also attaches as exhibits to his Response two unidentified documents pertaining to the JIT program (Exs. B&C) and a letter of reference from Laughlin (Ex. D). Maguire, however, does not cite to these exhibits in his statement of disputed material facts and the Court can discern no material relevance of these documents to the issues in this case.

testified that potential to contribute to the business, in addition to job performance, was a factor in determining who to retain and that Maguire's responsibility to purchase production hardware was reduced to a part-time job due to the JIT program, thus limiting his potential. *Haymore Affidavit* ¶¶9-10, *Laughlin Affidavit* ¶¶9,12-14. Pointedly, Maguire does not dispute that much of his responsibilities had been outsourced. Maguire offers nothing other than his opinion as to his comparable worth to the department to call into question Haymore's and Laughlin's assessment of his potential. Neither does Maguire offer any admissible evidence to refute Haymore's testimony that the three Rockwell employees who were later transferred from another location performed different functions than Maguire and that neither they nor the temporary Manpower, Inc. personnel replaced Maguire. *Haymore Affidavit* ¶¶21-22. Maguire, in fact, admits that Pam Dunbar had taken over his "non-JIT" job duties after he left, *Maguire Deposition, pp 41-43, Ex. to Defendant's Reply*, and it is undisputed that Dunbar is older and had more company seniority than Maguire. *Defendant's Undisputed Fact No. 20*. A closer call is Laughlin's purported statement to Maguire as "[a]ge-related comments referring directly to the worker may support an inference of age discrimination."³ *Cone v. Longmont United Hospital Assoc.*, 14 F.3d 526, 531 (10th Cir. 1994). However, Maguire testified in his deposition that Laughlin and Haymore made the decision to lay him off and Maguire offers nothing to connect their decision with any purported mandate from Human Resources. *Maguire Deposition, pp 35-36, Ex. A. to Defendant's Summary Judgment Motion*. Because "age-related comments by non-decisionmakers are not material" in showing discriminatory animus, the Court finds that Maguire's testimony without more is insufficient to raise a factual question as to pretext.

³Laughlin denies ever making the comment. *Laughlin's Affidavit*, ¶¶17, 19.

2. ADA claim

To succeed on his ADA claim, Maguire must establish “(1) that he is a disabled person within the meaning of the ADA; (2) that he is qualified, that is, with or without reasonable accommodation (which he must describe), he is able to perform the essential functions of the job; and (3) that [Rockwell] [laid him off] because of his disability.” *White v. York International Corp.* 45 F.3d 357, 360-61 (10th Cir. 1995). The ADA applies only if Maguire is “disabled” according to the following statutory definition:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.

42 U.S.C. §12102(2). Factors to be considered in determining whether an impairment “substantially limits” a major life activity are “(i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.” 29 C.F.R. §1630.2(j)(2); *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 943 (10th Cir. 1994).

The only evidence adduced pertaining to Maguire’s “disabilities” under the ADA is his affidavit testimony. In his affidavit Maguire makes the following statements:

6. During [my employment at Rockwell as a Buyer Specialist], I became aware of a possible medical condition that I might have had, to wit, Attention Deficit Disorder (“ADD”), because I displayed the symptoms associated with that disorder. In addition, I became aware of this condition since Attention Deficit Disorder is hereditary and three of my children have ADD.

7. On February 17, 1995, I informed Ms. Haymore and Mr. Laughlin of that perceived disability (ADD) in the form of a memo. I also informed my former supervisor, Condia Ellison, of the condition while he was still employed as my supervisor.

8. During my employment with Rockwell I suffered from chronic ulcers which often caused me to double over in pain and be unable to sit up in a chair. I

experienced these ulcers about once a week.

9. These episodes of pain were apparent to Ms. Haymore and Mr. Laughlin and everyone that I worked in close vicinity with. In addition, I expressed to Mr. Laughlin and Ms. Haymore that I had this limiting condition.

10. On August 25, 1994 I received medical attention for what I perceived was a possible stroke because of symptoms that I thought accompanied a stroke. Some of the symptoms that I experienced were partial loss of vision in one eye and severe headaches. My primary care physician referred me to a specialist for treatment. The specialist told my primary care physician that I appeared to have suffered a stroke.

11. The possible stroke was apparent to everyone at work. I lost vision as a result of the stroke. I could no longer grip things. I suffered some memory loss. I had to take off work to remedy it. Mr. Laughlin had called me after my doctor's visit at home to see if I was alright.

12. I had been diagnosed with high blood pressure which I had brought to the attention of Ms. Haymore and Mr. Laughlin on more than one occasion.

13. No other employee in Department 953 has had a combination of medical conditions perceived or real, similar to mine while I was employed with Rockwell.

Maguire's Affidavit, Ex. A to Plaintiff's Response.

Regarding his "stroke," Maguire admits in his deposition that he can't identify any medical records diagnosing his stroke and that his doctor did not prescribe any medical restrictions on his work performance when he returned. *Maguire's Deposition, pp. 113-11, Ex.A. to Defendant's Summary Judgment.* Further, the specialist Maguire consulted, Dr. Frank L. Mitchell, did not diagnose Maguire as having had a stroke in the notes he took after examining Maguire, to wit:

Bob Maguire was referred to my office by Dr. Don Loveless to evaluated a soft tissue mass in the left temporal region. The patient states this has resolved. Apparently he was placed on antibiotics by Dr. Loveless for a tooth infection and it is possible this could have been a lymph node which could have resolved since last week; therefore, there is nothing to evaluate or excise.

Ex. K to Defendant's Summary Judgment Motion. Maguire also admits that he was able to return to work after his "stroke" and that none of his conditions prevented him from performing his job well. *Maguire's Deposition, pp. 126, 128-29, Ex.A to Defendant's Summary Judgment Motion.* Finally, Maguire concedes that he was never tested for or diagnosed with ADD, treated by a physician for

ADD, or given a physician's note restricting any of his job duties due to ADD. *Id.* at p.134. Nor did he ever ask for any accommodation of his ADD- because "I couldn't ask to make accommodations till I was diagnosed." *Id.* at 150. Maguire also admits that he did not inform Haymore or Laughlin that he was going to be tested for ADD until his February 17, 1995 memo, *id.* at 135-36, and concedes that the decision to lay him off was made either on or before February 14, 1995 before the memo was sent. *Maguire's Deposition, p. 45, Exs. to Defendant's Supplemental Authority.* Such is insufficient to raise a genuine issue of material fact as to whether Maguire had a disability under the ADA.

Maguire also argues that the ADA does not require that he have a disability if he is regarded by Rockwell as having a disability, citing 29 C.F.R. §1630.2(1)(3) (employer regards employee as having a disability when "he is treated by a covered entity [employer] as having a substantially limiting impairment"). However, Maguire offers no evidence that Rockwell treated him as having a substantially limiting impairment. Haymore and Laughlin testified that they were not aware that Maguire was planning to be tested for ADD until after the decision was made to lay him off. *Haymore Affidavit* ¶¶15-16, *Laughlin Affidavit* ¶20. Haymore also testified that she "was not aware of any health condition that Mr. Maguire may have had except for an ulcer condition, which did not appear to have any affect on Mr. Maguire's job performance," and that she never counseled Maguire regarding attendance and in fact, gave him favorable performance reviews. *Haymore Affidavit* ¶¶17,20. Laughlin attested that although he was aware that Maguire had high blood pressure, Maguire's performance was at all times acceptable and Maguire never "indicated any difficulties he was having in the performance of his job due to any health condition" and never presented Laughlin with any medical restrictions or request for accommodation. *Laughlin Affidavit* ¶¶21-24. Indeed,

by Maguire's own admission, any impairment resulting from his conditions did not substantially limit his ability to work and he never asked for any accommodation from Rockwell. *Maguire's Deposition, pp. 114-115, 126, 128-249, 134, 149-51, Ex. A to Defendant's Summary Judgment Motion and Reply.* The Court thus finds that Maguire has failed to raise a genuine issue of material fact as to whether Rockwell regarded him as having a substantially limiting impairment.

For the reasons set forth above, the Court grants Rockwell's motion for summary judgment.

ORDERED this ^{6th} day of June, 1997.



THOMAS R. BRETT
UNITED STATES DISTRICT COURT

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

PERNELL D. JEFFERSON,

Plaintiff,

vs.

RON ISACC and DR. JOHNSON,

Defendants.

Case No.97-CV-117-B

FILED
JUN 06 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE ~~JUN 6 9 1997~~

REPORT AND RECOMMENDATION

This action is a civil rights action, 28 U.S.C. § 1983, filed by Plaintiff, pro se, an inmate incarcerated at the Tulsa County Jail.

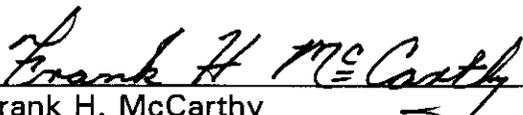
On March 31, 1997, the Court entered an order granting Plaintiff leave to proceed *in forma pauperis* and requiring payment of an initial partial filing fee of \$11.73 on or before April 29, 1997. [Dkt. 3]. Plaintiff was informed that unless the partial filing fee was paid by the date specified his action would be subject to dismissal without prejudice. That order was returned to the Court Clerk marked "attempted not known".

Plaintiff's failure to keep the Court apprised of his address has prevented him from receiving the orders and instructions necessary to prosecute his case. As a consequence, the April 29 deadline has passed and Plaintiff has not submitted the initial filing fee. The undersigned United States Magistrate Judge therefore RECOMMENDS that this action be DISMISSED, without prejudice, for failure to prosecute.

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In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 6th day of June, 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

JUN - 6 1997 *plw*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KENNETH PRUDOM,)
)
Plaintiff,)
)
vs.)
)
CITY OF TULSA, a municipality;)
TULSA POLICE DEPARTMENT;)
OFFICER GARY UPTON, an individual;)
OFFICER L.C. BREASHEARS, an)
individual; CPL R.C. REYNOLDS, an)
individual,)
)
Defendants.)

No. 96-C-502-B ✓

ENTERED ON DOCKET
DATE JUN 6 1997

J U D G M E N T

In accord with the Order filed this date granting summary judgment to Defendant, the Court hereby enters judgment in favor of Defendants, City of Tulsa, Tulsa Police Department, Officer Gary Upton, Officer L.C. Breashears and Cpl. R.C. Reynolds, and against Plaintiff, Kenneth Prudom. Costs may be paid upon proper application. The parties are to pay their own attorney's fees, if any.

Dated, this 6th day of June, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

JUN - 6 1997 *mlw*

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

KENNETH PRUDOM,)
)
Plaintiff,)
)
vs.)
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CITY OF TULSA, a municipality;)
TULSA POLICE DEPARTMENT;)
OFFICER GARY UPTON, an individual;)
OFFICER L.C. BREASHEARS, an)
individual; CPL R.C. REYNOLDS, an)
individual,)
)
Defendants.)

No. 96-C-502-B ✓

ENTERED ON DOCKET
JUN 09 1997

ORDER

Before the Court is the Motion to Dismiss/Alternative Motion for Summary Judgment filed by defendants City of Tulsa, Tulsa Police Department (hereinafter jointly referred to as "Tulsa"), Officer Gary Upton ("Upton"), Officer L.C. Breashears ("Breashears") and Cpl. R.C. Reynolds ("Reynolds"). (Docket No. 7). This motion came on for hearing on May 6, 1997, at which time the Court heard argument on the motion. The parties agree that discovery and briefing on the motion are complete and the matter is ripe for summary judgment review.

A. Factual Summary

On March 5, 1995, Plaintiff Kenneth Prudom was executing a left turn while he was traveling eastbound on East Pine Street when his 1976 Brown Cadillac Seville was struck by Officer Upton's police car. Upton was on duty and claims he was responding to an Emergency 911 call at the time of the accident:

On 03-05-95, at 2005 hours, I was radio assigned a 911 call with an open line at

1540 North Lewis Ave. While traveling westbound on East Pine Street, in the #2 lane at the 2500 block, a vehicle traveling eastbound on East Pine Street, in the #1 lane, executed a left turn in front of my vehicle. I applied brakes prior to the impact, however, I was unable to avoid striking the right side of the turning vehicle with the front of my vehicle. The air bag deployed upon impact and I sustained abrasions and bruising to my right forearm and back of right hand. Supervisors assigned to the call were Cpl. Reynolds and Cpl. Young. Officers assigned to work the accident were Off. Breshears, UDN and Det. Makinster took photographs under Photo File #77844.

Interoffice Memo from Upton to Chief Palmer, Ex. B. to Plaintiff's Supplemental Response

(Docket No. 29). There is no record of the emergency call to which Upton claims he was responding. The Operations Manager for the Public Safety Division, City of Tulsa Telecommunications, attests that Emergency 911 audiotapes are "routinely reused unless impounded for evidence or similar purposes" and since no "audiotape containing 'Emergency 911' dispatch activity for March 5, 1995 was impounded for such reason . . . [it] in all probability was erased and reused in the normal course of business." *Affidavit of John H. Jarrett, Ex. E to Plaintiff's Supplemental Response (Docket No. 29)*.

The policy of the Tulsa Police Department regarding "Vehicle Operations/Response Codes" states

Officers normally shall respond to calls for police service by driving within the speed limit and by observing the traffic laws of the City and State. It is the policy of the Tulsa Police Department that marked police units shall be equipped with both emergency lights and siren which are in operation before violating the "rules of the road". This provision shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his/her reckless disregard for the safety of others. (47 OS 11-1066).

Driving with emergency lights only does not exempt an officer from obeying the "rules of the road" under Oklahoma Statutes and City Ordinance. Therefore, officers shall not violate the City and State traffic laws while driving a police vehicle with emergency lights only.

Ex. D. to Plaintiff's Supplemental Response (Docket No. 29). Upton admits that he did not

have his emergency lights or sirens on and was traveling in excess of the speed limit at the time of the collision. *Ex. C. to Plaintiff's Supplemental Response (Docket No. 29)*.

Officer Breashears investigated the accident and filled out the Official Oklahoma Traffic Collision Report, dated March 5, 1995, ("official report") as follows:

POI: 5' S. OF N. E/R of E. PINE ST. (AND) 64' E. OF E. E/R OF N. ATLANTA AVE. DRIVER OF UNIT #1 [PRUDOM] SAID HE DID NOT SEE UNIT #2 [UPTON] AND TURNED LEFT INTO THE PRIVATE DRIVE WHEN HE WAS STRUCK BY UNIT #2. DRIVER OF UNIT #2 SAID HE WAS WEST BOUND ON E. PINE ST. WHEN UNIT #1 TURNED LEFT IN FRONT OF HIM. DRIVER #2 SAID HE WAS UNABLE TO AVOID THE COLLISION. SEE WITNESS STATEMENTS FOR WITNESSES #1 - #2 - #3.¹
(CONT'D)

State Record attached to Notice of Removal (Docket No. 1). Witness #1, identified as Tommy Ralls, stated that "the cop car was going fast 60 mph and the car hit by the store. No turn signal on brown car [Prudom's vehicle]." *Ex. A. to Plaintiff's Objection (Docket No. 12)*. Witness #2, Carl Ralls, stated that "I was in the in side line [sic] doing about 40 a hour. I guess the cop car was doing about 55, 60 mile a hour." *Id.* Witness #3, Patrick Rooks, stated "...the car [Upton's vehicle] was going about 65 [mph] the black person [Prudom] was going into the store and the cop coming down [through] Fast Stop [we're] in the right [lane] west bound. Our car was going about 45 miles an hour." *Id.*

In the official report, Breashears also identified two other witnesses, Jerry Young [Witness #4] and Charles Breshears [Witness #5], and summarized their statements in the continued accident description:

¹Three separate Statement of Witness forms were attached to the official report and filled out by witnesses Carl Ralls, Tommy Ralls and Patrick Rook. *Ex. A. to Plaintiff's Objection (Docket No. 12)*. No Statement of Witness forms were filled out by the other identified witnesses, Jerry Young and Charles Breshears; their statements were summarized by Breashears in the official report.

WITNESS #4 [JERRY YOUNG] STATED THAT HE HEARD BRAKES LOCKING UP ON THE ROADWAY AND SAW A POLICE CAR TRAVELING WEST ON EAST PINE STREET. HE SAID THAT THE POLICE CAR HIT A VEHICLE THAT TURNED LEFT INTO THE FAST STOP PARKING LOT.

WITNESS #5 STATED THAT HE SAW UNIT #1 TURN LEFT IN FRONT OF UNIT #2.

UNIT #2 LEFT 85'4" OF SKIDMARKS ON THE ROADWAY.

TULSA POLICE DETECTIVE MAKINSTER (V334) TOOK PHOTOS AT THE SCENE AND TURNED THEM IN UNDER PHOTO FILE #77844.

State Record attached to Notice of Removal (Docket No. 1).

Based on this investigation, Breashears determined that Prudom "failed to yield on left turn" and that Upton had taken "no improper action." *Id.* As a result, Breashears issued a citation/information ("citation") to Prudom for failure to yield/left turn. *Ex. A. to Defendants' Brief in Support of Motion for Summary Judgment ("Summary Judgment Motion") (Docket No. 8).* In the citation, Breashears signed the following attestation:

I, THE UNDERSIGNED ISSUING OFFICER, HEREBY CERTIFY AND SWEAR THAT I HAVE READ THE FOREGOING INFORMATION AND KNOW THE FACTS AND CONTENTS THEREOF AND THAT THE FACTS SUPPORTING THE CRIMINAL CHARGE STATED THEREIN ARE TRUE.

Reynolds reviewed the investigation and approved the citation. Prudom signed the citation with the understanding that his "release to appear for arraignment is conditional" upon his agreement to pay a \$67.00 fine or appear in Tulsa Municipal Court. *Id.* On April 11, 1995, the Prosecutor's Endorsement which states that "THE WITHIN COMPLAINT-INFORMATION [the citation] HAS BEEN EXAMINED AND THERE IS PROBABLE CAUSE FOR FILING THE SAME. COMPLAINT FILED" was signed by an assistant to David Pauling, the City Attorney.

