

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

FILED

JUN 19 1997

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

THE GUARDIAN LIFE INSURANCE)
COMPANY OF AMERICA, a New)
York Corporation,)
)
Plaintiff,)
)
vs.)
)
GUARDIAN INVESTORS, INC.,)
an Oklahoma Corporation,)
)
Defendants.)

Case No. 97-C-232-BU

ENTERED ON DOCKET
JUN 20 1997
DATE _____

ADMINISTRATIVE CLOSING ORDER

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

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 18th day of June, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

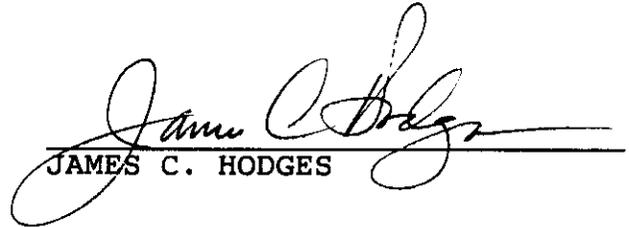
(15)

CERTIFICATE OF SERVICE

I, the undersigned do hereby certify that on the 18th
day of June, 1997, a true and correct copy of the above
and foregoing document was hand-delivered to the following:

James W. Rusher, OBA #11501
Heath E. Hardcastle, OBA # 14247
2600 Bank IV Center
15 West Sixth Street
Tulsa, Oklahoma 74119-5434
(918) 583-5800

ATTORNEYS FOR DEFENDANTS
OILWELL TECHNOLOGIES & ENHANCEMENT
CORP. AND SOUTHWEST OPERATING COMPANY



JAMES C. HODGES

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

FILED

JUN 19 1997

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

GERALD R. CATHEY,

Plaintiff,

v.

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

Defendant.

CASE NO. 96-CV-158-M ✓

ENTERED ON DOCKET
JUN 29 1997
DATE _____

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 19th day of June, 1997.

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

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

TANYA SUE SIKES,)
)
Plaintiff,)
)
vs.) Case No. 96CV1094K
)
UNITED STATES OF AMERICA,)
)
Defendant.)

FILED

JUN 20 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE JUN 20 1997

STIPULATION OF DISMISSAL

COMES NOW the Plaintiff, Tanya Sue Sikes, by and through her attorneys of record,
Wayne M. Copeland and David A. Russell, and hereby dismisses this cause of action.

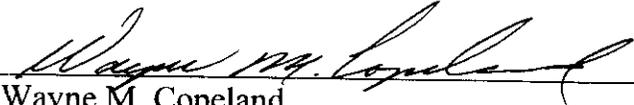
By: Wayne M. Copeland
Wayne M. Copeland, OBA# 13880
David A. Russell, OBA# 15104
1516 South Boston Avenue, Suite 316
Tulsa, Oklahoma 74119
(918) 583-1464

By: Wyn Dee Baker
Wyn Dee Baker, OBA# 465
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103

CLJ

CERTIFICATE OF SERVICE

This is to certify that on the 9 day of June, 1997, a true and correct copy of the foregoing was hand-delivered to: Assistant United States Attorney, Wyn Dee Baker, 333 West 4th Street, Suite 3460, Tulsa, Oklahoma 74103.

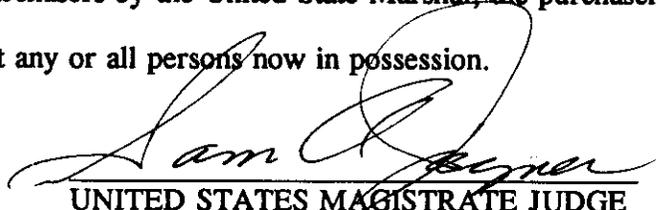

Wayne M. Copeland

attorney Shelia Condren; County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; State of Oklahoma ex rel. Oklahoma Tax Commission through Kim D. Ashley, Assistant General Counsel; and Purchasers, Leonard Warren and Juanita Warren, by mail, and the Defendant, Gene Jones, Jr. aka Gene Jones, by publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to Leonard Warren and Juanita Warren, 3741 South Braden, Tulsa, Oklahoma 74135, they being the highest bidders. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

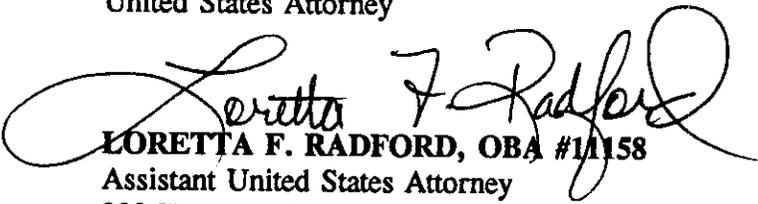
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchasers, Leonard Warren and Juanita Warren, 3741 South Braden, Tulsa, Oklahoma 74135, a good and sufficient deed for the property.

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


UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

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

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

LFR:cas

**Report and Recommendation of United States Magistrate Judge
Civil Action No. 95-C-768-BU (Jones)**

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
vs.)
)
SARAH JANE RANEY; COUNTY)
TREASURER, Tulsa County, Oklahoma;)
BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
)
Defendants.)

F I L E D

JUN 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE JUN 19 1997

Civil Case No. 96-CV-149-BU

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 18th day of June, 1997, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on February 25, 1997, pursuant to an Order of Sale dated October 15, 1996, of the following described property located in Tulsa County, Oklahoma:

LOT THREE (3), BLOCK TEN (10), MOELLER HEIGHTS, AN
ADDITION IN TULSA COUNTY, STATE OF OKLAHOMA,
ACCORDING TO THE RECORDED PLAT THEREOF.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma, by mail; the Purchaser, Jarry Jones, by mail; and the Defendant, Sarah Jane Raney, by publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

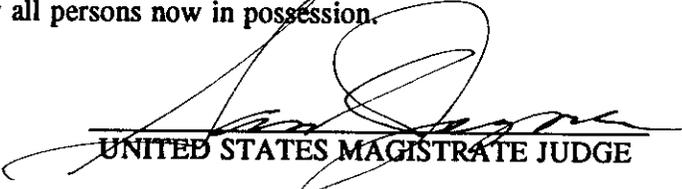
The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least

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four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to Jarry Jones, P.O. Box 702100, Tulsa, Oklahoma 74170, he being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

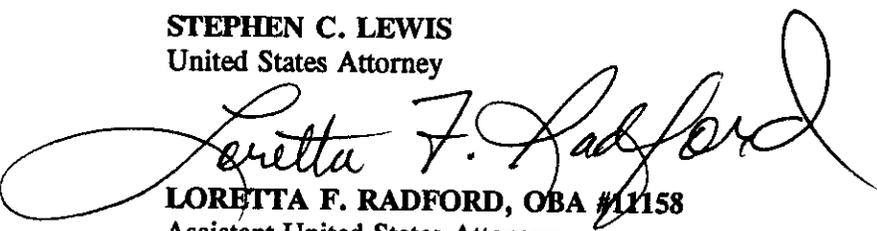
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, Jarry Jones, P.O. Box 702100, Tulsa, Oklahoma 74170, a good and sufficient deed for the property.

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


UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney


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

Report and Recommendation of United States Magistrate Judge
Case No. 96-CV-149-BU (Raney)

LFRC:m

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

PIERRE LE BAUD, M.D.,)
)
 Plaintiff,)
)
 vs.)
)
 PACIFICARE OF OKLAHOMA,)
 INC., an Oklahoma corporation, and)
 FIRST HEALTH WEST, a Trust,)
)
 Defendants.)

ENTERED ON DOCKET
DATE JUN 18 1997

No. 97CV 191H

FILED

JUN 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NOTICE OF DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, Pierre Le Baud, M.D., by and through his undersigned attorney, and pursuant to Rule 41(a)(1), F.R.C.P., hereby dismisses the above-captioned matter as to both Defendants, without prejudice.

Dated this 18 day of June, 1997.