On May 4, 1995, Prudom, after negotiations between his counsel and the City Prosecutor, entered a plea of no contest to the citation before Judge Jerry Perigo in Tulsa Municipal Court.

Judge Perigo inquired of Prudom regarding his competence to enter a plea and the voluntariness of his plea and waiver of his right to a jury or non jury trial. Satisfied of such, Judge Perigo accepted the plea and placed Prudom on a deferred sentence until July 5, 1995:

THE COURT: And are you satisfied with the advice of your counsel?
MR. PRUDOM: Yes, sir.
THE COURT: You have weighed the pros and cons of proceeding in this action and you think this is the best course for you; is that correct?
MR. PRUDOM: Yes, sir.
THE COURT: You are pleading to a recommendation offered by the prosecutor's office; is that correct?
MR. PRUDOM: Yes, sir.
THE COURT: Very well. You understand the Court is not bound by that. However, I have indicated that absent some compelling reason I would follow the prosecutor's recommendation. Is that your understanding?
MR. PRUDOM: Yes, sir.
THE COURT: Very well. The Court at this time -- do you have anything further to say before I proceed?
MR. PRUDOM: No, sir.
THE COURT: Do you have anything further to say on behalf of your client?
MS. DAY: No I don't, Your Honor.
THE COURT: Very well. The Court at this time will accept your plea as being freely and voluntarily given, will withhold a finding of guilt for a period of sixty days, within which time you are not to violate any local, state or federal ordinances. You are not going to be placed under rules and conditions of probation, however, you must understand that during this sixty day period your behavior will be closely scrutinized and should anything come before this Court or any information come before this Court then you stand potentially liable to have to serve the entire or be eligible for the entire offense, whatever, it is as far as the penalty. Do you understand what I'm saying?
MR. PRUDOM: Yes, sir.
THE COURT: In this regard under this probationary period, you are to report to this Court on July the 5th -- at the end of this probationary period on July the 5th at 10:30. If everything is satisfactory this matter will be dismissed, expunged and costs will be assessed to the City. Is that your understanding?
MR. PRUDOM: Yes, sir.

Ex B. to Defendants' Summary Judgment Motion (Docket No. 8). As directed, Prudom appeared again before the Tulsa Municipal Court on July 5, 1995 and the following transpired:

MS. DAY: I'm here on behalf of Kenneth Ray Prudom. We're here for review this morning.
THE COURT: Come on up. Prudom, P-r-u-d-o-m?
MR. PRUDOM: Yes, sir.
THE COURT: 1317907, Failure to Yield. This was a sixty day continued it looks like. No, deferred. Show it dismissed, expunged, costs to the City. Well, you can't beat a deal like that I guess.
MS. DAY: Thank you, Your Honor. May we be excused?
THE COURT: Yes. You are quite a plea bargainer.

Ex. C. to Defendants' Summary Judgment Motion (Docket No. 8). Accordingly, on July 5, 1995, the municipal court dismissed and expunged the charge of failure to yield with costs assessed to the city.

On February 14, 1996, Prudom filed his original petition in Tulsa County court stating negligence claims against Upton and Tulsa, and malicious prosecution claims against Tulsa, Breashears, Reynolds and Upton under Oklahoma's Governmental Tort Claims Act ("GTCA"). 51 O.S. §152 *et seq.* Defendant Tulsa on March 7, 1996 moved to dismiss on the ground that Prudom's action was barred by the statute of limitations provision of the GTCA, 51 O.S. §157(B), which required Prudom to file suit within 180 days of the denial of his notice of claim.² The individual officers, Upton, Breashears and Reynolds, also filed motions to dismiss based on 51 O.S. §163(C) asserting that they were acting within the scope of their employment for Tulsa at the time of the acts complained of in Prudom's petition, and thus could not be named as defendants.³ In his motion to amend, Prudom stipulated that the "statute of limitations has

²Prudom, through his counsel, filed a notice of tort claim letter with Tulsa on March 29, 1995. His claim was denied by operation of law ninety days later on June 27, 1995 pursuant to 51 OS §157(A). Thus, the 180-day statute of limitations began to run as of June 27, 1995.

³Section 163(C) of the GTCA states in pertinent part the following:
Suits instituted pursuant to the provisions of this act shall name as defendant the state or the political subdivision against which liability is sought to be established. In no instance shall an employee of the state or political subdivision acting within

expired under the Governmental Tort Claims Act,” but sought leave to amend his petition to allege “ a claim of action for constitutional violations.” The state court granted Prudom leave to amend his petition, which was amended on May 16, 1996 to allege claims under 42 U.S.C. §1983 based on negligence against Upton and Tulsa, and on malicious prosecution and intentional infliction of emotional distress against Upton, Breashears, Reynolds and Tulsa. Based on the amended petition, defendants removed the action to this Court on June 4, 1996 and filed the instant motion to dismiss, or in the alternative, motion for summary judgment.

B. Analysis

The issues before the Court on summary judgment are the following: (1) whether Upton is entitled to qualified immunity from Prudom’s constitutional claim based on Upton’s operation of his police vehicle; (2) whether Upton, Breashears and Reynolds are entitled to qualified immunity from Prudom’s constitutional claim based on malicious prosecution and intentional infliction of emotional distress; (3) whether Tulsa is liable under §1983 for the acts of its police officers, Upton, Breashears and Reynolds.

The standard of the Court’s review of a qualified immunity defense is set forth in *Romero v. Fay*, 45 F.3d 1472, 1475 (10th Cir. 1995):

“To reach the question of whether a defendant official is entitled to qualified immunity, a court must first ascertain whether the plaintiff has sufficiently asserted the violation of a constitutional right at all.” This requires the district court to “first determine whether plaintiff’s allegations, if true, state a claim for a violation of a constitutional right that was clearly established when defendant acted” In order to carry his burden, . . . the plaintiff must articulate the clearly established constitutional right and the defendant’s conduct which violated the right with specificity, and “demonstrate a ‘substantial correspondence between the conduct in question and prior law . . . establishing that the defendant’s actions were clearly

the scope of his employment be named as defendant . . .

prohibited.” “Unless such a showing is made, the defendant prevails.” “Once the plaintiff has sufficiently alleged the conduct violated clearly established law, then the defendant bears the burden, as a movant for summary judgment, of showing no material issues of fact remain that would defeat the claim of qualified immunity.”

Thus, the Court’s first inquiry is whether, taking the allegations in the Amended Petition as true, Prudom has met his burden in sufficiently asserting the violation of a constitutional right. If Prudom’s allegations state a claim of violation of clearly established constitutional law, then the defendant police officers are entitled to summary judgment on their qualified immunity defense “if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Should the Court reach summary judgment review, the Court must construe the evidence and inferences therefrom in a light most favorable to Prudom. *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992). As noted above, the parties agree that discovery is complete on the defense of qualified immunity.

1. Prudom’s constitutional claim against Defendant Upton based on Upton’s operation of the police vehicle

In evaluating Prudom’s constitutional claim based on Upton’s negligent operation of a police vehicle, the Court is mindful that “[t]he Supreme Court has repeatedly warned that section 1983 must not be used to duplicate state tort law on the federal level.” *Medina v. City and County of Denver*, 960 F.2d 1493, 1495 (quoting *Washington v. District of Columbia*, 802 F.2d 1478, 1480 (D.C.Cir. 1986)). The Fourteenth Amendment is not “a font of tort law to be superimposed upon whatever systems may already be administered by the States.” *Paul v. Davis*, 424 U.S. 693, 701 (1976). In his Amended Petition, Prudom alleges that Upton’s negligent operation of a police vehicle violated some unidentified constitutional right. However, it is clearly

established that negligence does not rise to the level of a constitutional violation. *Daniels v. Williams*, 474 U.S. 327, 333 (1986); *Webber v. Mefford*, 43 F.3d 1340, 1343 (10th Cir. 1994); *Apodaca v. Rio Arriba County Sheriff's Dep't*, 905 F.2d 1445, 1446-47 (10th Cir. 1990); *Archuleta v. McShan*, 897 F.2d 495, 496-97 (10th Cir. 1990). Thus, taking the allegations as true, the Court finds that Prudom has failed his burden of identifying a constitutional violation in his Amended Petition. *Romero*, 45 F.3d at 1481 (defendant entitled to qualified immunity on plaintiff's §1983 malicious prosecution claim as plaintiff failed to allege a violation of a federal constitutional right).

Although Prudom failed to state a constitutional claim in his Amended Petition, Prudom argues on summary judgment that Upton's conduct was not merely negligent or grossly negligent, but was reckless, deliberate and directed toward Prudom; and thus, under *Medina v. City and County of Denver*, 960 F.2d 1493 (10th Cir. 1992), *Archuleta v. McShan*, 897 F.2d 495 (10th Cir. 1990) and *Williams v. Denver*, 99 F.2d 1009 (10th Cir. 1996), Prudom's substantive due process rights have been violated. The Court disagrees.

To establish actionable conduct under 42 U.S.C. §1983, Prudom must demonstrate that: (1) he was a member of a limited and a specifically definable group; (2) Upton's conduct put him and other members of that group at substantial risk of serious, immediate and proximate harm; (3) the risk was obvious or known; (4) Upton acted recklessly in conscious disregard of that risk; and (5) such conduct, when viewed in total, "shocks the conscience." *Medina*, 960 F.2d at 1496; *Uhlrig v. Harder*, 64 F.3d 567, 573-576 (10th Cir. 1995); *Williams*, 99 F.3d at 1014-15. Prudom argues that (1) he was within the limited class of drivers on a public road; (2) Upton's operating his vehicle at an excessive speed without his siren or emergency lights while traveling in

a residential and business area posed a substantial risk of serious, immediate and proximate harm to fellow drivers; (3) it was obvious that drivers would be turning into and out of East Pine Avenue; (4) Upton acted recklessly in conscious disregard of the risk to other drivers; and (5) such conduct is similar to that considered by the Tenth Circuit in *Williams* to “shock the conscience.”

In *Williams*,⁴ a police officer, Officer Farr (“Farr”), was responding to a non-emergency request by another officer to back up the arrest of a car thief when he broadsided Randy Bartel’s vehicle, killing Bartel. *Id.* at 1012. At the time of the accident, Farr was driving down a major Denver boulevard at 60 m.p.h. in a 35 m.p.h. zone, had activated his emergency lights but not his siren, and ran a red light without slowing down. *Id.* Farr hit Bartel as Bartel was proceeding into the intersection on a green light at no more than 20 m.p.h. *Id.*

When Farr applied for a position with the Denver Police Department, his license had been revoked three times and he had four convictions for speeding. *Id.* The executive director of the Denver Civil Service Commission strongly recommended that Farr not be hired because of his driving record and “he was an accident waiting to happen.” *Id.* The psychological report requested by the City stated that Farr “may show a serious behavioral or emotional adjustment disorder” and “strongly recommended that follow-up testing and interviewing be conducted in order to determine the significance and range of these difficulties.” *Id.* And although the report noted that Farr showed “a significant history and/or pattern of motor vehicle infractions and driving difficulties . . . [which was] likely to included moving violations, automobile accidents, and in some cases, driving while under the influence of drugs or alcohol,” the City conducted no

⁴At the time of this decision, a rehearing had been granted in *Williams*.

further investigation or testing of Farr, nor did the City provide him with special or remedial driving training. *Id.* Farr had nine incidents of unacceptable driving during regular training and prior to the accident with Bartel, he had received a written reprimand for an accident which resulted from his making a U-turn into oncoming traffic without using his siren or emergency lights. *Id.*

Because the district court relied on *Apodaca* in concluding as a matter of law that such conduct did not rise to a constitutional violation, the Tenth Circuit distinguished the two cases.

In *Apodaca*, the fatal collision occurred when a deputy sheriff responded to a silent burglar alarm by speeding around a blind curve at 55-65 m.p.h. in a 35 m.p.h. zone after midnight when it had been raining and sleeting. The officer, who was not using his siren or flashing lights, rounded the curve and struck the decedent's car broadside as she was making a left turn out of a restaurant parking lot. We held the allegations that the officer was driving too fast for road and visibility conditions to be grounded in negligence. *Apodaca* should not be interpreted as holding that every law enforcement officer who drives too fast for the road and the weather without his flashing lights and siren is merely negligent. The presence of additional or distinguishing factors can clearly elevate such conduct from merely negligent to unconstitutionally reckless and conscience-shocking.

Id. at 1015-16 (citations omitted). The circuit court then cited the distinguishing factors:

First, although the officer in *Apodaca* was speeding, he had the right-of-way when he collided with the decedent turning left out of a parking lot. Here, to the contrary, Officer Farr sped into the intersection against the light without reducing his speed and without the warning sound of his siren. An officer who speeds through a red light without his or her siren decidedly disregards a much more obvious risk of serious harm than does a speeding officer who has the right-of-way. Moreover, here Officer Farr was driving in violation of both state law and Department requirements governing emergency driving. While certainly not dispositive of the constitutional issue, this fact is relevant to whether his conduct could be characterized as conscience-shocking. Second, the officer in *Apodaca* was responding to a burglary in progress, whereas Officer Farr had been requested on a non-emergency basis to back up the arrest of a suspected car thief who was hiding in the car in a parking lot. Third, the record of Officer Farr's prior driving history supports the inference that he was a scofflaw who deliberately operated his vehicle in a manner that imperiled the lives of those in his path. No such evidence

appears in *Apodaca*.

Id. at 1016.

Not surprisingly, both plaintiff and defendants cite *Williams* in support of their opposing positions. Such is less an affect of litigation than an effect of the application of the subjective “shock the conscience” standard. As noted by the Tenth Circuit in *Uhrig*,

[t]he level of conduct required to satisfy this additional requirement cannot precisely be defined, but must necessarily evolve over time from judgment as to the constitutionality of specific government conduct. We do know, however, that the “shock the conscience” standard requires a high level of outrageousness because the Supreme Court has specifically admonished that a substantive due process violation requires more than an ordinary tort and that merely allowing unreasonable risks to persist . . . is not necessarily conscience shocking.

Uhrig, 64 F.3d at 574. In other words, conduct which “shocks the conscience” is conduct so outrageous it shocks the conscience. Such circular reasoning offers no guidance and more likely spawns subjective, idiosyncratic decisions than evolved judgment. That said, applying the three “distinguishing factors” in *Williams*, the Court concludes that Upton’s conduct is not “conscience shocking.” Like the police officer in *Apodaca*, Upton had the right-of-way when he collided with Prudom and there was no evidence of prior history of operating his vehicle “in a manner that imperiled the lives of those in his path.” *Williams*, 99 F.3d. at 1016. Upton claimed that he was responding to an Emergency 911 call at the time of the accident. The only evidence offered by Prudom to controvert Upton’s claim is the fact that there is no record of the emergency call. Even viewing this factor in a light most favorable to Prudom, the facts in this case more closely parallel those in *Apodaca* than in *Williams*.

Further, the Court concludes that Upton’s conduct was negligent, not reckless in a constitutional context, and for that reason does not rise to the level of a constitutional violation.

Reckless conduct, unlike the non-intentional torts of negligence or gross negligence, “includes an element of deliberateness - a conscious acceptance of a known, serious risk.” *Archuleta*, 897 F.2d at 499. “[R]ecklessness is generally regarded as satisfying the scienter requirement of section 1983 because it requires proof that the defendant focused upon the risk of unconstitutional conduct and deliberately assumed or acquiesced in such risk.” *Woodward v. City of Worland*, 977 F.2d 1392, 1399 n.11 (10th Cir. 1992). Prudom accurately characterized Upton’s conduct as negligent in his Amended Complaint: Upton was driving too fast in a residential and business area without emergency lights or siren. The allegations sound in tort, not in constitutional violation. A §1983 claim is not created simply because Prudom failed to pursue his available tort remedy by filing suit within the 180 days allowed under Oklahoma’s GTCA. *See Daniels v. Williams*, 474 U.S. 327, 342 (1986)(STEVENS, J. concurring).

In sum, Prudom has failed to allege a violation of his substantive due process rights based on Upton’s operation of his police vehicle because he cannot demonstrate that Upton acted recklessly or in a manner which “shocks the conscience.” Thus, Upton is entitled to qualified immunity on this claim.

2. Prudom’s constitutional claim against the individual defendants based on malicious prosecution and intentional infliction of emotional distress

Prudom also fails his burden to identify a constitutional violation based on defendants’ alleged malicious prosecution of his traffic citation. Prudom incorrectly alleges that defendants Upton, Breashears and Reynolds deprived him of substantive due process under the Fourteenth Amendment by citing him for failure to yield to right of way, which citation set in motion a malicious prosecution. The United States Supreme Court has held that a claim to be free from prosecution except on the basis of probable cause does not arise from any substantive due process

right, but rather, the Court suggests, such claim is grounded in the Fourth Amendment. *Albright v. Oliver*, 510 U.S. 266, 271-74 (1994)(plurality opinion affirming the dismissal of a §1983 claim based on malicious prosecution because plaintiff relied on a violation of substantive due process and not the Fourth Amendment). Under *Albright*, Prudom's failure to allege a violation of the Fourth rather than the Fourteenth Amendment mandates dismissal for failure to state a claim. *Id.* ("In view of our disposition of this case, it is evident that substantive due process may not furnish the constitutional peg on which to hang such a 'tort'"); *Romero*, 45 F.3d at 1481; *Taylor v. Meacham*, 82 F.3d 1556, 1560 (10th Cir. 1996) (although plaintiff alleged violation of the Fourth, Fifth and Fourteenth Amendments as the constitutional basis of his wrongful arrest and malicious prosecution claims, in light of *Albright*, we "address [plaintiff's] claim only in a Fourth Amendment context").