ATTORNEY FOR PLAINTIFF DR. LE BAUD



FRANK GREGORY, OBA #3594
3105 E. Skelly Dr., Suite 400
Tulsa, OK 74105
(918) 712-2388
(918) 712-2372 (fax)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE JUN 18 1997

F I L E D

JUN 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
on behalf of the Secretary of Veterans Affairs,)
)
Plaintiff,)
)
v.)
)
WILLIAM AARON DILLON, JR.)
aka William A. Dillon, Jr.;)
LINDA K. DILLON;)
COUNTY TREASURER, Washington County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Washington County, Oklahoma,)
)
Defendants.)

CIVIL ACTION NO. 96-CV-496-H

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 18th day of June, 1997, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on May 6, 1997, pursuant to an Order of Sale dated October 30, 1996, of the following described property located in Washington County, Oklahoma:

LOT TWELVE (12), BLOCK TWENTY-EIGHT (28), OAK PARK VILLAGE,
SECTION II, BARTLESVILLE, WASHINGTON COUNTY, OKLAHOMA.

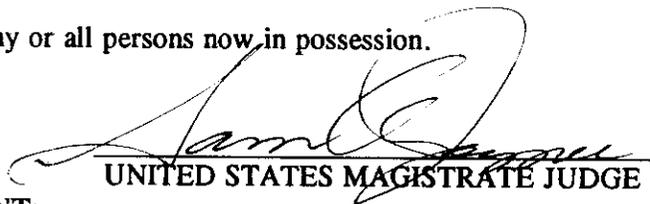
Appearing for the United States of America is Phil Pinnell, Assistant United States Attorney. Notice was given the Defendants, William Aaron Dillon, Jr. aka William A. Dillon, Jr.; Linda K. Dillon; County Treasurer, Washington County, Oklahoma and Board of County Commissioners, Washington County, Oklahoma, through Thomas Janer, Assistant District Attorney, Washington County, Oklahoma; and the Purchasers, Bryan Ballard and Sandy Ballard, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

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The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Examiner-Enterprise, a newspaper published and of general circulation in Washington County, Oklahoma, and that on the day fixed in the notice the property was sold to Bryan Ballard and Sandy Ballard, 1919 College View Drive, Bartlesville, Oklahoma 74003, they being the highest bidders. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchasers, Bryan Ballard and Sandy Ballard, 1919 College View Drive, Bartlesville, Oklahoma 74003, a good and sufficient deed for the property.

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


UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

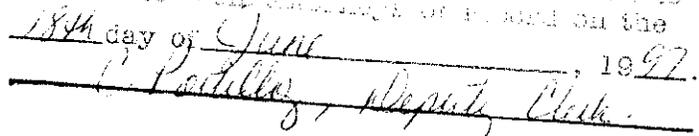
STEPHEN C. LEWIS
United States Attorney



PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

Report and Recommendation of United States Magistrate Judge
Case No. 96-CV-496-H (Dillon)
PP:cas

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the proceedings of the United States Marshal under the Order of Sale and all proceedings under the Order of Sale and all proceedings under the Order of Sale and all proceedings under the Order of Sale were served on each of the parties herein named and the same to them or to their attorneys of record on the 18th day of June, 1997.

Deputy Clerk

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

BILLY W. FLECK, Personal
Representative of the Estate of
SUSAN FLECK, Deceased,

Plaintiff,

vs.

RICHARD H. HOCH and
HOCH & STEINHEIDER,
a Nebraska Partnership,

Defendants.

FILED ON DOCKET
DATE JUN 18 1997

Case No. 97 CV 477 B (M)

FILED
JUN 17 1997

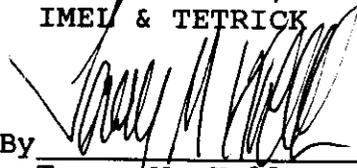
Phil Lombardi, Clerk
U.S. DISTRICT COURT

DISMISSAL WITHOUT PREJUDICE

COMES NOW the plaintiff, Billy W. Fleck, Personal Representa-
tive of the Estate of Susan Fleck, Deceased, and dismisses, without
prejudice, the above-styled and numbered action.

MOYERS, MARTIN, SANTEE,
IMEL & TETRICK

By


Terry M. Kollmorgen, OBA #13713
James E. Maupin, OBA #14966
320 S. Boston, Suite 920
Tulsa, OK 74103-3722
Telephone: (918) 582-5281
Telecopier: (918) 585-8318

ATTORNEYS FOR PLAINTIFF

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

FILED

JUN 17 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WAYMOND A. EASTER,)
)
Petitioner,)
)
v.)
)
SONNY SCOTT,)
)
Respondent.)

No. 96-CV-558-B

ENTERED ON DOCKET

DATE JUN 18 1997

ORDER

The Court has for decision Petitioner Waymond A. Easter's *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, filed June 21, 1996. For the reasons stated below, the Court concludes the petition should be denied.

I. BACKGROUND

Petitioner is an inmate of the Oklahoma Department of Corrections. On November 6, 1981, Petitioner pled guilty to Robbery With Firearms charges in the District Court of Tulsa County, Oklahoma, in Case Nos. CRF-81-2326 and CRF-81-2442, and *nolo contendere* to a third charge of Robbery With Firearms in Case No. CRF-81-2372. On said date, Petitioner also pled guilty to First Degree Murder in Case No. CRF-81-2403. Petitioner was found guilty of said charges and a pre-sentence investigation and report followed. On November 24, 1981, in accordance with the plea agreement, Petitioner was sentenced to life imprisonment on the First Degree Murder conviction and to three concurrent thirty-year terms on the three armed robbery

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convictions; the armed robbery sentences to be consecutive to the life sentence for First Degree Murder.

The record and transcript of the November 6 and 24, 1981 plea and sentencing proceedings reveal the following: Petitioner was represented by appointed counsel, H. I. Aston, of Tulsa, Oklahoma. At the plea hearing and sentencing, Mr. Aston also represented the Petitioner. At the plea hearing Petitioner orally acknowledged his pleas of guilty to two of the Robbery With Firearms charges and the Murder in the First Degree charge, and his no contest plea to one of the Robbery With Firearms charges. Regarding the First Degree Murder charge, the Petitioner stated:

“For the record, I am pleading guilty to the murder on my part, but not the shooting.”

The record then reflects the following dialogue between the Court, Petitioner and his counsel:

THE COURT: Do you understand you are charged with murder in the first degree, and you've had an opportunity to go over the information with your attorney, is that correct?

MR. ASTON: That's correct.

THE DEFENDANT: Yes.

MR. ASTON: I've explained the murder/killing doctrine; we're guilty of the crime. He understands that.

THE COURT: Do you understand that, Mr. Easter? This has to be your voluntary plea of guilty to that charge.

THE DEFENDANT: Yes.

THE COURT: You are satisfied with your attorney, and of course there were plea negotiations in the murder I, and he desires to plead guilty to murder I; is that correct?

MR. ASTON: That's correct, Your Honor.

THE COURT: Has anyone forced or coerced you to plead guilty to murder I and plead no contest in one count of robbery and you are guilty of two counts of robbery with firearms?

THE DEFENDANT: No, they haven't.

The trial judge explained Petitioner's right to a jury trial, to confront and cross-examine witnesses, and the right not to testify or to testify if he chose. Petitioner acknowledged he was not under the influence of any medication or drugs and that he had completed the twelfth grade in school. Petitioner acknowledged he was voluntarily entering his pleas of guilty. Petitioner stated his understanding of the word voluntary was, "That I give up the right myself, no one is forcing me." Petitioner acknowledged that as to the one Robbery With Firearms no contest plea, it was tantamount to a plea of guilty, as he did not desire to contest the allegations charged in the state's Information.

At sentencing, Petitioner stated he knew of no reason, legal or otherwise, why sentencing should not be imposed. The trial court found Petitioner guilty of First Degree Murder and sentenced Petitioner to life imprisonment, and guilty of the armed robbery charges and sentenced Petitioner to thirty year concurrent sentences on each of the Robbery With Firearms charges, to run consecutive to the life term First Degree Murder sentence. The trial judge advised Petitioner of his right to file an appeal, and further

advised Petitioner had ten days to file a written application with the court to have the judgment and sentence withdrawn and ninety days in which to file a writ of *certiorari* with the Court of Criminal Appeals.