Even if Prudom had alleged the proper constitutional basis of his §1983 malicious prosecution claim to escape a Rule 12(b)(6) dismissal, the Court concludes that he has not established any violation of the Fourth Amendment to defeat summary judgment. As observed by the Supreme Court in *Albright*, while there is "an embarrassing diversity of judicial opinion" on the extent to which a malicious prosecution claim is actionable under §1983, "[m]ost of the lower courts recognize some form of malicious prosecution action under §1983." *Albright*, 510 U.S. at 270 n.4; *Taylor*, 82 F.3d at 1560. The Tenth Circuit has recognized the viability of both malicious prosecution and wrongful arrest claims under §1983. *Taylor*, 82 F.3d at 1560. In *Taylor*, the Tenth Circuit reviewed the history of its inconsistent decisions concerning the relationship of a malicious prosecution claim under the common law and under §1983 and concluded that

our circuit takes the common law elements of malicious prosecution as the “starting point” for the analysis of a §1983 malicious prosecution claim, but always reaches the ultimate question, which it must, of whether the plaintiff has proven a constitutional violation. Following Albright, in the §1983 malicious prosecution context, that constitutional right is the Fourth Amendment’s right to be free from unreasonable seizures.

Id. at 1561. Thus, while the common law elements of malicious prosecution provide guidance for the analysis of a §1983 claim, the failure of one of those elements does not preclude this Court’s inquiry as to whether a constitutional violation occurred.

The elements of the tort of malicious prosecution under Oklahoma law are as follows:

“(1) the bringing of the original action by the defendant; (2) its successful termination in favor of the plaintiff; (3) want of probable cause to bring the action; and (4) malice; and (5) damages.”

Parker v. City of Midwest City, 850 P.2d 1065, 1067 (Okla. 1993). Prudom alleges that Breashears’ decision to issue the citation to Prudom, Reynolds’ subsequent approval of the police report and Upton’s collusion in its issuance were without probable cause, with malice, and caused damage to Prudom’s person and property. Prudom contends that the evidence is undisputed that at the time of the accident Upton was in violation of Oklahoma emergency vehicle statutes and Tulsa Police Department Policy for failing to turn on his emergency lights and siren when he was violating the “rules of the road” by exceeding the posted speed limit. Thus, there was no probable cause for citing Prudom for the accident.

Defendants argue that Prudom cannot establish a malicious prosecution tort claim under Oklahoma law because it is undisputed that he entered into a plea bargain with the City Prosecutor. Defendants cite *Young v. First State Bank, Watonga*, 628 P.2d 710 (Okla. 1981); *First State Bank v. Denton*, 82 Okla. 137, 198 P. 874 (1921); and *Meyers v. Kruger*, 759 F.Supp. 770, 772-73 (E.D. Okla. 1990) for the proposition that “[w]here the termination is

pursuant to a settlement, the action for malicious prosecution is barred because either the settlement is an admission of probable cause for the initiation of the prosecution, or because it would be unfair to allow a person to consent to a termination and then take advantage of it.” *Young*, 628 P.2d at 710. Defendants thus urge that Prudom bargained away his right to bring a malicious prosecution claim when he entered a plea of no contest to the charge of failure to yield/left turn.

While it is clear under Oklahoma law that Prudom’s entry of a no contest plea bars a malicious prosecution claim based on the same charge, this is a §1983 claim, not a state tort claim. The Court therefore looks to federal law to determine whether Prudom’s plea of no contest to the traffic citation “conclusively settles the question of probable cause” in a §1983 malicious prosecution claim. *Howard v. Dickerson*, 34 F.3d 978, 981 n.2 (10th Cir. 1994).

In false arrest cases (which are similar to malicious prosecution cases in that both require proof of no probable cause), federal law borrows from state common law on the issue of whether a subsequent conviction bars a §1983 claim of false arrest. Although not specifically reached by the Tenth Circuit in *Howard v. Dickerson*, a case involving a false arrest claim, the Tenth Circuit Court noted that “a conviction represents a defense to a §1983 action asserting arrest without probable cause,” citing *Cameron v. Fogarty*, 806 F.2d 380, 388-89 (2d Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987) and *Malady v. Crunk*, 902 F.2d 10, 11-12 (8th Cir. 1990). The cited decisions conclude that “long-established common-law principles” which bar a false arrest claim upon subsequent conviction of the charge are applicable to a claim under §1983:

[T]he common-law rule . . . was and is that the plaintiff can under no circumstances recover if he [or she] was convicted of the offense for which he [or she] was arrested. . . . This rule “represents the compromise between two conflicting interests of the highest order -- the interest in personal liberty and the

interest in apprehension of criminals,” and constitutes a refusal as a matter of principle to permit any inference that the arrest of a person thereafter adjudged guilty had no reasonable basis. . . .

. . . . [W]e conclude that the proper accommodation between the individual’s interest in preventing unwarranted intrusions into his [or her] liberty and society’s interest in encouraging the apprehension of criminals requires that §1983 doctrine be deemed, in the absence of any indication that Congress intended otherwise, to incorporate the common-law principle that, where law enforcement officers have made an arrest, the resulting conviction is a defense to a §1983 action asserting that the arrest was made without probable cause.

Malady, 902 F.2d at 11 (quoting *Cameron v. Fogarty*, 806 F.2d 380, 387-89 (2d Cir. 1986).

Because both claims turn on the existence of probable cause, the Court sees no reason to distinguish §1983 claims based on malicious prosecution from those based on false arrest, and thus concludes that a conviction on the underlying charge bars a malicious prosecution claim based on the same charge.⁵ *Cf. Coogan v. City of Wixom*, 820 F.2d 170 (6th Cir. 1987) (finding §1983 claim for malicious prosecution collaterally estopped where plaintiff had contested

⁵The Court notes that Prudom’s §1983 claim may be more properly identified as one based on false arrest than on malicious prosecution. Although Prudom was not “arrested,” he was arguably “seized” when he was issued a citation requiring him to pay a fine or appear before the Tulsa Municipal Court. *Albright*, 510 U.S. at 278 (“A person facing serious criminal charges is hardly freed from the state’s control upon his release from a police officer’s physical grip. He is required to appear in court at the state’s command.”) (J. Ginsburg, concurring); *Taylor*, 82 F.3d at 1561 n.5 (“Justice Ginsburg’s concurrence suggest a theory under which a person is effectively “seized” for constitutional purposes as long as a prosecution is pending.”). While it is true that the filing of a properly endorsed citation/information commences criminal prosecution on the cited charge, such does not mandate proceeding on a malicious prosecution theory. In fact, reliance on this theory is questionable given the absolute immunity of the prosecutor. As noted by Justice Ginsburg,

The principal player in carrying out a prosecution . . . is not police officer but prosecutor. Prosecutors, however, have absolute immunity for their conduct. Under *Albright*’s [malicious prosecution theory], the star player is exonerated, but the supporting actor is not. In fact, *Albright*’s theory might succeed in exonerating the supporting actor as well. By focusing on the police officer’s role in initiating and pursuing a criminal prosecution, rather than his role in effectuating and maintaining a seizure, *Albright*’s theory raises serious questions about whether the police officer would be entitled to share the prosecutor’s absolute immunity.

Albright, 510 U.S. at 279 n.5 (J. Ginsburg, concurring)(citations omitted). Thus, while a citation/arrest without probable cause may set in motion a malicious prosecution, the “chain of causation” is broken by the prosecutor’s endorsement of the citation, “absent an allegation of pressure or influence exerted by the police officers, or knowing misstatements made by the officers to the prosecutors.” *Taylor*, 82 F.3d at 1564.

probable cause issue at state court preliminary hearing).

The Court also concludes that an underlying “conviction” includes a plea of no contest or nolo contendere to the charge. *Howard*, 34 F.3d at 981 n.2 (noting that New Mexico defines “conviction” to include pleas of nolo contendere). Section 513, Okla Stat. tit. 22 states that “[t]he legal effect of [a nolo contendere] plea shall be the same as that of a plea of guilty, but the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based.” *See also* 12 O.S. §2410. In *Irwin v. SWO Acquisition Corp.*, 830 P.2d 587 (Okla.App.Ct. 1992), the Oklahoma Court of Appeals considered whether a nolo contendere plea to a larceny of merchandise charge was a defense to plaintiff’s claim of false arrest. In holding that it is, the Oklahoma Court of Appeals adopted the rationale set forth in *Walker v. Schaeffer*, 854 F.2d 138 (6th Cir. 1988), a case involving a §1983 claim of false arrest, wherein the Sixth Circuit held that plaintiffs’ nolo contendere pleas entered in state court estopped plaintiffs “from asserting in federal court that the defendant police officers acted without probable cause.” *Id.* at 142. The *Irwin* and *Walker* courts also held that

We do not consider our conclusion to be barred by Fed.R.Evid. 410,⁶ which provides that evidence of “a plea of nolo contendere” is not, “in any civil or criminal proceeding, admissible against the defendant who made the plea.” This case does not present the kind of situation contemplated by Rule 410: the use of a nolo contendere plea against the pleader in a subsequent civil or criminal action in which he is the defendant.

* * * *

We find a material difference between using the nolo contendere plea to subject a former criminal defendant to subsequent civil or criminal liability and using the plea as a defense against those submitting a plea interpreted to be an admission which

⁶The *Irwin* court noted that 12 O.S. §2410 is “virtually identical with Fed.R.Evid. 410.” *Irwin*, 830 P.2d at 590.

would preclude liability. Rule 410 was intended to protect a criminal defendant's use of the nolo contendere plea to defend himself from future civil liability. We decline to interpret the rule so as to allow the former defendants to use the plea offensively, in order to obtain damages, after having admitted facts which would indicate no civil liability on the part of the arresting police.

Id. at 143. Accordingly, even if Prudom's §1983 malicious prosecution claim survived defendants' 12(b)(6) motion, defendants Upton, Breashears and Reynolds are entitled to summary judgment on this claim based on Prudom's plea of no contest to the traffic citation.⁷

As Prudom's §1983 intentional infliction claim is based on the same conduct alleged in his malicious prosecution claim, that claim also fails.

3. Tulsa's liability for the acts of its police officers Upton, Breashears and Reynolds

Prudom's claims against Tulsa are based on the acts of its police officers Upton, Breashears and Reynolds. Because the Court finds no constitutional violation on the part of Upton, Breashears and Reynolds, there can be no §1983 claim against Tulsa. *Taylor*, 82 F.3d at 1564; *Webber*, 43 F.3d at 1344-45; *Apodaca*, 905 F.2d at 1447-48.

C. Conclusion

In accordance with above, the Court grants the motion for summary judgment filed by defendants City of Tulsa, Tulsa Police Department, Officer Gary Upton, Officer L.C. Breashears and Cpl. R.C. Reynolds. (Docket No. 7).

⁷The Court is not persuaded by Prudom's argument that his no contest plea does not bar a §1983 malicious prosecution claim because the municipal court ultimately dismissed and expunged the charge and assessed costs to the city. The ultimate dismissal and expungement of the charge was a bargained exchange for Prudom's no contest plea and his good behavior during the "probationary period" from May 4 to July 5, 1995. It is undisputed that Prudom entered a nolo contendere plea to the charge and it is that act which estops him from now claiming that the citation was issued without probable cause. *Walker*, 854 F.2d at 142.

ORDERED this 6th day of June, 1997.



THOMAS R. BRETT
UNITED STATES DISTRICT COURT

RECORDED ON DOCKET

6-9-97

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

VALERIE COMAN,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

)
)
)
)
)
)
)
)
)
)

No. 97-C-118-K ✓

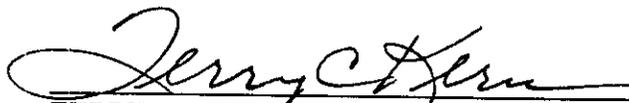
FILED
JUN 06 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

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

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. 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 5 day of June, 1997.


TERRY C. KEEN, Chief
UNITED STATES DISTRICT JUDGE

DATE 6-9-97

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

FILED

HAROLD D. BROSETTE,)
)
Plaintiff,)
)
v.)
)
JOHN J. CALLAHAN, Acting)
Commissioner of the Social Security)
Administration,)
)
Defendant.)

JUN 05 1997

U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CASE NO. 96-cv-952-M

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 5th day of June, 1997.


 FRANK H. McCARTHY
 UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET
6-9-97

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

WILLIAM D. CARPENTER)
Plaintiff,)
vs.)
ROBIN FAGALA, et al.,)
Defendants.)

No. 97-CV-66-K

FILED

JUN 06 1997

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

REPORT AND RECOMMENDATION

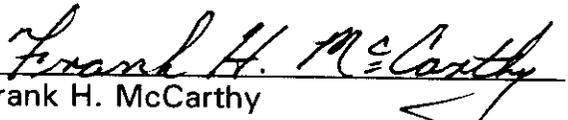
On April 29, 1997, the Court entered an order construing Plaintiff's "Response to U.S. Magistrate Judges Order to Cure Deficiency [sic] And Supplemental Information To Motion To Proceed In Forma Pauperis" [Dkt. 5] as a motion to amend. The Court granted the motion and directed Plaintiff to submit his civil rights complaint on the appropriate form on or before the 30th day of May, 1997. He was advised that each defendant must be individually named and that the use of *et al.* in the complaint is not appropriate. Plaintiff was further advised that failure to comply with the order within the time specified may result in dismissal of his action.

The May 30, 1997 deadline has passed. As of the date of this order Plaintiff has not filed the documents required by the April 29, 1997 order. The undersigned United States Magistrate Judge therefore recommends that Plaintiff's action be DISMISSED, without prejudice, for failure to prosecute.

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

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

DATED this 6th day of June, 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

MANUFACTURED HOUSING)
ASSOCIATION OF OKLAHOMA,)
JOHN L. HAYNES, and BYRON)
GIBSON INVESTMENT CO., d/b/a)
DESIGNER HOMES,)
Plaintiffs,)

vs.)

CITY OF JAY, OKLAHOMA, a)
municipal corporation; BILL)
ROBERTS, Mayor; RON ROGERS,)
Councilman; LEFTY MELTON,)
Councilman; MELVINA SHOTPOUCH,)
Councilwoman; WAYNE DUNHAM,)
Councilman; all individuals)
in their official capacities;)
CITY OF JAY, OKLAHOMA PLANNING)
AND ZONING BOARD; DALE DENNEY,)
Chairman; DAN PRICE, Board)
Member; MARK GOELLER, Board)
Member; LEROY HENDREN, Board)
Member; LEFTY MELTON, Board)
Member; all individuals in)
their official capacities,)
Defendants.)

Case No. 97-C-269-BU

FILED

JUN 5 - 1997

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

ENTERED ON BOOKET

DATE JUN 09 1997

ORDER

This matter comes before the Court upon the Zoning Board's Motion to Dismiss and the Individual Defendants' Motion to Dismiss. Plaintiffs have responded to the motion and upon due consideration of the parties' submissions and the applicable law, the Court makes its determination.

At the outset, the Court deems the Zoning Board's motion confessed pursuant to Local Rule 7.1(C). While Plaintiffs responded to the Individual Defendants' motion, they failed to file a response to the Zoning Board's motion and failed to request an

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extension of time to respond to the motion.

In its motion, the Zoning Board asserts that it does not have the capacity to be sued because it is a non-independent entity affiliated with the City of Jay, Oklahoma. The Court agrees. The Court takes judicial notice of the City Charter of the City of Jay, Oklahoma and Ordinance 184. Zimomra v. Alamo Rent-A-Car, Inc., 111 F.3d 1495, 1503-1504 (10thCir.1997). From these documents, the Court concludes that the Zoning Board's function is primarily advisory and that the city council for the City of Jay, Oklahoma is the ultimate decisionmaker in regard to any subject matter tending to the development and betterment of the City of Jay, Oklahoma.

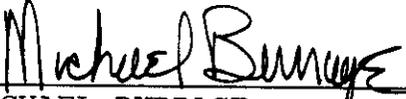
As to the Individual Defendants' motion, Plaintiffs have conceded that they have sued the board members of the Zoning Board and the councilmen and councilwoman of the City of Jay, Oklahoma, in their official capacities only. Indeed, paragraphs 5 and 6 of the Complaint alleges that they have been sued in their official capacities. It is well-established that when a governmental official is sued in his official capacity, the official has no stake, as an individual, in the outcome of the litigation. An official capacity suit is only another way of pleading an action against an entity of which the officer is an agent. Kentucky v. Graham, 473 U.S. 159, 165, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 (1985). Because the Zoning Board is not a proper party to this action as it lacks the capacity to be sued and this suit which is brought against the board members in their official capacities is in all respects a suit against the Zoning Board of which they are

agents, the Court finds that dismissal of the board members is warranted.

The Court also finds that dismissal of the councilmen and councilwoman of City of Jay, Oklahoma is appropriate. The City of Jay, Oklahoma has been named as a defendant in this action. The action against the councilmen and councilwoman in their official capacities is an action against the City of Jay, Oklahoma. Id. With the City of Jay, Oklahoma being a defendant in this suit, the presence of the councilmen and councilwoman in their official capacities in this proceeding is redundant. The Court therefore concludes that they should be dismissed.¹

Accordingly, the Zoning Board's Motion to Dismiss (Docket Entry #5) and the Individual Defendants' Motion to Dismiss (Docket Entry #4) are GRANTED. The City of Jay, Oklahoma, a municipal corporation, shall remain the only defendant in this proceeding.

ENTERED this 4 day of June, 1997.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

¹ In reaching its decision, the Court need not address the defense of qualified immunity. The defense of qualified immunity applies to governmental officials sued in their individual capacities. Moore v. City of Wynnewood, 57 F.3d 924, 929 n.4 (10th Cir. 1995). As noted, the board members of the Zoning Board and the councilmen and councilwoman of the City of Jay, Oklahoma have been sued in their official capacities.

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

FILED

JUN 5 - 1997

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

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

Case No. 96-CV-1014-BU ✓

ENTERED ON DOCKET
DATE 6-6-97

ORDER

Before the Court for consideration is the Joint Stipulation of Dismissal with Prejudice, filed by the parties. For good cause shown,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above-captioned matter is dismissed with prejudice. The parties are responsible for their own attorneys' fees.



DISTRICT COURT JUDGE

13

ENTERED ON DOCKET
DATE 6-6-97

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

FILED

JUN 04 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-C-611K

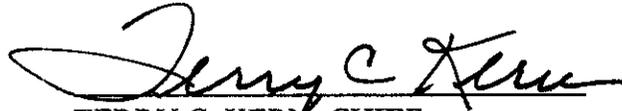
GRANVILLE P. WILCOX,)
an individual,)
)
Plaintiff,)
)
vs.)
)
THE CITY OF CLEVELAND, OKLA.,)
)
Defendant.)