Petitioner's counsel, H. I. Aston, of Tulsa, Oklahoma, has filed an affidavit that in pertinent part states:

"I, H. I. Aston, OBA Number 362, state that on or about the 16th day of July, 1981, I was appointed to represent Waymon Allen Easter in Tulsa County District Court cases numbered CRF 81-2326, Robbery With Firearms; CRF 81-2372, Robbery With Firearms; CRF 81-2442, Robbery with Firearms; and CRF 81-2403, First Degree Murder.

That preliminary hearings were held and at the conclusion of the hearings, Waymon Allen Easter was bound over for District Court Arraignment.

That the District Attorney's office in and for Tulsa County made a recommendation that, if the Defendant would enter a plea of guilty to the murder charge and guilty pleas to each of the three armed robbery charges, they would recommend a life sentence on the murder charge and thirty year sentences each on the armed robbery charges, with sentences on the robbery charges to run concurrently. Waymon Allen Easter could not enter a guilty plea to the third armed robbery case but elected to accept the recommendations of the District Attorney and enter a guilty plea to the first degree murder case, guilty to two of the armed robbery cases and nolo contendere to the third armed robbery case.

I fully advised Mr. Easter as to the effect of his entering the above mentioned pleas prior to the pleas being made and accepted by the court. I spent in excess of sixty-two (62) hours in representing Mr. Easter concerning these four charges."

The Petitioner filed no timely direct appeal nor did he file an application to withdraw his pleas of guilty that resulted in the judgment and sentence.

Thirteen years later, on May 22, 1995, Petitioner filed an application for post-conviction relief in Tulsa County District Court asserting the following seven grounds:

- I. The trial court erred in accepting the guilty pleas without making the appropriate interrogation regarding Petitioner's mental state and without showing of sufficient factual basis.
- II. Trial judge erred by not requiring full disclosure of any plea agreement and by misadvising a petitioner consequences of such agreement.
- III. The trial court erred by not eliciting a factual basis for the pleas of guilty.
- IV. The trial court erred by misinforming petitioner of the nature and consequences of the pleas of guilty.
- V. Petitioner was denied effective assistance of counsel.
- VI. Trial court erred by failure to advise petitioner as to his right to direct appeal as required by due process of law.
- VII. The cumulation of errors denied petitioner a fair trial.

The Tulsa County district court denied Petitioner post-conviction relief, concluding that Petitioner was adequately informed of his rights, including his appeal rights; Petitioner's plea was knowingly and voluntarily made; Petitioner's counsel acted as a reasonably competent attorney under the facts and circumstances of the case; and Petitioner's failure to appeal timely the above complaints barred post-conviction relief on those issues. Petitioner timely appealed the denial of his post conviction relief and the Oklahoma Court of Criminal Appeals affirmed.

II. ANALYSIS

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. §2254(b) and (c). Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by either (a) showing the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) that at the time Petitioner filed his federal petition, he had no available means for pursuing a review of his conviction in state court. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988).

In the instant petition for writ of habeas corpus, Petitioner asserts the identical grounds for post-conviction relief presented to the state district and appellate courts, and thus has exhausted his claims, with one exception: Petitioner additionally alleges that his counsel was ineffective in failing to challenge separate counts of felony murder and robbery on the ground of double jeopardy. While Respondent acknowledges that this claim has not been presented to the highest court of the state of Oklahoma, Respondent asserts that the exhausted claims are procedurally barred and the unexhausted claim would be procedurally barred if raised in a second application for post conviction relief. See 22 O.S. §1086. Thus, Respondent relies on procedural default of all of Petitioner's claims and does not ask that the petition be dismissed for failure to exhaust state remedies.

The existence of an unexhausted claim among exhausted claims constitutes a mixed petition which ordinarily must be dismissed. Rose v. Lundy, 455 U.S. at 510.

However, because the Court finds, as set forth below, that the record establishes that Petitioner cannot state a federal constitutional claim based on double jeopardy, the Court will forego the needless “judicial ping-pong” of dismissing this habeas corpus petition as a mixed petition. Granberry v. Greer, 481 U.S. 129, 131, 135 (1987) (failure to exhaust does not preclude consideration of merits when no colorable federal claim is raised); Steele v. Young, 11 F.3d 1518, 1524 (10th Cir. 1993)(failure to exhaust does not preclude consideration of merits where claim would be procedurally barred).