JUDGMENT

This matter came before the Court for consideration of the Defendant the City of Cleveland, Oklahoma's Motion for Summary Judgment pursuant to *Fed. R.Civ. P.* 56. The issues having been duly considered and a decision having been rendered in accordance with the Order filed on June 3, 1997, the Court finds summary judgment is appropriate in favor of Defendant the City of Cleveland, Oklahoma.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the City of Cleveland, Oklahoma and against the Plaintiff.

ORDERED this 3 day of June, 1997.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

GRANVILLE P. WILCOX,)
 an individual,)
)
 Plaintiff,)
)
 vs.)
)
 THE CITY OF CLEVELAND, OKLA.,)
)
 Defendant.)

FILED

JUN 04 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-C-611K

ORDER

Before the Court is the Defendant's Motion for Summary Judgment. Plaintiff has brought this cause of action seeking relief for alleged violations of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*

I. Statement of Facts

The Plaintiff, Granville Wilcox was terminated from his position as fire chief of the City of Cleveland, Oklahoma ("the City" or "Cleveland") on April 4, 1995. At the time of his termination, the Plaintiff was 48 years old, and had been employed by the City's fire department for approximately 20 years. At the time of his termination, the Plaintiff had held the position of fire chief for approximately one year. In August of 1994, Eric Kuykendall was hired as City Manager for Cleveland. Prior to that time, Kuykendall served as City Manager for the City of Tishomingo, Oklahoma. Pursuant to the *Charter of the City of Cleveland* §§ 2.4, 2.5, 3.1, and 3.2, the city manager is authorized to terminate any city employee "when necessary for the good of the service," and the city council is prohibited from interfering with those decisions.

At the time Plaintiff was appointed fire chief, the City's fire department consisted of six

employees: Plaintiff, Vernon Maxwell, Butch Buchanan, Jo Berger, James Mitchell, and Robert Page. Additionally, a group of volunteer firefighters could be utilized if necessary. Among these volunteer firefighters was Kenny Beatty.

In December, 1994, firefighters Jo Berger and Butch Buchanan, and volunteer firefighter Kenny Beatty delivered written complaints concerning the Plaintiff to Kuykendall. Among other complaints, firefighter Berger complained that Wilcox's alleged practice of criticizing employees in front of other employees was hurting morale. Kenny Beatty's letter confirmed Berger's complaint. Firefighter Buchanan also complained that morale was at an all time low, and that the Plaintiff was not making fair or consistent decisions regarding personnel assignments. As a result of these complaints, Kuykendall met with Plaintiff in January, 1995, and advised him of the complaints. Kuykendall gave copies of the letters to the Plaintiff and informed him that at least two fire department employees were ready to leave because of Plaintiff. Plaintiff felt that the complaints were unwarranted, and did nothing different with regard to his relationship with the firefighters. Kuykendall instructed Plaintiff to raise morale, and gave him 60 days to make some improvements. Subsequently, Kuykendall met with fire department personnel to discuss morale and possible shift schedule changes. He informed the Plaintiff on February 28, 1995 that he had met with the employees, that 60 days had passed since the original complaints were submitted, and that Kuykendall intended to survey the fire department again on April 3 to determine if Plaintiff had implemented changes to improve morale. On April 3, 1995, a survey questionnaire was distributed to the fire department personnel, and the results were compiled. Kuykendall determined from the survey results that 80% of the department personnel were unhappy with their situations in the department; however, 100% of the fire department employees indicated that the Plaintiff made "no further offensive comments" during the

60-day period, and 40% believed that the Plaintiff had the ability/authority to alter the situation for the good of the City and themselves.

On April 4, 1995, Kuykendall informed the Plaintiff that he was terminated "for the good of the service" effective that day. After Plaintiff's termination, Vernon Maxwell, who was older than the Plaintiff, served as interim fire chief. Eventually Mr. Maxwell was also terminated by Kuykendall. Bruce Anthony, age 34, was ultimately hired to replace Plaintiff as fire chief.

Mr. Kuykendall was terminated by the City of Cleveland in March, 1996. During his tenure as city manager of Cleveland, Kuykendall terminated three employees over the age of 40: Plaintiff, C. Wayne Johnson, age 47, and Vernon Maxwell, age 51. Kuykendall also terminated two employees under the age of 40: Shawn Price, age 25, and Mike Randall, age 39. Kuykendall submitted in his affidavit, legitimate, non-discriminatory reasons in support of each of these terminations. Additionally, Kuykendall hired persons as city employees who were over 40 years of age, as well as persons who were under 40 years of age. The ages of persons hired ranged from 24 to 72. At his prior employment as City Manager for the City of Tishomingo, Kuykendall terminated three city employees who were over the age of 40.

II. Summary Judgment Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P.* 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and

identify specific facts which demonstrate the existence of an issue to be tried by the jury. *Mares v. ConAgra Poultry Co., Inc.*, 971 F.2d 492, 494 (10th Cir. 1992). Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. *Thomas v. Internat'l Business Machines*, 48 F.3d 478, 485 (10th Cir. 1995).

III. Discussion

The ADEA prohibits employers from discharging individuals because of that individual's age. 29 U.S.C. § 623(a)(1). The protective provisions of the ADEA are limited to individuals who are at least 40 years of age. 29 U.S.C. § 631(a). To establish a claim for relief under the ADEA, the Plaintiff must prove that age was a determining factor in the employer's decision to terminate him. *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 557 (10th Cir. 1996). Although the Plaintiff is not required to show that age was the sole reason he was terminated, he must show that age made the difference in the employer's decision. *Id.* A plaintiff may meet this burden either through presenting direct or circumstantial evidence of age discrimination, or he may rely on the proof scheme for a *prima facie* case established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973) and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-56, 101 S.Ct. 1089, 1093-95, 67 L.Ed.2d 207 (1981). *Id.* at 557-58. In this case, the Plaintiff has chosen to pursue the *McDonnell Douglas/Burdine* approach.

To establish a *prima facie* case under the ADEA, the Plaintiff must prove that (1) he was within the protected age group; (2) he was doing satisfactory work; (3) he was discharged despite the adequacy of his work; and (4) he was replaced by a younger person. *Greene*, 98 F.3d at 558. For purposes of this motion, the Defendant concedes that the Plaintiff has established a *prima facie* case. Once the Plaintiff establishes a *prima facie* case, there is a presumption that the employer

unlawfully discriminated against the employee. *Id.* The burden then shifts to the employer to produce evidence that the adverse employment action took place for a legitimate non-discriminatory reason. *Greene*, 98 F.3d at 558. Here, the City of Cleveland asserts that the Plaintiff was terminated from his position as fire chief because he failed to improve morale within the fire department after being given three months to do so. The Court finds that the Defendant has met its burden of production, thus the presumption of discrimination is rebutted and drops from the case. *Id.* To survive summary judgment, the Plaintiff must put forth sufficient evidence to create a factual question as to whether the reasons stated by the Defendant were pretextual, and that the true reason for the Plaintiff's termination was age discrimination.

In support of his contention that the Defendant's stated reasons for the Plaintiff's termination were pretextual, the Plaintiff presented deposition testimony regarding the circumstances of Kuykendall's subsequent termination from Cleveland. The Court finds that this evidence merely suggests that Eric Kuykendall may have been prone to firing employees, but it presents no evidence whatsoever that anyone thought Kuykendall's termination decisions were in any way motivated by age bias. This evidence is thus irrelevant to the issue of pretext.

The Plaintiff submitted affidavits in support of three additional arguments. First, Plaintiff contends that Eric Kuykendall fired employees over the age of 40 both during his tenure at Cleveland, and as city manager of Tishomingo. Plaintiff insists in his response brief that the Tishomingo employees were fired "under questionable circumstances." In support of this, Plaintiff submitted affidavits from Paul Wilson and Johnny Hammond, former employees of Tishomingo. Paul Wilson's affidavit indicates that he was terminated by Kuykendall in June, 1994 for "poor communication with the city", that he was 46 years old at the time, and that he was rehired approximately seven months

later. Wilson's affidavit further states that the new city manager who rehired him indicated to Wilson that he "should never have been terminated in the first place". Johnny Hammond's affidavit states that he and another police officer, Steve Bowman, were terminated by Kuykendall in 1994. Hammond further states that both officers were over the age of 40, and that other younger, less-qualified police officers were working in the department at the time of their termination. Hammond also indicates that both he and Steve Bowman were "recalled" to work within months.

The Defendant opposes submission of these affidavits as evidence of either pretext or age discrimination, asserting that they are irrelevant, and contain inadmissible hearsay. Plaintiff submits that evidence of Kuykendall's treatment of other employees within the protected age group is relevant to establish Kuykendall's "pattern or practice" of discrimination. The Court agrees that evidence of unfavorable treatment by an employer of other employees within a protected age group is generally admissible to establish discriminatory intent. *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1156 (10th Cir. 1990). However, in order to be relevant, there must be some evidence that the unfavorable treatment was related to age discrimination. With regard to the affidavit of Paul Wilson, there is no admissible evidence presented in his statement that his termination was related in any way to his age. The statement merely indicates that he was within the protected age category when he was terminated by Kuykendall for "poor communication", and that he was later rehired after Kuykendall quit. The statement by Wilson that the new city manager told him that "he should have never been fired in the first place," is inadmissible hearsay. Wilson does not dispute that his termination was unjust, nor does he make any indication that his termination had anything to do with his age. Thus, Wilson's affidavit is inadmissible due to lack of relevance, and will not be considered by the Court in determining whether the Plaintiff has presented sufficient evidence to withstand Defendant's motion for summary

judgment. The same is true with regard to the terminations by Kuykendall of Vernon Maxwell and C. Wayne Johnson, former employees of the City of Cleveland. Plaintiff admits in his deposition testimony that he doesn't know whether there was a legitimate job-related justification for the termination of these employees, nor is there any other evidence presented that these terminations were, in any way, age related. In Tenth Circuit cases affirming admission of evidence of terminations of other employees within the protected age group, there was evidence that the terminations were age-related. *See e.g., Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 561 (10th Cir. 1996) (admitting evidence that within eight months after the decision-maker was employed, eight top-level executives over the age of 50 were fired, resigned or retired "en masse", and were replaced by younger persons); *Thomas v. Internat'l Business Machines*, 48 F.3d 478, 486 (10th Cir. 1995) (affirming admission of testimony of witnesses who were former employees who allegedly experience age discrimination); *Bingman v. Natkin & Co.*, 937 F.2d 553, 556 (10th Cir. 1991) (allowing evidence that two 60-year-old employees lost their jobs during reductions in force, while younger employees were retained in violation of the employer's seniority policy); *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1156 (10th Cir. 1990) (upholding admission of evidence regarding the termination of former employees who claimed (1) that they were replaced by younger employees, (2) the reasons given for their termination were invalid, (3) one had been questioned about taking early retirement; and (4) one was fired a few months before his pension vested). The terminations of C. Wayne Johnson, Vernon Maxwell, and Paul Wilson are clearly distinguishable from the above-cited cases. No admissible evidence has been presented that their terminations were based upon invalid reasons. Additionally, none of these employees have asserted that their terminations were motivated by age bias, nor have any of these employees alleged that they were replaced by younger individuals.

Johnny Hammond's affidavit suffers from some of the same inadequacies in that Hammond makes no statement regarding whether or not he and Steve Bowman were performing their positions satisfactorily when they were terminated. However, taking all reasonable inferences in a light most favorable to the Plaintiff, Hammond's affidavit creates an inference that the "terminations" of Steve Bowman and himself were somewhat related to age discrimination, since they were terminated while other younger, less-qualified police officers were retained. Because both officers were later re-employed by the City of Tishomingo, a reasonable inference can be made that the officers were performing satisfactorily. Thus, the Court will consider the affidavit of Johnny Hammond in considering Plaintiff's evidence.

The second type of evidence submitted by the Plaintiff is the Plaintiff's affidavit. In this affidavit, the Plaintiff alleges that the firefighters who submitted written complaints to Kuykendall were "manipulated" by Kuykendall so that Kuykendall would have an "excuse" to fire Plaintiff. The Plaintiff did not submit affidavits from these firefighters, but merely states that Beaty told him "that somebody had asked him to make his complaint" and that Burger told him that "she felt she had been manipulated into making her complaint." This evidence must be excluded as inadmissible hearsay. *Thomas v. Internat'l Business Machines*, 48 F.3d 478, 485 (10th Cir. 1995)("[H]earsay testimony that would be inadmissible at trial may not be included in an affidavit to defeat summary judgment because '[a] third party's description of [a witnesses'] supposed testimony is not suitable grist for the summary judgment mill.") (*citations omitted*).

Plaintiff's third and final submissions of evidence of pretext also come from his personal affidavit. Plaintiff alleges that when Kuykendall informed Plaintiff about the firefighters' complaints, Plaintiff and Kuykendall discussed the fact that the complaints "were not serious" and seemed to arise

from discipline Plaintiff had given to those employees. Plaintiff also stated in his affidavit that Kuykendall informed him two to three weeks prior to his termination that “it looked like things were going well in the fire department.” Additionally, Plaintiff contends that a “couple of days” before his termination, Kuykendall told him that Kuykendall intended to terminate two employees in both the fire department and the police department as a “cost-saving” measure. Defendant argues that the Court should not consider these statements because they constitute subsequent attempts by the Plaintiff to contradict his deposition testimony. The Court disagrees. The statements made in Plaintiff’s affidavit are not in any way contradicted by the deposition testimony submitted to the Court in support of this motion. While Plaintiff’s first assertion that the complaints against him were not serious appears somewhat incredulous given the fact that Plaintiff later admits that he was given 60 days to improve the situation, this statement does not contradict Plaintiff’s deposition testimony. Additionally, the alleged statements made by Kuykendall do not contract Plaintiff’s deposition testimony, nor are they inadmissible hearsay because they would constitute admissions by a party opponent, which are excluded from the definition of hearsay pursuant to *Fed. R. Evid.* 801(d)(2).

Thus, the Court finds the following evidence admissible as proof of pretext: (1) the terminations by Eric Kuykendall of Johnny Hammond and Steve Bowman, former City of Tishomingo police officers over the age of 40; and (2) statements allegedly made by Eric Kuykendall that the complaints against Plaintiff were not serious, that things appeared to be “going well” in the fire department, and that Kuykendall intended to terminate two fire and police department employees as “cost-saving” measures.

To survive summary judgment, the Plaintiff must present sufficient evidence that a reasonable trier of fact could find that the employer’s stated reason was pretextual. *Biester v. Midwest Health*

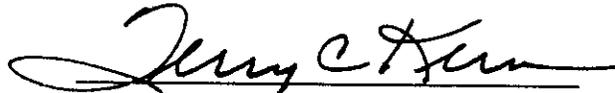
Services, Inc., 77 F.3d 1264, 1266 (10th Cir. 1996). If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Beister*, 77 F.3d at 1266. A plaintiff demonstrates pretext by showing either that a discriminatory reason more likely motivated the employer or that the employer's proffered explanation is unworthy of credence. *Jones v. Unisys Corp.*, 54 F.3d 624, 632 (10th Cir. 1995). Even though all doubts must be resolved in Plaintiff's favor, allegations alone will not defeat summary judgment. *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 530 (10th Cir. 1994). The Court finds that the Plaintiff has failed to meet this burden. Taking all of the Plaintiff's admissible allegations as true, none of the evidence presented by the record would support an inference of discriminatory termination based on the Plaintiff's age. Plaintiff has not disputed the fact that several fire department personnel submitted complaints to Kuykendall, and that Kuykendall gave him 60 days to improve the situation. Plaintiff admits he did nothing different to improve his relationship with the firefighters, and that, in his opinion, the complaints weren't serious. The Plaintiff has presented no evidence to rebut the Defendant's evidence that a majority of the firefighters were not satisfied with their particular situation in the fire department, and that at least three of them blamed the Plaintiff, in part, for the poor morale in the department. The evidence is undisputed that Kuykendall received complaints about the Plaintiff from the firefighters, and that he warned Plaintiff to improve morale or risk losing his job. The uncontested evidence in the record shows that the Plaintiff did nothing to improve morale, that the firefighters continued to be displeased with their situation, and that Plaintiff was terminated the day after Kuykendall received the survey results which he felt indicated no improvements had been made.

IV. Conclusion

Because the Plaintiff has failed to produce any evidence that could lead a rational trier of fact

to conclude that he was terminated because of his age, Defendant's Motion for Summary Judgment is GRANTED.

ORDERED this 3 day of June, 1997.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

AMERCOOL MANUFACTURING, INC.,)
a Texas corporation,)

Plaintiff,)

vs.)

Case No. 96CV1016K

ODESSA INDUSTRIES, INC., a foreign)
corporation; and UNIVERSAL)

COMPRESSION SYSTEMS, a foreign)
corporation, aka UNIVERSAL)

COMPRESSION SERVICES; and TSI)
COMPRESSION, a foreign corporation,)

Defendant.)

F I L E D

JUN - 4 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL OF DEFENDANT TSI COMPRESSION

COMES NOW Plaintiff, Amercool Manufacturing, Inc., and pursuant to Fed.R.Civ.P. 41(a)(1), hereby submits its Stipulation of Dismissal as to TSI Compression ("TSI") in the above-referenced matter, and would state as follows:

I.

Defendant TSI has entered its appearance in this matter by and through the law firm of Rhodes, Hieronymus, Jones, Tucker & Gable.

II.

Although TSI has denied its liability, it has not asserted any counterclaims, cross-claims, or third party claims in this matter.

III.

Defendant Universal Compression Services ("UCS") has apparently filed bankruptcy in this matter, and any litigation against UCS is therefore subjected to the automatic stay in

bankruptcy. In any event, UCS has not filed its Answer, nor asserted any counterclaims, cross-claims or third party claims in this matter.

IV.