The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, *See* Townsend v. Sain, 372 U.S. 293, 317-18 (1963), overruled in part by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

A. Procedural Default

The alleged procedural default in this case results from Petitioner's failure to raise his claims in a timely direct appeal and his failure to provide the court sufficient reason for failing to do so. The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state's highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner “demonstrate[s] cause for the default and actual prejudice as a result of alleged violation of federal law, or demonstrate[s] that failure to consider the claim will result in a fundamental miscarriage of justice.” Coleman v. Thompson, 501 U.S. 722, 724 (1991); *see also* Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), *cert. denied*, 115 S.Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). “A state court finding

of procedural default is independent if it is separate and distinct from federal law.” Maes, 246 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly “in the vast majority of cases.” *Id.* (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), *cert. denied*, 502 U.S. 1110 (1992)).

Applying these principles to the instant case, the Court concludes Petitioner's exhausted claims are barred by the procedural default doctrine. The state court's procedural bar as applied to Petitioner's claims was an “independent” state ground because “it was the exclusive basis for the state court's holding.” Maes, 46 F.3d at 985. Additionally, the procedural bar was an “adequate” state ground because the Oklahoma Court of Criminal Appeals has consistently declined to review claims which were not raised on direct appeal. Moore v. State, 809 P.2d 63, 64 (Okla. Crim. App.), *cert. denied*, 502 U.S. 913 (1991) (the doctrine of *res judicata* bars consideration in post-conviction proceedings of issues which have been or which could have been raised on direct appeal).

Because of his procedural default, this Court may not consider the Petitioner's claims unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. *See* Coleman, 501 U.S. at 750. The cause standard requires a petitioner to “show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules.” Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. *Id.* As for prejudice, a petitioner must show “actual

prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner attempts to show cause by alleging ineffective assistance of counsel because his counsel filed no pretrial motions, failed to advise him of the consequences of his plea, and failed to investigate and prepare an adequate defense.

To establish ineffective assistance of counsel, a petitioner must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); Osborn v. Shillinger, 997 F.2d 1324, 1328 (10th Cir. 1993). A petitioner can establish the first prong by showing that counsel performed below the level expected from a reasonably competent attorney in criminal cases. Strickland, 446 U.S. at 687-88. "The proper standard for measuring attorney performance is reasonably effective assistance." Gillette v. Tansy, 17 F.3d 308, 309 (10th Cir. 1994) (quoting Laycock v. New Mexico, 880 F.2d 1184, 1187 (10th Cir. 1989)). In doing so, a court must "judge . . . [a] counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. There is a "strong presumption [however,] that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 695. Moreover, review of counsel's performance must be highly deferential. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular

act or omission of counsel was unreasonable.” *Id.* at 689.

To establish the second prong, a petitioner must show that this deficient performance prejudiced the defense, to the extent that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. *See also* Lockhart v. Fretwell, 506 U.S. 364, 368-73 (1993) (holding counsel's unprofessional errors must cause a trial to be “fundamentally unfair or unreliable”). There is no reason to address both components of the Strickland inquiry if the petitioner makes an insufficient showing on one. Strickland, 466 U.S. at 697.

The record does not support Petitioner's claim of ineffective assistance of counsel. This Court has been acquainted professionally with the work of attorney H. I. Aston, Petitioner's appointed counsel, for in excess of twenty years. The Court knows attorney Aston to be both competent and conscientious in the representation of his clients. When the record is reviewed, along with the affidavit of attorney Aston, the Court cannot conclude Petitioner's ineffective assistance of counsel contention has merit. Petitioner does not allege he asked counsel to file a motion to withdraw his guilty plea or appeal his conviction within ten days of sentencing as he had been advised by the trial court at the time of sentencing. Further, there is no “constitutional requirement that defendants must always be informed of their rights to appeal following a guilty plea.” Carey v. Laverette, 605 F.2d 745, 746 (4th Cir.), *cert. denied*, 444 U.S. 983 (1979); *see also* Hardiman v. Reynolds, 971 F.2d 500, 506 (10th Cir. 1992); Castellanos v. United States, 26 F.3d 717 (7th Cir. 1994); and Davis v. Wainwright, 462 F.2d 1354 (5th Cir. 1972). Only “[i]f a