Defendant Odessa Industries, Inc. ("Odessa"), has failed to Answer or otherwise respond in this case, and the Court has granted default judgment against it. In any event, Odessa has not asserted any counterclaims, cross-claims or third party claims in this matter.

V.

Undersigned counsel for Plaintiff has conferred with counsel for TSI, the only party to enter an appearance and respond in this matter, and counsel for TSI has agreed to join in this dismissal by stipulation pursuant to Fed.R.Civ.P. 41(a)(1).

VI.

Prior to this dismissal, this Court has (i) granted a judgment by default against Defendant Odessa Industries, Inc., in favor of Plaintiff; (ii) denied Defendant TSI's motion for summary judgment; and (iii) presently has this matter set for status conference on June 10, 1997.

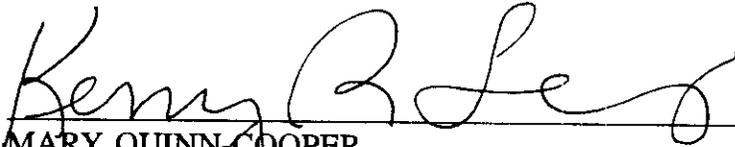
VII.

This Dismissal by Stipulation of TSI is without prejudice, and both parties agree that each is responsible for its own attorney fees and costs incurred in this matter.

AGREED AND STIPULATED TO BY:



JAMES R. POLAN
Riggs, Abney, Neal, Turpen,
Orbison & Lewis
502 West Sixth Street
Tulsa, OK 74119-1010
ATTORNEYS FOR PLAINTIFF



MARY QUINN-COOPER
KERRY R. LEWIS
100 West Fifth Street, Suite 400
Tulsa, OK 74103
ATTORNEYS FOR TSI COMPRESSION

COPY

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

Monte Handley,

Plaintiff,

vs.

FIBERCAST COMPANY,

Defendant.

)
)
)
)
)
)
)
)
)
)

Case Number: 96-CV 808 H ✓

FILE :

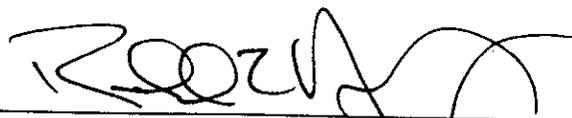
JUN - 4 1997

Phil Lombardi, Cler
U.S. DISTRICT COURT

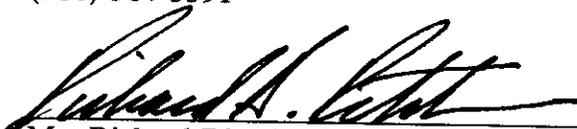
JOINT STIPULATION OF DISMISSAL

COMES NOW, the Plaintiff, Monte Handley, personally and through his attorney of record, James Huber, MALLOY & MALLOY, INC., and the Defendant, Fibercast Company, by and through Richard Ritchie, Chief Executive Officer Fibercast Company, and through its attorneys of record, McGIVERN, GILLIARD & CURTHOYS, by Ronald E. Hignight, and make and file their Joint Stipulation of Dismissal WITH PREJUDICE TO THE REFILEING THEREOF, all pursuant to Rule 41(a)(1)(ii), each showing, and affirming by the execution of this stipulation, that all parties who have appeared in this action have executed this stipulation and agree that the matter should be dismissed with prejudice to the refileing thereof.

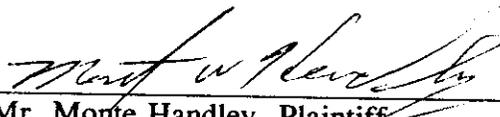
IT IS SO STIPULATED:



Ronald E. Hignight, O.B.A. #10334
McGIVERN, GILLIARD & CURTHOYS
Attorneys for Fibercast
1515 South Boulder, P.O. Box 2619
Tulsa, Oklahoma 74101-2619
(918) 584-3391



Mr. Richard Ritchie, for the Defendant
Chief Executive Officer
FIBERCAST COMPANY
P.O. Box 968
Sand Springs, OK 74083



Mr. Monte Handley, Plaintiff



Mr. James R. Huber
MALLOY & MALLOY, INC.
Attorneys for Plaintiff
1924 S. Utica, #810
Tulsa, Oklahoma 74104
(918) 747-3491

JAZ

ENTERED ON DOCKET
DATE 6-10-97

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

F I L E D

JUN - 4 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DONALD R. NICHOLS, *et al.*,)
)
 Plaintiffs,)
)
 vs.)
)
 G. DAVID GORDON, *et al.*,)
)
 Defendants.)

Case No. 95-C-1126H ✓

NOTICE OF DISMISSAL

Plaintiffs, Howard Collins, Charles W. Buck, Al Bryson and Mary Bryson hereby dismiss pursuant to Rule 41(A)(1)(i) of the Federal Rules of Civil Procedure with prejudice their claims against all appearing parties with the exception of Robert L. Miller and Northern Ohio Engineering Co., both of whom have answered in this action.



Laurence L. Pinkerton (OBA #7168)
Judith A. Finn (OBA #2923)
PINKERTON & FINN, P.C.
2000 First Place
15 East 5th Street
Tulsa, Oklahoma 74103-4367
(918) 587-1800
Attorneys for Plaintiffs

98

ctj

CERTIFICATE OF SERVICE

I, Lawrence L. Pinkerton, hereby certifies that on the 4th day of June, 1997, I caused to be mailed a true and correct copy of the above and foregoing *Notice of Dismissal*, with postage thereon fully prepaid to:

George D. Gordon, Esq.
BAGGETT, GORDON & DEISON
307 N. San Jacinto
Conroe, Texas 77301

William E. King, Esq.
WILLIAM E. KING, P.C.
Post Office Box 309
Kemah, Texas 77565

William B. Federman, Esq.
DAY, EDWARDS, FEDERMAN,
PROPESTER & CHRISTENSEN
2900 Oklahoma Tower
210 Park Avenue
Oklahoma City, Oklahoma 73102-5605

Joel L. Wohlgemuth, Esq.
John E. Dowdell, Esq.
NORMAN & WOHLGEMUTH
2900 Mid-Continent Tower
Tulsa, Oklahoma 74103

R. Thomas Seymour, Esq.
C. Robert Burton, Esq.
F. Randolph Lynn
550 ONEOK Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103



ENTERED ON DOCKET
DATE 6-6-97

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

MICHAEL E. McADAMS,)
)
 Plaintiff,)
)
 vs.)
)
 ONEOK, INC., a Delaware corporation,)
 also known as Oklahoma Natural)
 Gas Company,)
 WILLIAM L. ANDERSON,)
 STUART PRICE, and J.D. SCOTT,)
)
 Defendants.)

Case No. 97CV 485H (W) ✓

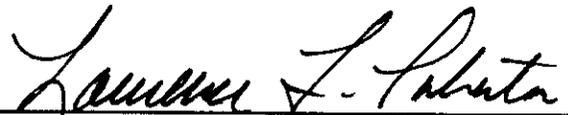
FILED
JUN - 4 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

DISMISSAL WITHOUT PREJUDICE

Plaintiff Michael E. McAdams hereby dismisses all Defendants, without prejudice,
each party to bear its own attorney fees and costs.

DATED this 4th day of June, 1997.

Respectfully submitted



Laurence L. Pinkerton (OBA #7168)
Judith A. Finn (OBA #2923)
PINKERTON & FINN
2000 First Place
15 East 5th Street
Tulsa, Oklahoma 74103-4367
(918) 587-1800
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I, Laurence L. Pinkerton, do hereby certify that on the 4th day of June, 1997, I caused to be mailed a true and correct copy of the above and foregoing *Dismissal Without Prejudice* with proper postage thereon fully prepaid, to:

James L. Kincaid, Esq.
CROWE & DUNLEVY
321 S. Boston
500 Kennedy Building
Tulsa, Oklahoma 74103



ENTERED ON DOCKET
DATE 6-6-97

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

F I L E D

JUN - 4 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NATIONAL EDUCATION CENTERS,)
INC., d/b/a SPARTAN SCHOOL)
OF AERONAUTICS,)

Plaintiff,)

vs.)

DIAMOND AIRCRAFT INDUSTRIES,)
INC., and DIAMOND FINANCIAL, INC.,)

Defendants.)

Case No. 96-CV-1013-H ✓

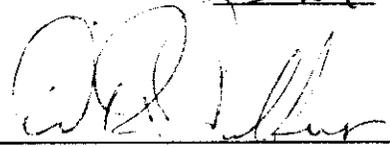
Judge Sven Erik Holmes

JOINT STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, National Education Centers, Inc., d/b/a/ Spartan School of Aeronautics, and Defendants, Diamond Aircraft Industries, Inc., and Diamond Financial, Inc., pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, and hereby dismiss by joint stipulation the above styled and numbered cause without prejudice.

It has further been agreed that each party will bear their own attorney fees and costs.

Dated this 3rd day of June, 1997.



David W. Wulfers
JAMES, POTTS & WULFERS, INC.
2828 Mid-Continent Tower
401 South Boston
Tulsa, Oklahoma 74103
Attorneys for Defendant



Patrick H. Kernan, OBA #4983
McKINNEY, STRINGER
& WEBSTER, P.C.
2100 Mid-Continent Tower
401 South Boston
Tulsa, Oklahoma 74103
582-3176
Attorneys for Plaintiff

CERTIFICATE OF MAILING

I do hereby certify that on this 3rd day of June, 1997, a true and correct copy of the

Joint Stipulation of Dismissal without Prejudice was mailed, postage prepaid to:

David W. Wulfers
JAMES, POTTS & WULFERS, INC.
2828 Mid-Continent Tower
401 South Boston
Tulsa, Oklahoma 74103
Attorneys for Defendant

E. Glenn Parr
E. GLENN PARR & ASSOCIATES, P.A.
Suite 632
115 Perimeter Center Place
Atlanta, Georgia 30346
Attorneys for Defendants



PATRICK H. KERNAN

PHK/KTL/als/30534.004V0015746

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

FILED

JUN 4 - 1997

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

GARY L. SMITH,)
)
Plaintiff,)
)
vs.)
)
DAVIS VENTRUE GROUP, L.P.,)
a Delaware limited partnership;)
BARRY M. DAVIS, individually)
and as a general partner;)
MICHAEL A. STONE, individually)
and as a general partner; and)
PHILIP A. TUTTLE, individually,)
and as a general partner,)
)
Defendants.)

Case No. 97-CV-427-BU ✓

ENTERED ON DOCKET
DATE 6-6-97

ORDER

This matter comes before the Court upon Plaintiff's Notice of Dismissal. The Court has been informed that Defendants have no objection to the dismissal.

Accordingly, the Court finds that this matter should be and is hereby **DISMISSED WITHOUT PREJUDICE**.

ENTERED this 3rd day of June, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

4

DATE 6-6-97

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

JERRY D. FULTZ,)
Plaintiff,)
vs.)
JOHN J. CALLAHAN,)
Acting Commissioner of the)
Social Security Administration,)
Defendant.)

F I L E D
JUN - 3 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-570-J

AGREED ORDER TO REMAND

NOW on this 3 day of JUNE, 1997, before me, the undersigned, Plaintiff's *Motion to Require Defendant To File Supplemental Transcript* and Defendant's *Motion to Remand* comes on for hearing. Prior to any hearing being held, counsels for both parties having submitted this agreed order to remand to the Court for approval, and the Court having reviewed Plaintiff's *Motion* and Defendant's *Motion*, and based upon the presentations of counsel, FINDS that this *Agreed Motion to Remand* should be GRANTED. The Court further FINDS as follows:

1. That the oral argument scheduled on June 2, 1997, on Plaintiff's *Motion to Require Defendant To File Supplemental Transcript* should be stricken.
2. That counsels for both parties have agreed, as evidenced by their respective signatures below, to remand this case to re-evaluate Plaintiff's condition for the period February 22, 1994, through June 30, 1995, without disturbing Defendant's subsequent decision finding that Plaintiff became disabled beginning July 1, 1995, and thereafter.

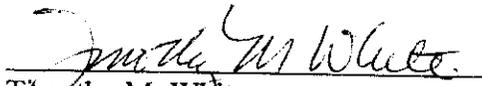
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the oral argument scheduled on June 2, 1997, on Plaintiff's *Motion to Require Defendant To File Supplemental Transcript*, is hereby stricken.

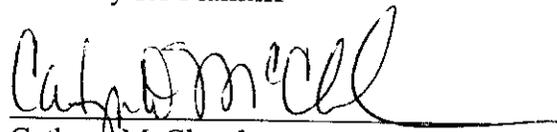
IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that this case shall be remanded to Defendant for further administrative action, in order to allow

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Defendant to re-evaluate Plaintiff's condition for the period February 22, 1994, through June 30, 1995, without disturbing Defendant's subsequent decision finding that Plaintiff became disabled beginning July 1, 1995, and thereafter.

Agreed as to Form & Content:


Timothy M. White,
Attorney for Plaintiff


Cathryn McClanahan
Attorney for Defendant


UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUN - 3 1997

UNITED STATES OF AMERICA,

Plaintiff

v.

JOHNA D. REYNOLDS,

Defendant.

)
)
)
)
)
)
)
)
)
)
)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Action No. 97CV0245K

ENTERED ON DOCKET
6-4-97

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of June 3, 1997 and the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendant, **Johna D. Reynolds**, against whom judgment for affirmative relief is sought in this action has failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

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

Dated at Tulsa, Oklahoma, this 3rd day of June, 1997.

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

By *A. Schurlyte*
Deputy Court Clerk for Phil Lombardi

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

F I L E D

GERALD DALE COOK,)
)
Petitioner,)
)
vs.)
)
HOWARD RAY,)
)
Respondent.)

No. 97-CV-211-BU

JUN 3 - 1997

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

ENTERED ON DOCKET

DATE 6-4-97

ORDER

This matter comes before the Court on Respondent's motion to dismiss this habeas corpus action for failure to exhaust state remedies (Docket #4). Petitioner, a prisoner in custody pursuant to a state court judgment, has filed no response or objection to Respondent's motion.

In this action, Petitioner alleges that the Oklahoma Department of Corrections has refused to award him emergency time, or "CAP," credits as allowed by 57 O.S. § 573. Prior to filing this federal action, Petitioner sought relief from the Tulsa County District Court in the form of a "motion for nunc pro tunc order," construed by that court as an application for post-conviction relief. That motion was denied by the Tulsa County District Court. Petitioner did not appeal to the Oklahoma Court of Criminal Appeals. Petitioner has made no other effort to present this claim to an Oklahoma court.

The United States Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 501 U.S. 722, 731 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal

Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

It is clear from the record in this case that Petitioner has yet to exhaust his state remedies. Petitioner has an available state court remedy, a petition for writ of mandamus. See Tomlin v. State, 814 P.2d 154 (Okla. Crim. App. 1991). The Court finds, therefore, that the petition for writ of habeas corpus should be dismissed without prejudice for failure to exhaust state remedies.

Accordingly, Respondent's motion to dismiss (docket #4) is **granted** and the petition for a writ of habeas corpus is hereby **dismissed without prejudice** for failure to exhaust state remedies.

IT IS SO ORDERED this 30th day of May, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS

United States Attorney

PETER BERNHARDT, OBA #741

Assistant United States Attorney

333 W. Fourth St., Suite 3460

Tulsa, OK 74103-3809

ENTERED ON DOCKET
DATE 6-4-97

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

F I L E D
JUN 03 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLES L. BOYD,)
)
Petitioner,)
)
vs.)
)
TULSA COUNTY DISTRICT)
COURT, et al.,)
)
Respondents.)

No. 96-CV-221-K

ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the U.S. Magistrate Judge filed on April 4, 1997, in this habeas corpus action brought pursuant to 28 U.S.C. § 2241. The Magistrate Judge recommends that Petitioner's request to dispense with the exhaustion requirement (Docket #20) be denied and the petition for a writ of habeas corpus be dismissed based on the fact that Petitioner has failed to exhaust available state remedies. None of the parties has filed an objection to the Report.

Having reviewed the Report and the facts of this case, pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court concludes that the Report should be adopted and affirmed.

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IT IS THEREFORE ORDERED that the Report and Recommendation of the Magistrate Judge (Docket #22) is **adopted and affirmed**. Petitioner's request to dispense with the exhaustion requirement (Docket #20) is **DENIED** and the petition for a writ of habeas corpus is **DISMISSED WITHOUT PREJUDICE** for failure to exhaust available state remedies. Any other pending motion is **DENIED** as moot.

SO ORDERED THIS 2 day of June, 1997.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

F I L E D

JUN 02 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLES FREDERICK,)
)
 Plaintiff,)
)
 v.)
)
 TULSA COUNTY DISTRICT)
 COURT, JUVENILE DIVISION,)
)
 Defendant.)

Case No. 97-C-150-K ✓

ENTERED ON DOCKET

DATE 6-4-97

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This report and recommendation pertains to Plaintiff's Application to Assume Original Jurisdiction Over Subject Matter pursuant to 28 U.S.C. § 1361(Docket #1). This statute, the federal mandamus statute, is not a jurisdictional basis in this case. The named defendant is Tulsa County District Court, Juvenile Division. No relief against state officials or agencies is afforded by § 1361. AMISUB (PSL), Inc. v. State of Colo. Dept. of Soc. Servs., 879 F.2d 789, 790 (10th Cir. 1989). The statute gives the federal district courts jurisdiction in the nature of mandamus to compel a federal officer or employee to perform a duty owed to plaintiff.

This case should be dismissed.

Pursuant to 28 U.S.C. § 636(b)(1)(C), the parties are given ten (10) days from the above filing date to file any objections with supporting brief to these findings and recommendations. Failure to object within that time period will result in waiver of the right to appeal from a judgment of the district court based upon the findings and recommendations of the Magistrate Judge.

9

Dated this 2nd day of June, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

s:\orders\freder.rr

FILED

JUN - 3 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

KAREN STONE,

Plaintiff,

vs.

PHILLIPS PETROLEUM COMPANY, INC.
a Delaware Corporation,

Defendant.

Case No. 96-C-341-K ✓

6-4-97

DISMISSAL WITH PREJUDICE

Plaintiff, KAREN STONE, dismisses with prejudice each and every claim against the Defendant, PHILLIPS PETROLEUM COMPANY, INC., arising out of the transaction which is the subject of this action in its entirety.

Respectfully submitted,

Karen S Stone
KAREN STONE, Plaintiff

Wesley E. Johnson
WESLEY E. JOHNSON, OBA #4731
ALLEN J. AUTREY, OBA #14980
15 W. 6th St, Suite 1608
Tulsa, Oklahoma 74119
(918) 582-0101
Attorneys for Plaintiff

12

55

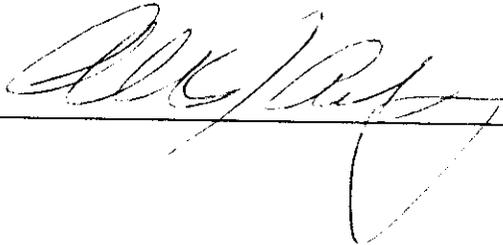
9/5

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 2 day of June, 1997, a true and correct copy of the above and foregoing instrument was mailed with proper postage thereon fully prepaid, to the following:

Ms. Kimberly Love
Mary L. Lohrke
Boone, Smith, Davis, Hurst & Dickman
500 Oneok Plaza
100 West Fifth Street
Tulsa, OK 74103

Robert J. Fries
Senior Attorney
Phillips Petroleum Company
1226 Adams Building
Bartlesville, OK 74004



RECORDED ON DOCKET
DATE 6-4-97

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

FILED

JUN - 3 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOE O. SAVILLE, JR.,)
an individual,)
)
Plaintiff,)
)
vs.)
)
MORTON COMPREHENSIVE)
HEALTH SERVICES, INC., an)
Oklahoma corporation, and)
MOZELLE S. LEWIS, an individual,)
and ERIC MIKEL, an individual,)
)
Defendants.)

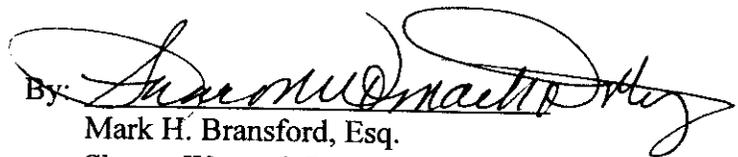
Case No. 96-C-355-K

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Joe E. Saville, Jr. ("Plaintiff"), and Defendants, Morton Comprehensive Health Services, Inc., Mozelle S. Lewis, and Dr. Eric Mikel ("Defendants"), jointly stipulate that all claims herein should be dismissed with prejudice. Plaintiff is responsible for his attorneys' fees, and Defendants are responsible for their attorneys' fees.

DATED this 30 day of May, 1997.

Respectfully submitted,

By: 

Mark H. Bransford, Esq.
Sharon Womack Doty
400 Beacon Building
406 South Boulder, Suite 408
Tulsa, OK 74103-3825

ATTORNEYS FOR PLAINTIFF

96

cis

AND

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

By: *Judith A. Colbert*

J. Patrick Cremin, OBA #2013
Judith A. Colbert, OBA#13490
320 South Boston Avenue
Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0594

ATTORNEYS FOR DEFENDANTS
MORTON AND MIKEL

AND

Janet M. Reasor

Janet M. Reasor, OBA# 10937
321 South Boston Avenue
Suite 900
Tulsa, OK 74103
(918) 587-8644

ATTORNEY FOR DEFENDANT LEWIS

gr

REGISTERED ON DOCKET
6-4-97

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

FILED

JUN - 3 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

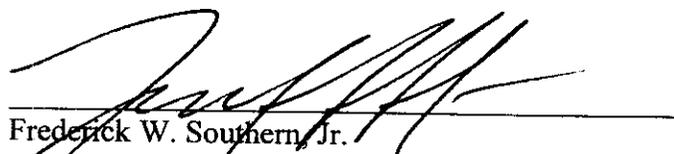
Case No. 96-CV-1014-BU

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Michael Ray Phillips ("Plaintiff"), and Defendant, Escort Trailer Corporation, ("Defendant"), jointly stipulate that all claims herein should be dismissed with prejudice. The parties are responsible for their own attorneys' fees.

DATED this 3^d day of ^{June,} ~~May~~, 1997.

Respectfully submitted,


Frederick W. Southern, Jr.
700 North Walker
Oklahoma City, Oklahoma 73102

ATTORNEY FOR PLAINTIFF

AND

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

By: 
J. Patrick Cremin, OBA #2013
Judith A. Colbert, OBA#13490

OKJ

320 South Boston Avenue
Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0594

ATTORNEYS FOR DEFENDANT
ESCORT TRAILER CORPORATION

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

BILL J. LOGHRY,)
)
 Plaintiff,)
)
 vs.)
)
 JAMES D. WOLFE and)
 PAMELA L. WOLFE,)
)
 Defendants and)
 Third-Party Plaintiffs,)
)
 vs.)
)
 UNITED STATES OF AMERICA,)
)
 Third-Party Defendant.)

No. 95-C-1214-E ✓

FILED
JUN 2 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

EOD 6/3/97

JUDGMENT

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendants, James D. Wolfe, Pamela L. Wolfe, and the United States of America and against the Plaintiff, Bill J. Loghry. Because of the judgment in favor of the Wolfes, the Third Party Complaint against the United States of America is denied as moot. Plaintiff shall take nothing of his claim. Costs may be awarded upon proper application.

ORDERED this 2^d day of June, 1997.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

83

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

JOHN PELLEGRINO,

Plaintiff,

vs.

STANLEY GLANZ,

Defendant.

No. 96-CV-695-E

FILED
JUN 2 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE JUN 03 1997

ORDER

Plaintiff filed a civil rights complaint and was granted leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, as amended by The Prison Litigation Reform Act of 1996, Pub.L.No. 104-134, § 805, 110 Stat. 1321 (April 26, 1996). On August 22, 1996, the Court granted Plaintiff's motion to proceed in forma pauperis and allowed Plaintiff fifteen (15) days to submit an amended complaint setting out his claims with more clarity and specificity (Docket #3). Plaintiff submitted an amended complaint but failed to sign it. On October 17, 1996, pursuant to a deficiency order, Plaintiff submitted his signed amended complaint. However, he failed to include the requisite number of copies for service on Sheriff Stanley Glanz although there is a completed summons and Marshal form. By order, dated December 16, 1996, the Court again directed Plaintiff to cure the deficiencies or the action would be dismissed without further notice.

A review of the file for this case reveals that no action has been taken since the entry of the December 16, 1996 Order. The Court finds, therefore, that this case should be dismissed without prejudice for failure to prosecute.

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ACCORDINGLY, IT IS HEREBY ORDERED that 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 of the date of this Order, an amended petition and the requisite number of copies in accordance with the Information and Instructions for Filing Complaints under 42 U.S.C. § 1983 and N.D. LR 9.3(A).

SO ORDERED THIS 2nd day of June, 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 30 1997

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

ORAL ROBERTS UNIVERSITY,)
an Oklahoma corporation,)
)
Plaintiff,)
)
v.)
)
TRAVIS ANDERSON, an individual, and)
METROPLEX PROPERTIES, L.L.C., a)
Colorado limited liability company,)
)
Defendants.)

Case No. 95-CV-583-H

ENTERED ON DOCKET
DATE JUN 2 1997

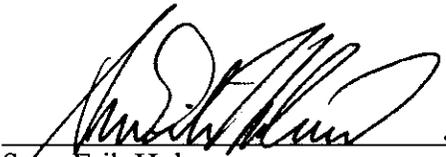
J U D G M E N T

This Court entered an order on May 14, 1997 granting Plaintiff's motion for attorneys' fees. On May 27, 1997, Defendants filed a waiver and consent with respect to the amount of reasonable attorneys' fees in this matter.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Plaintiff and against the Defendants for attorneys' fees in the amount of \$217,442.25.

IT IS SO ORDERED.

This 29TH day of May, 1997.


Sven Erik Holmes
United States District Judge

107

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

ENTERED ON DOCKET

BILL J. LOGHRY,)
)
 Plaintiff,)
)
 vs.)
)
 JAMES D. WOLFE and)
 PAMELA L. WOLFE,)
)
 Defendants and)
 Third-Party Plaintiffs,)
)
 vs.)
)
 UNITED STATES OF AMERICA,)
)
 Third-Party Defendant.)

~~MAY 02 1997~~

No. 95-C-1214-E ✓

FILED

MAY 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Now before the Court is the Motion For Summary Judgment (Docket #46) of the defendants James D. and Pamela L. Wolfe; the Motion for Summary Judgment (Docket #49, 52)¹ of the plaintiff Bill J. Loghry; and the Motion to Dismiss (Docket #40) of the United States. Additionally before the Court are the Motion for Summary Judgment (Docket #59) and the Supplemental Motion for Summary Judgment (Docket #64) of the defendants, the Wolfes, and the Motion to Dismiss Amended Complaint (Docket #62) of the United States of America.

This matter began in November, 1995, as a quiet title action

¹ Plaintiff provides no explanation for filing two motions for summary judgment that are virtually identical, and filed within one week of one another. It is only the latter motion that is accompanied by what plaintiff calls a "Motion for Judicial Notice of Evidence of Fraud in Support of Motion for Summary Judgment." Apparently the earlier motion was filed to meet the deadline set for filing such motions, and the latter motion filed when discovery was received from the government.

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brought by plaintiff, Billie Joe Loghry against the Wolfes in state court. The Wolfes had purchased the Loghry property located at 7525 South Elwood Avenue, Tulsa, Oklahoma, at a public auction of the Internal Revenue Service. Loghry took position that there was no valid tax assessment and that he did not receive proper notice, and therefore the IRS did not have the right to auction the property for delinquent taxes. The Wolfes removed this matter to federal court, asserting that it was an action which arose under the laws of the United States, because the "plaintiff bases his claim for relief against the defendants under the federal statutes and acts of Congress." The Wolfes then filed a counterclaim against Loghry, requesting to be declared the legal and equitable owners of the property, based on the Quit Claim Deed issued by the Internal Revenue Service on January 12, 1996. The Wolfes then filed a third party claim against the IRS, asserting that if this Court should determine that the sale was improper, they would ask the Court to declare the sale void and order the return of any monies paid to the IRS by the Wolfes. Thereafter, in September, 1996, Mr Loghry ceased referring to himself in pleadings as "Billie Joe Loghry," and unilaterally, without leave of court, filed an amended complaint wherein he changed his name and the style of the case to "Billie Joe, Loghry."

Both Mr. Loghry and the Wolfes filed Motions for summary judgment on the original complaint, and the Wolfes renewed and then supplemented their motion after the amended complaint was filed. The IRS filed a motion to dismiss the third party complaint that named them, as well as the amended complaint wherein the Mr. Loghry

makes a direct claim against it.

The Court will first consider the Motion for Summary Judgment of the Wolfes. In their motion, the Wolfes set forth the following undisputed facts:

1. On November 15, 1993 Bill and Patricia Loghry each signed two Internal Revenue Service examination reports consenting to the assessment and collection of federal tax liabilities for the years 1987-1992. By signing the reports, each waived his and her appeal rights with the IRS and the right to contest the assessments in tax court.

2. The IRS assessed Federal income taxes against Bill and Patricia Loghry for tax years 1987-1992.

3. On December 27, 1994, notices of federal tax liens were filed with the Tulsa County Clerk in Tulsa, Oklahoma against Bill Loghry for his federal tax liabilities for tax years 1987-1992, and against Bill and Patricia Loghry for their joint federal tax liability for tax year 1993.

4. On March 6, 1995, the IRS sent to Bill and Patricia Loghry by certified mail to their last known address, a Notice of Intent to Levy for federal income tax liabilities for tax years 1987-1993.

5. The written notice of levy and notice of seizure were served by means of personal delivery to Bill Loghry. The IRS posted the notices of seizure at the property.

6. On June 6, 1995, neither Bill nor Patricia Loghry were present at the property. Consequently, the IRS served the Loghry's with copies of the minimum bid worksheet and copies of the notice of levy and notice of seizure by taping the notices to the door inside the porch enclosure of the residence.

7. The IRS arranged for a notice of a public auction sale to be published in the *Tulsa World* on June 25, 1995.

8. On June 20, 1995, the IRS posted the notice of the sale at the post office located at 51st and Sheridan in Tulsa, Oklahoma.

9. The notice of sale specified the property to be sold, and the time, place, manner, and conditions of the sale.

10. On June 20, 1995, the IRS hand-delivered a copy of the notice of sale to Plaintiff. Patricia Loghry

answered the door, but refused to accept a copy of the notice of sale. The IRS taped the notice to the door inside the porch enclosure of the residence.

11. The IRS established a minimum price of fifty-seven thousand six hundred dollars and offered the property for sale at public auction on July 7, 1995.

12. The IRS sold the property for eighty thousand dollars to Jim D. Wolfe, the highest bidder at the public auction.

13. The plaintiff was present during the sale.

14. The plaintiff failed to exercise his right to redeem the property after the sale. Consequently, on January 12, 1996, the IRS issued a deed to Jim D. Wolfe, the purchaser of the property.

Plaintiff failed to respond to either of defedants' motions for summary judgment, or the supplement. Instead plaintiff filed a "Notice of Refusal for Fraud" with respect to each pleading, making the frivolous assertion that he refused the documents because they were fraudulent because the name and address used were incorrect, and bore only some "semblence to [his] Christian appellation which is as follows: Billie Joe, Loghry", or his "Proper mailing location," which he claims to be: "7525 South Elwood Avenue, Tulsa, Oklahoma state NonDomestic 74132." The Court finds that the Notice of Refusal For Fraud, and all allegations based on fraud resulting from using "an incorrect" name or address for Mr. Loghry, are completely without merit.² Moreover, in his "Notice of Refusal for

² Depite the fact that Mr. Loghry now refers to himself as "Billie Joe, Loghry" he referred to himself as Bill J. Loghry in the beginning of this litigation, and never sought leave of court to substitute parties, or change the style of the case. Further, from the text of each "Notice of Refusal for Fraud," it is absolutely clear that Mr. Loghry has received and read every pleading which he has refused for fraud. Additionally, Mr. Loghry's assertion that he was defrauded into responding to

Fraud," the only pleading that is even arguably responsive to the Motions for Summary Judgment, Mr. Loghry does not in any way address or controvert the undisputed facts set forth in the Motions for Summary Judgment, as required by Fed.R.Civ.P. 56(e). Therefore, pursuant to Local Rule 56.1(B) the uncontroverted facts of defendants are deemed admitted.

The validity of the assessment is the issue raised by Mr. Loghry in his Amended Complaint. However, under the admitted facts, and based on the Certificates of Assessments and Payments (form 4340's) which were attached to the original motion filed by the Wolfes the Court finds that a valid assessment was made. "Certificates of Assessments and Payments are `routinely used to prove that tax assessment has in fact been made.' They are `presumptive proof of a valid assessment." Guthrie v. Sawyer, 970 F.2d 733,737 (10th Cir. 1992).³

Defendants' Motion for Summary Judgment (Docket # 59) is granted. Because it is granted, the motions for summary judgment of Loghry and the Motions to Dismiss of the United States are denied as moot.

ORDERED this 30TH day of May, 1997.



JAMES O. ELLISON, Senior Judge

pleadings and other documents that did not contain his correct name is frivolous.

³ A review of plaintiff's own motion for summary judgment and Motion for Judicial Notice of Evidence of Fraud in Support of Motion for Summary Judgment does not change this result.

UNITED STATES DISTRICT COURT

RECORDED ON DEPT
96-2-97

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SODEXHO SERVICES, INC., a corporation, f/k/a
GARDNER MERCHANT FOOD SERVICES, INC. or
MORRISON'S HOSPITALITY GROUP, INC.

Plaintiff,

versus

TULSA COMMUNITY ACTION AGENCY, INC.,
a non-profit corporation,

Defendant.

JUN 02 1997 *M*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-844K ✓

AGREED JUDGMENT

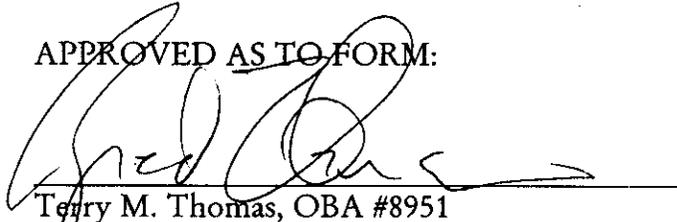
The captioned matter was decided by summary judgment in favor of Plaintiff Sodexho Services, Inc. The Court postponed a determination of damages until Plaintiff and Defendant Tulsa Community Action Agency, Inc., could compile their records. Plaintiff and Defendant have now agreed that the proper measure of damages is \$112,804.00.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff have and recover judgment on its Complaint herein in the amount of \$112,804.00 plus interest as allowed by law.

Submitted ~~March~~ ^{May} 29, 1997


The Honorable Terry C. Kern

APPROVED AS TO FORM:



Terry M. Thomas, OBA #8951

Brad R. Carson, OBA #15957

CROWE & DUNLEVY

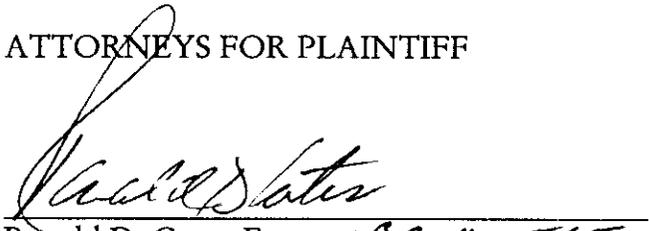
500 Kennedy Building

321 South Boston Avenue

Tulsa, Oklahoma 74103-3313

(918) 592-9800

ATTORNEYS FOR PLAINTIFF



Ronald D. Cates, Esq. OBA # 1565

Suite 680, Park Centre

525 South Main

Tulsa, Oklahoma 74103

ATTORNEY FOR DEFENDANT

frivolous, malicious, or fails to state a claim upon which relief may be granted. In addition, the Act provides that a district court may dismiss an action filed in forma pauperis "at any time" if the court determines that the action is frivolous, malicious, or fails to state a claim on which relief may be granted. See id. § 804(a)(5) (amending 28 U.S.C. § 1915(d)) (to be codified at 28 U.S.C. § 1915(e)(2)(B)).

"The term 'frivolous' refers to 'the inarguable legal conclusion' and 'the fanciful factual allegation.'" Hall v. Bellmon, 935 F.2d 1106, 1108 (10th Cir. 1991) (quoting Neitzke v. Williams, 490 U.S. 319, 325, 327 (1989)). If a plaintiff states an arguable claim for relief, even if not ultimately correct, dismissal for frivolousness is improper. Id. at 1109. Inarguable legal conclusions include those against defendants undeniably immune from suit or those alleging infringement of a legal interest which clearly does not exist. Id. A plausible factual allegation which lacks evidentiary support, even though it may not ultimately survive a motion for summary judgment, is not frivolous within the meaning of section 1915(e)(2)(B). Id.

Even liberally construing the complaint in this case, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes Plaintiff's allegations do not raise constitutional claims and, thus, lack an arguable basis in law. West v. Atkins, 487 U.S. 42, 48 (1988). Moreover, Judge Jennings is absolutely immune from this suit because he acted in his judicial capacity. See Stump v. Sparkman, 435 U.S. 349, 356 (1978); Schepp v. Fremont County, 900 F.2d 1448, 1451 (10th Cir. 1990). Nor is the District Court of Tulsa County a proper party under Section 1983.

Lastly, the Court notes that the relief which Plaintiff seeks is not cognizable in this civil rights action and may be more appropriate by petition for writ of habeas corpus pursuant to 28 U.S.C. §

2254(a). That section permits a person in custody pursuant to the judgment of a State court to seek relief on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. See Duncan v. Gunter, 15 F.3d 989, 991 (10th Cir. 1994), and cases cited therein.

ACCORDINGLY, IT IS HEREBY ORDERED that

- (1) Plaintiff's motion for leave to proceed in forma pauperis (¹#2) is **granted**;
- (2) Plaintiff's motion for appointment of counsel (²#3) is **denied**;
- (3) this civil rights action is hereby **dismissed without prejudice**; and
- (4) the Clerk is directed to "**flag**" this dismissal as one under § 1915A and to **mail** a copy of the complaint to Plaintiff along with this Order.

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

GARY MICHAEL BARNES,)
)
Plaintiff,)
)
v.)
)
COMPUTER BUSINESS SERVICES,)
INC., a corporation; GEORGE L.)
DOUGLASS, individually; JEANNETTE)
L. DOUGLASS, individually; ANDREW)
L. DOUGLASS, individually and as)
President of Computer Business Services,)
Inc.; MATTHEW R. DOUGLASS,)
individually; PETER B. DOUGLASS,)
individually; ROBERT B. GOODING,)
individually; and DOES 1-50,)
)
Defendants.)

DATE JUN 2 1997

Case No. 96-CV-939-H

FILED
MAY 30 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on Defendants' Motion to Dismiss.

Pursuant to Fed. R. Civ. P. 12(b)(2), Defendants George L. Douglass, Jeanette L. Douglass, Andrew L. Douglass, Matthew R. Douglass, Peter B. Douglass, and Robert B. Gooding bring on a motion to dismiss this case for lack of personal jurisdiction. Additionally, pursuant to Fed. R. Civ. P. 12(b)(6), Defendant Computer Business Services, Inc. ("CBSI"), and Defendants George L. Douglass, Jeanette L. Douglass, Andrew L. Douglass, Matthew R. Douglass, Peter B. Douglass, and Robert B. Gooding, bring on a motion to dismiss for failure to state a claim upon which relief may be granted.

I.

With regard to Defendants Andrew L. Douglass, Matthew R. Douglass, Peter B. Douglass and Robert B. Gooding, Plaintiff has failed to allege any basis for personal jurisdiction in this Court. Therefore, the Court hereby grants Defendants' Andrew L. Douglass, Matthew R.

Douglass, Peter B. Douglass and Robert B. Gooding motion to dismiss for lack of personal jurisdiction.

The only remaining jurisdictional question is whether the Court has personal jurisdiction over Defendants George L. Douglass and Jeanette L. Douglass.

The Tenth Circuit has held that:

[t]he plaintiff bears the burden of establishing personal jurisdiction over the defendant. Prior to trial, however, when a motion to dismiss for lack of jurisdiction is decided on the basis of affidavits and other written materials, the plaintiff need only make a prima facie showing. The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. If the parties present conflicting affidavits, all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party.

Rambo v. American Southern Ins. Co., 839 F.2d 1415, 1417 (10th Cir. 1988) (citations omitted).

Thus, the Court must "determine whether the plaintiff's allegations, as supported by affidavits, make a prima facie showing of the minimum contacts necessary to establish jurisdiction over each defendant." Id. In making this determination,

[t]he test for exercising long-arm jurisdiction in Oklahoma is to determine first whether the exercise of jurisdiction is authorized by statute and, if so, whether such exercise of jurisdiction is consistent with the constitutional requirements of due process. In Oklahoma, this two-part inquiry collapses into a single due process analysis, as the current Oklahoma long-arm statute provides that "[a] court of this state may exercise jurisdiction on any basis consistent with the Constitution of this state and the Constitution of the United States."

Id. at 1416 (citations omitted).

The Rambo court stated further that:

Jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum state is "specific jurisdiction." In contrast, when the suit does not arise from or relate to the defendant's contacts with the forum and jurisdiction is based on the defendant's presence or accumulated contacts with the forum, the court exercises "general jurisdiction."

839 F.2d at 1418 (citations omitted); see also Doe v. Nat'l Medical Servs., 974 F.2d 143, 145

(10th Cir. 1992) ("Specific jurisdiction may be asserted if the defendant has 'purposefully directed' its activities toward the forum state, and if the lawsuit is based upon injuries which 'arise

out of' or 'relate to' the defendant's contacts with the state." The Supreme Court has explained that:

Jurisdiction in these circumstances may not be avoided merely because the defendant did not physically enter the foreign state . . . it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communication across state lines, thus obviating the need for physical presence within a state in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another state, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction.

Burger King, 471 U.S. at 476.

Three criteria guide the Court's determination of whether personal jurisdiction exists: (1) in relation to the plaintiff's claim, the defendant must have purposefully availed herself of the privilege of conducting activities in Oklahoma, Henson v. Denckla, 357 U.S. 235, 253 (1958); (2) for specific jurisdiction, the cause of action must arise from the defendant's activities in Oklahoma; and (3) the acts or the consequences of the acts of the defendant must have a substantial enough connection with Oklahoma to make the exercise of jurisdiction reasonable, see LAK, Inc. v. Deer Creek Enterprises, 885 F.2d 1293, 1299 (6th Cir. 1989), cert. denied, 110 S. Ct. 1525 (1990). Additionally, in cases involving multiple defendants, minimum contacts must be found as to each defendant over whom the court exercises jurisdiction. Calder v. Jones, 465 U.S. 783, 790 (1984).

In the instant case, Plaintiff alleges facts which, if true, would make Mr. and Mrs. Douglass' contacts with this forum personal rather than on behalf of the corporate defendant. "Jurisdiction over corporate officers or agents must ordinarily be based on their personal, rather than corporate, contacts with the forum . . ." McClelland v. Watling Ladder Co., 729 F. Supp. 1316, 1319 (W.D. Okla. 1990). The record before the Court indicates that the actions of CBSI in Oklahoma may have been for and on behalf of Mr. and Mrs. Douglass. See Pl. Aff. at ¶ 1 (stating inter alia that CBSI's advertising included a personal letter from Mr. and Mrs. Douglass and that the return mail card on the advertisement states "George and Jeanie will send you . . ."). Taking

these allegations as true and resolving all factual disputes in favor of Plaintiff, the Court finds a sufficient prima facie showing to exercise personal jurisdiction over Mr. and Mrs. Douglass. The Court hereby denies Defendants George L. Douglass and Jeanette L. Douglass motion to dismiss for lack of personal jurisdiction.

II.

Defendants¹ also move to dismiss this lawsuit pursuant to Fed. R. Civ. P. 12(b)(6) because the claims asserted in Plaintiff's complaint are allegedly barred by the relevant statutes of limitations. See Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036, 1041 n.4 (10th Cir. 1980) (holding that statutes of limitations questions may be appropriately resolved on a 12(b) motion). Plaintiff filed this action on October 15, 1996, alleging violation of sections 19 and 22 of the Oklahoma Business Opportunities Sales Act as well as common law deceit and fraud claims. The parties agree that the applicable statute of limitations for these claims is two years. Therefore, in order to satisfy the statute of limitations, Plaintiff must have been unable to discover the basis for his claims prior to October 15, 1994.

According to the complaint, in January 1993, Plaintiff purchased a business opportunity ("Business Center") from Defendants. He received the Business Center in February 1993. From February 1993 to March 1995, Plaintiff attempted unsuccessfully to realize income using the Business Center.

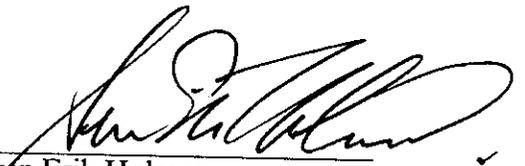
It is well settled in Oklahoma that "the limitation period of two years [does] not begin to run until learning of or, in the exercise of reasonable care and diligence, should have learned of the harm through discovery of the [cause of action]" provided that the plaintiff did not fail "to exercise reasonable care and diligence [or] should have made the discovery earlier." Smith v.

¹The Court notes that in this respect "Defendants" does not include CBSI. By virtue of the Notice of Filing of Bankruptcy and of Automatic Stay Under 11 U.S.C. § 362, this action against CBSI is stayed by operation of law. Therefore, the Court's ruling on the motion to dismiss does not in any way affect CBSI.

Johnston, 591 P.2d 1260, 1264 (Okl. 1978). Defendants assert that "Plaintiff had all the information he needed to determine that he had allegedly been defrauded well before October 15, 1994." Def. Reply at 9. In Defendants' view, "a reasonable person . . . would have known within six months" of receiving the Business Center that he had a cause of action. Id. at 10. In response, Plaintiff's affidavit describes the various steps Plaintiff took from February 1993 until March 1995 and the various assurances Plaintiff allegedly received from Defendants encouraging him to keep trying. Accepting as true the statements in Plaintiff's affidavit, the Court concludes that there is an issue of fact with respect to the reasonableness of Plaintiff's continuing efforts to make money with his CBSI Business Center. Resolving any factual dispute about the reasonableness of Plaintiff's actions in favor of Plaintiff, the Court hereby denies Defendants' motion to dismiss for failure to state a claim upon which relief can be granted.

IT IS SO ORDERED.

This 30TH day of May, 1997.


Sven Erik Holmes
United States District Judge

F I L E D

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MAY 30 1997

UNITED STATES OF AMERICA,

Plaintiff

v.

JOE D. FANNING,

Defendant.

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

Civil Action No. 97CV 205H

ENTERED ON DOCKET

DATE JUN 2 1997

DEFAULT JUDGMENT

This matter comes on for consideration this 30th 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, Joe D. Fanning, appearing not.

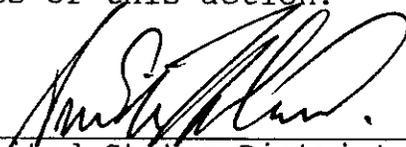
The Court being fully advised and having examined the court file finds that Defendant, Joe D. Fanning, was served with Summons and Complaint on April 17, 1997. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant 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, Joe D. Fanning, for the principal amount of \$4,663.41, plus accrued interest of \$3,975.03, plus administrative charges in the amount of \$25.19, plus interest thereafter at the rate of 9 percent per annum

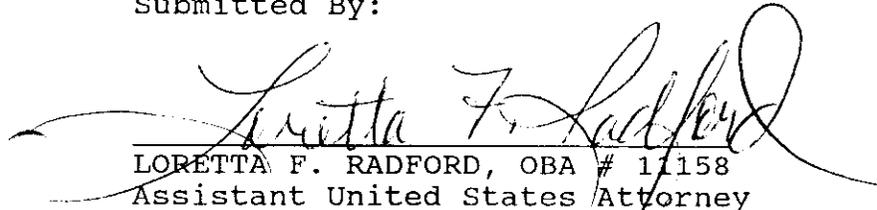
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until judgment, a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus filing 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

FILED

MAY 30 1997

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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

UNITED STATES OF AMERICA,

Plaintiff

v.

THERESA CROOK,

Defendant.

Civil Action No. 97CV 228H

ENTERED ON DOCKET

DATE JUN 2 1997

DEFAULT JUDGMENT

This matter comes on for consideration this 30th 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, Theresa Crook, appearing not.

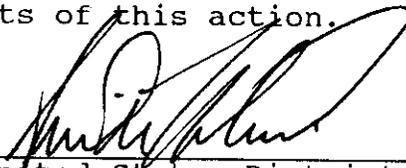
The Court being fully advised and having examined the court file finds that Defendant, Theresa Crook, was served with Summons and Complaint on March 14, 1997. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant 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, Theresa Crook, for the principal amount of \$47.72, plus accrued interest of \$.58, plus interest thereafter at the rate of 8 percent per annum until judgment, a surcharge of 10% of the amount of the debt in

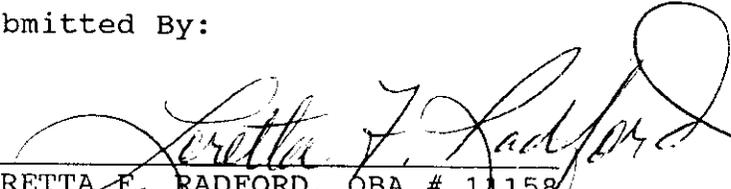
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connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), 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

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

F I L E D

MAY 30 1997

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

CHARLES ENOCH BROWN,
Petitioner,

vs.

RON CHAMPION, et al.,

Respondents.

Case No. 93-C-609-K

FILED ON DOCKET

6-2-97

REPORT AND RECOMMENDATION

This petition for a writ of habeas corpus has been referred to the undersigned United States Magistrate Judge for report and recommendation in accordance with 28 U.S.C. § 636(b)(1).

Petitioner, currently confined at the Dick Connor Correctional Center, challenges his First Degree Murder conviction in Creek County District Court Case No. CFR-83-288. The Court has previously found that Petitioner has met the exhaustion requirements of 28 U.S.C. § 2254(b) and (c), and has denied grounds one and two of the petition. [Dkt. 21]. The Court has also found that the new standards set out in the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1), are not applicable to this petition which was pending prior to the effective date of the Act. [Dkt. 31]. The Court appointed counsel to address the remaining question posed by the petition. [Dkt. 23]

The question before the United States Magistrate Judge for report and recommendation is: whether the state trial court failed to provide petitioner the

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assistance of an independent psychiatrist at State expense, in violation of the United States Constitution, as established in *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).¹

I. BACKGROUND

On October 5, 1983, Oklahoma Highway Patrol Trooper Leon Bench stopped Petitioner one mile north of Sapulpa on State Highway 97 and requested a wrecker for impoundment purposes because Petitioner's driver license had been suspended due to financial responsibility for a car accident. Petitioner obtained his .44 magnum single action revolver from a clothes basket in the back of his pickup, and fired three shots at Bench who later died as the result of one of the bullet fragments striking him in the forehead. Examination of the Trooper's service revolver, backup weapon, and the Mini-14 rifle strapped to the inside of the patrol car door revealed that none of the weapons had been fired. Petitioner left the scene following the shooting and was arrested the next day. On October 6, 1983, Petitioner was charged with First-Degree Murder.

¹ Regardless of the Court's finding on the applicability of the 1996 amendments to 28 U.S.C. § 2254, *Ake* is applicable to this petition. *Ake* was decided by the United States Supreme Court on February 26, 1985, after Petitioner's trial but while his direct appeal was pending. See *Brown v. State*, 743 P.2d 133 (Okla.Crim.App. 1987).

In *Griffith v. Kentucky*, 479 U.S. 314, 322, 107 S.Ct. 708, 713, 93 L.Ed.2d 649 (1987), the Court stated "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." The Court held, "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Id.*, 479 U.S. at 328, 107 S.Ct. at 716. The Tenth Circuit applies *Griffith* to *Ake* claims. *Castro v. State of Okl.*, 71 F.3d 1502, 1512 (10th Cir. 1995); *Liles v. Saffle*, 945 F.2d 333 (10th Cir. 1991), *cert. denied*, 502 U.S. 1066, 112 S.Ct. 956, 117 L.Ed.2d 123 (1992).

On October 13, 1983, the district court ordered Petitioner committed to Eastern State Hospital in Vinita, Oklahoma, for a competency examination. The Court ordered the doctors at Eastern State Hospital to examine Petitioner to determine:

1. Is this person able to appreciate the nature of the charges against him?
2. Is this person able to consult with his lawyer and rationally assist in preparation of his defense?
3. If the answer to Question 1 or 2 is no, can the person obtain competency within a reasonable time if provided with a course of treatment, therapy or training?
4. Is the person a mentally ill person or a person requiring treatment as defined by OKLA. STAT. TITLE 43a, § 3² (Supp. 1979)?
5. If the person were released without treatment, therapy or training, would he probably pose a significant threat to the life or safety of himself or others?

[Dkt. 25, attachment]. Following evaluation, a competency trial was held February 6, 1984, during which the jury heard the testimony of psychologist, Jane Reudi, Ph.D. and psychiatrist, Mason Robison, M.D.

Doctor Reudi testified she observed, tested and interviewed Petitioner on October 14, 17, 19 and 20, 1984. Dr. Reudi concluded that Petitioner was suffering

² 43A Okl. Stat. (1981) § 3(c) provided: "Mentally ill person' means any person afflicted with a substantial disorder of thought, mood, perception, psychological orientation or memory that significantly impairs judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life."

A "person requiring treatment" was defined in 43A Okl. Stat. (1981) § 3(o) as: "(1) a person who has a demonstrable mental illness and who as a result of that mental illness can be expected within the near future to intentionally or unintentionally seriously and physically injure himself or another person and who has engaged in one or more recent overt acts or made significant recent threats that substantially support that expectation . . ."

from paranoia, delusions and auditory hallucinations. His hallucinations caused him to believe the welfare department operated machines which could communicate with him and which were capable of reading his mind. He was also extremely distrustful of law enforcement officials. [Comp. Tr. 124-26]. Dr. Reudi was of the opinion that Petitioner was mentally ill, in need of treatment, and not competent to stand trial. [Comp. Tr. 135-36].

Dr. Robison also examined Petitioner at Eastern State Hospital. He also concluded that Petitioner was mentally ill, suffering from paranoia and auditory hallucinations. [Comp. Tr. 285-86]. However, Dr. Robison believed Petitioner was "marginally competent" and that he was able to assist his attorneys in his defense. [Comp. Tr. 279]. The Creek County jury found Petitioner competent to stand trial.

On February 10, 1984, Petitioner filed a Motion for Funds for a Psychiatrist which was denied following argument. At trial Petitioner raised the defense of insanity. The defense called Dr. Reudi who characterized Petitioner as reaching the point where his paranoia interfered with his conception of reality. [Tr. 1230]. However, she testified she was "not used to assessing the ability to determine right from wrong per se." [Tr. 1233]. She thought "his perception of the right action might be influenced by his delusional system in the areas where it pertained" which areas included law enforcement and governmental agencies. [Tr. 1247]. The state called Dr. Robison as a rebuttal witness. Dr. Robison testified that at the time of the shooting, Petitioner "knew what he was doing and that the shooting, whether or not a person was hit by it, was an illegal act." [Tr. 1420].

On February 23, 1984, the jury found Petitioner guilty of Murder in the First Degree and sentenced him to life imprisonment. The Oklahoma Court of Criminal Appeals affirmed his conviction in a published opinion dated August 28, 1987. *Brown v. State*, 743 P.2d 133 (Okla.Crim.App. 1987). The Oklahoma Court of Criminal Appeals determined that since Petitioner had access to both a psychologist and a psychiatrist in Drs. Reudi and Robison, "[w]e cannot say the appellant was deprived of the basic tools of an adequate defense consistent with *Ake*." *Brown*, 743 P.2d at 137.

The Oklahoma Court of Criminal Appeals denied rehearing, finding that recent Tenth Circuit authority³ concerning appointment of psychiatrists to assist the defense was not applicable. The Oklahoma Court ruled that Petitioner "failed to make an *ex parte* threshold showing to the trial court that his sanity was likely to be a significant factor in his defense as required by *Ake* . . ." *Brown*, 743 P.2d at 140.

"We cannot say that the bald assertions which appear in the motion for funds for a psychiatrist, and argued to the trial court prior to trial were sufficient to undergird the allegations with evidentiary support and particularized facts showing that the petitioner's sanity at the time of the offense was seriously in question."

Id.

³ See *U.S. v. Crews*, 781 F.2d 826 (10th Cir. 1986)(refusal to appoint psychiatrist to help interpret technical psychiatric diagnosis and findings of expert witness was error) and *U.S. v. Sloan*, 776 F.2d 926 (10th Cir. 1985) (duty to appoint psychiatric expert to assist defense is not satisfied when services of such expert must be shared with prosecution).

ANALYSIS

In *Ake*, the Court announced due process requires the states to provide indigent criminal defendants with expert psychiatric assistance under certain circumstances:

This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.

Ake, 470 U.S. at 76, 105 S.Ct. at 1092. The Court pointed out that the assistance of a psychiatrist is necessary to identify the "elusive and often deceptive symptoms of insanity." *Id.*, at 80, 105 S.Ct. 1095. [citation and internal quotation marks omitted]. Thus, when the mental condition of the accused is a real issue in the case, the assistance of a psychiatrist is essential to the concept of meaningful access to justice since "the testimony of a psychiatrist can be crucial and a virtual necessity if an insanity plea is to have any chance of success." *Id.* [citation and internal quotation marks omitted].

The Court held:

[W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will

conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Ake, 470 U.S. at 83, 105 S.Ct. at 1096. However, the Supreme Court has held that a criminal defendant must offer "more than undeveloped assertions that the requested assistance would be beneficial." *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1, 105 S.Ct. 2633, 83 L.Ed.2d 182 (1985). The Tenth Circuit has elaborated on this standard, as follows:

If sanity or mental capacity defenses [are] to be defense issues, they must be established by a clear showing by the indigent defendant as genuine, real issues in the case. In order for a defendant's mental state to become a substantial threshold issue, the showing must be clear and genuine, one that constitutes a close question which may well be decided one way or the other. It must be one that is fairly debatable or in doubt.

Liles v. Saffle, 945 F.2d 333, 336 (10th Cir. 1991) (quoting *Cartwright v. Maynard*, 802 F.2d 1203, 1211 (10th Cir. 1986), *rev'd on other grounds*, 822 F.2d 1477, 1478 n.2 (10th Cir. 1987) (en banc), *aff'd* 486 U.S. 356 (1988)) [quotation marks omitted]; *United States v. Sloan*, 776 F.2d 926, 928-29 (10th Cir. 1985).

Petitioner argues that the state trial court denied him due process by failing to grant his request for funds for an expert psychiatrist to assist him at trial. He contends that he met the requisite threshold showing under *Ake* requiring the appointment of a psychiatrist at the State's expense.

The respondent argues that Petitioner's request for habeas relief should be denied because a clear showing that the issue of sanity would be genuine did not accompany the request for psychiatric assistance. According to the respondents:

[Defense counsel] never explained how the testimony of a psychiatrist would be essential, he never specified what behavior indicated severe mental illness, he never explained why the cause and extent of this alleged behavior required psychoanalysis and evaluation or why it would be pertinent to the trial, and he never articulated how the assistance of a psychiatric expert would aid in his defense. At trial, in urging his Motion for Funds to Hire Private Psychiatrist, trial counsel merely claimed that Petitioner was indigent and that the issue of sanity would be very important part of the defense.

[Dkt. 32, p. 5].

The Court need not address whether defense counsel's presentation to the trial court was in fact sufficient under *Ake* as that question does not focus on the appropriate inquiry. In *Castro v. State of Okl.*, 71 F.3d 1502, 1513 (10th Cir. 1995), the Tenth Circuit held that for cases such as this one, where *Ake* was decided after trial but while direct appeal was pending, the question presented is whether, "upon review of the entire record, [petitioner] *could have* made a threshold showing under *Ake* that his sanity at the time of the offense is to be a significant factor at trial." (quoting *Cartwright*, 802 F.2d at 1212) [internal quotations omitted, emphasis in original].

The record before the Court consists of the transcript of the competency trial; transcript of defense counsel's argument requesting appointment of a psychiatrist; and the transcript of the trial testimony of Drs. Reudi and Robison. Petitioner was apprehended the day after he shot officer Bench. His first interview with Dr. Reudi took place just nine days after the shooting. He expressed the view that there had been efforts by governmental bodies, the welfare department and the police to

persecute him. He also expressed an unrealistic view of his legal situation. [Comp. Tr. 125]. Dr. Reudi was of the opinion that Petitioner was mentally ill, and in need of treatment. She diagnosed paranoia, and borderline intellectual functioning. [Comp. Tr. 135]. Dr. Reudi defined paranoia as "unrealistic or psychotic -- in other words, out of contact with reality diagnosis, characterized by feelings of persecution. . . ." [Tr. 1224]. In interviews with Dr. Reudi, Petitioner expressed "delusional material," which means beliefs that are not based in reality. [Tr. 1224-25]. Dr. Reudi testified that Petitioner's paranoia could interfere with his perception of right or wrong, depending upon the area in which his delusional ideas operate. Dr. Reudi's testimony thus demonstrates that the question of Petitioner's sanity at the time of the offense was a significant, genuine, real issue in the case. *See, e.g. Ake* 470 U.S. at 83, 105 S.Ct. at 1096; *Liles*, 9 F.3d at 336; *Cartwright*, 802 F.2d at 1211; *Sloan*, 776 F.2d at 928-29.

Based on this record, the Court concludes that Petitioner could have made a threshold showing that his sanity at the time of the offense would be a significant factor at trial. Accordingly, under *Ake* the failure to provide Petitioner with a psychiatrist deprived him of due process.

In the present case, despite the request of defense counsel, the only psychiatric assistance provided to the indigent defendant was the testimony of the doctors who evaluated Petitioner solely for purposes of determining his competency to stand trial. The court order engaging their services did not instruct the doctors to determine his sanity at the time of the offense. Further, whatever assistance these

doctors were able to provide was equally available to both the prosecution and the defense. In *Sloan*, the Tenth Circuit stated "[t]he essential benefit of having an expert in the first place is denied when the services of the doctor must be shared with the prosecution." 776 F.2d at 929. See also, *Liles v. Saffle*, 945 F.2d 222 (10th Cir. 1991); *Smith v. McCormick*, 914 F.2d 1153, 1158-59 (9th Cir. 1990)(under *Ake*, evaluation by a "neutral" court psychologist does not satisfy due process); *U.S. v. Crews*, 781 F.2d 826, 834 (10th Cir. 1986). This Court finds that the availability of Drs. Reudi and Robison was insufficient to satisfy the State's duty under *Ake*.

The Tenth Circuit has held, "the denial of a psychiatric expert in violation of *Ake* is 'trial error' and thus, subject to harmless-error analysis." *Brewer v. Reynolds*, 51 F.3d 1519, 1529 (10th Cir. 1995) (quoting *Starr v. Lockhart*, 23 F.3d 1280, 1287 (8th Cir. 1994)). The harmless-error analysis requires the Court to determine whether the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brewer*, 51 F.3d at 1529 (quoting *Kotteakos v. U.S.*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946)). The Court notes that although Petitioner's brief in support of his petition addressed harmless-error, the respondent did not.

Petitioner points out that the State was required to prove, beyond a reasonable doubt that he formed the "specific intent" to take another person's life.⁴ The record

⁴ Petitioner was charged with First Degree Murder. According to Oklahoma law, "A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof." 21 Okla. Stat. § 701.7(A).

is uncontroverted that Petitioner exhibited paranoia, delusions and auditory hallucinations just days after the shooting and these conditions had existed for some time prior to it. However, the absence of a psychiatric expert for the defense prevented the development of evidence of the effects of these mental impairments at the time of the offense. Consequently, as a practical matter, the option of finding Petitioner insane was virtually eliminated. There was no question that Petitioner had killed the trooper, at trial Petitioner testified that he had shot him. The only issues at trial related to Petitioner's mental state: specific intent versus sanity. Under these circumstances the trial court's failure to appoint an independent psychiatrist constitutes a "substantial and injurious effect or influence in determining the jury verdict" and cannot be considered harmless error. *Kotteakos*, 328 U.S. at 776, 66 S.Ct. at 1253.

CONCLUSION

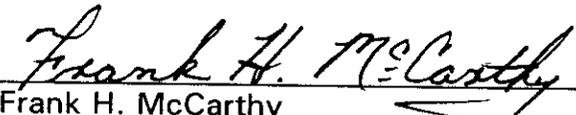
For the foregoing reasons, the undersigned United States Magistrate Judge concludes that Petitioner is entitled to a new trial with the appointment of a psychiatrist to assist the defense on the issue of Plaintiff's insanity at the time of the offense.

IT IS THEREFORE THE RECOMMENDATION of the United States Magistrate Judge that a writ of habeas corpus be conditionally issued with Petitioner to be released from custody unless, within 120 days from the district court's acceptance of this recommendation, a new trial is commenced.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within

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

DATED this 30th day of February, 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 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

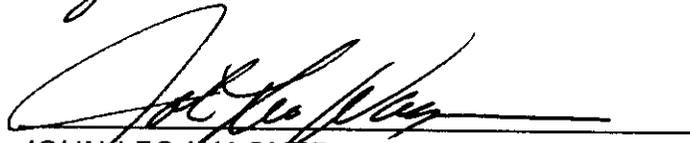
ROSA L. FOSTER,)
)
 Plaintiff,)
)
 v.)
)
 JOHN L. CALLAHAN,)
)
 COMMISSIONER OF THE SOCIAL)
 SECURITY ADMINISTRATION,¹)
)
 Defendant.)

Case No: 96-C-860-W ✓

JUDGMENT

Judgment is entered in favor of Rosa L. Foster pursuant to this court's Order filed May 30th, 1997, remanding case to the Commissioner for further administrative action pursuant to sentence 4 of section 205(g) of the Social Security Act, 42 U.S.C. 405(g).

Dated this 30th day of May, 1997.


 JOHN LEO WAGNER
 UNITED STATES MAGISTRATE JUDGE

s:jud.sent4

¹Effective March 1, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), John J. Callahan is substituted for Shirley S. Chater, Commissioner of Social Security, as the defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

ENTERED ON DOCKET
6-2-97

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

ROSA L. FOSTER,)
)
Plaintiff,)
)
v.)
)
JOHN J. CALLAHAN, Acting)
Commissioner of the Social)
Security Administration,)
)
Defendant.)

MAY 30 1997

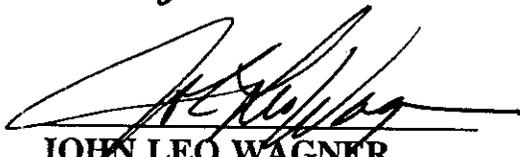
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-860-W ✓

ORDER

Upon the motion of the defendant, Acting Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Cathryn McClanahan, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 4 of section 205(g) of the Social Security Act, 42 U.S.C. 405(g).

DATED this 30th day of May, 1997.

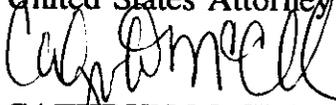


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS

United States Attorney

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

CATHERYN McCLANAHAN, OBA #14853

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

F I L E D

CHARLES WAYNE GEORGE,)
)
 Petitioner,)
)
 v.)
)
 STORMY WILSON and the)
 ATTORNEY GENERAL OF THE)
 STATE OF OKLAHOMA,)
)
 Respondents.)

MAY 30 1997 *PL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-C-1075-K ✓

REPORT AND RECOMMENDATION OF U. S. MAGISTRATE JUDGE

This report and recommendation pertains to Plaintiff's Motion for Appointment of Counsel (Docket #4) and Respondents' Motion to Dismiss for Failure to Exhaust State Court Remedies and Motion to Dismiss the Attorney General of the State of Oklahoma as a Party (Docket #6). Plaintiff was granted leave to file this action *in forma pauperis* under Title 28 U.S.C. § 1915.

Appointment of counsel in civil cases filed *in forma pauperis* is a privilege, not a right. The determination of the necessity of appointment of counsel is within the discretion of the district court. Shabazz v. Askins, 14 F.3d 533, 535 (10th Cir. 1994). The court is to consider all the circumstances with particular emphasis on those factors that are highly relevant to a request for counsel. McCarthy v. Weinberg, 753 F.2d 836, 838 (10th Cir. 1985). The Tenth Circuit has found that the factors to be considered include the merits of the litigant's claims, the nature of the factual issues raised in the claims, the litigant's ability to present his claims, and the complexity of the legal issues raised by the claims. Williams v. Meese, 926 F.2d 994,

996 (10th Cir. 1991) (citing Maclin v. Freake, 650 F.2d 885, 887-89 (7th Cir. 1981)).

The burden is on the applicant to convince the court that there is sufficient merit to his claim to warrant the appointment of counsel. 753 F.2d at 838.

The court finds that the appointment of counsel in this case is not warranted because the plaintiff's petition must be dismissed under 28 U.S.C. § 2254(b)(1) and therefore Plaintiff's Motion for Appointment of Counsel (Docket #4) should be denied.

Under 28 U.S.C. § 2254(b)(1), "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that - (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant."

In Rose v. Lundy, 455 U.S. 509, 510 (1982), the Supreme Court held that a federal habeas corpus petition which contained exhausted and unexhausted claims (a "mixed petition") was required to be dismissed by the federal habeas corpus court. The court stated "[b]ecause a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statutes, we hold that a district court must dismiss such 'mixed petitions,' leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." 455 U.S. at 510.

In Jones v. Hess, 681 F.2d 688, 695 (10th Cir. 1982), the Tenth Circuit Court discussed the reasoning behind the Rose v. Lundy decision: "The Court noted that

this rule 'will relieve the district courts of the difficult if not impossible task of deciding when claims are related, and will reduce the temptation to consider unexhausted claims.'"

The claim raised by petitioner in his Motion for Leave to File Second Supplement/Amend Habeas Corpus § 2254 Pursuant to Rule 15(a) F.R.C.P. (Docket #2) that Oklahoma's competency standard was too high and thus he could not show he was incompetent has not been presented to the highest state court for review. The other claims he raises have been exhausted, as they were raised in an application for post-conviction relief (See Exhibit "A" to Respondent's Brief in Support of Motion to Dismiss for Failure to Exhaust State Court Remedies (Docket #7)). Therefore, this case involves a "mixed petition" which contains both exhausted and unexhausted claims.

Under § 2254(b)(3), a respondent can waive exhaustion. However, respondent has not waived it, but raises the failure to exhaust as the basis of its motion to dismiss. The motion to dismiss should be granted.

In addition, the Motion to Dismiss the Attorney General of the State of Oklahoma as a Party should be granted. The Attorney General is not a proper party to this case, as Rule 2(a) of the Rules Governing Habeas Corpus Petitions states that the person having custody of the petitioner should be named as the respondent. The Attorney General does not have custody of petitioner.

In summary, Plaintiff's Motion for Appointment of Counsel (Docket #4) should be denied. Respondents' Motion to Dismiss for Failure to Exhaust State Court

Remedies and Motion to Dismiss the Attorney General of the State of Oklahoma as a Party (Docket #6) should be granted.

Pursuant to 28 U.S.C. § 636(b)(1)(C), the parties are given ten (10) days from the above filing date to file any objections with supporting brief to these findings and recommendations. Failure to object within that time period will result in waiver of the right to appeal from a judgment of the district court based upon the findings and recommendations of the Magistrate Judge.

Dated this 30th day of May, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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