claim of error is made on constitutional grounds, which could result in setting aside the plea, or if the defendant inquires about an appeal right” does counsel have a duty to inform the defendant of his limited right to appeal a guilty plea. Laycock, 880 F.2d at 1184-88. Petitioner offers no evidence to support a lack of competence on his part in reference to the plea and sentencing hearings of November 1981. Petitioner does not allege that he inquired of counsel about his appeal rights or informed counsel that he did not understand the district court’s admonition. Thus, the Court does not find sufficient “cause” to excuse the procedural default.

Petitioner’s only other means of gaining federal habeas review is a claim of actual innocence. The “actual innocence” or “miscarriage of justice” exception is a narrow exception to the procedural default doctrine which allows a federal habeas court to consider the merits of a defaulted claim when the petitioner makes a showing, based on new evidence, that “a constitutional violation has probably resulted in the conviction of one who is actually innocent.” Schlup v. Delo, 115 S.Ct. 851, 867 (1995). When this exception is raised, the petitioner must “show that it is more likely than not that ‘no reasonable juror’ would have convicted him.” Id. at 868.

Petitioner pled guilty to the subject charges, including the First Degree Murder charge, which raises a question as to whether he is foreclosed from a later claim of actual innocence, absent a showing that the plea was invalid. Brownlow v. Groose, 66 F.3d 997, 999 (8th Cir. 1995). However, even if he is not so foreclosed, Petitioner offers no evidence, new or otherwise, to support his claimed innocence. Rather, he cites his

statement at the plea hearing that he was “pleading guilty to the murder on [his] part, but not the shooting” and vaguely contends that his counsel would have found exonerating evidence if an adequate investigation ensued.

The Information for the first degree murder charge and the transcript of the plea hearing, however, belie Petitioner’s current gloss on his 1981 statement. The Information in CRF-81-2403 alleges that Petitioner, Victor Miller and Kenneth Martin Wallace “did unlawfully, feloniously and wilfully while acting in concert each with the other, and without authority of law, did effect the death of IFTI KHAR AHMED by shooting him with a certain gun, to-wit: a .22 caliber pistol while engaged in the commission of the crime of Robbery With Firearms.” Petitioner’s statement was made in the context of a discussion among the court, Petitioner and his counsel as to Petitioner’s understanding of the felony murder count to which he was pleading guilty in CRF-81-2403. Petitioner’s response that he was pleading guilty to the murder but not the shooting reflects the understanding that he was criminally responsible for the death which occurred during the armed robbery as alleged in the Information although he did not actually shoot the robbery victim.

Finally, Petitioner’s assertion that his counsel failed to adequately investigate his innocence is “insufficient to overcome the barrier of procedural default in the absence of a showing sufficient to satisfy Schlup’s actual innocence gateway.” Brownlow, 66 F.3d at 999.

The Court thus concludes that Petitioner has failed to meet the threshold showing

of actual innocence to fall within this exception to the procedural default of his claims.

B. Double Jeopardy Claim

Although Petitioner's double jeopardy claim is raised for the first time in the instant habeas petition, the Court finds that Oklahoma courts would apply the same procedural default rule to Petitioner's double jeopardy claim, if brought in a second application for post-conviction relief, that they applied to his other claims. Steele, 11 F.3d at 1524 (citing Hale v. State, 807 P.2d 264, 266-67 (Okla.Crim.App.) cert. denied, 502 U.S. 902 (1991)). The Court further finds that Petitioner has not shown cause for the default: his failure to timely raise this claim appears an effect of the denial of state relief rather than a legitimate claim based on any "external" factor. Id. Moreover, Petitioner's pro se status and lack of legal training in filing for post-conviction relief do not constitute sufficient cause under the cause and prejudice standard. Rodriguez v. Maynard, 948 F.2d 684, 688 (10th Cir. 1991). Finally, as noted above, Petitioner has not met the actual innocence threshold to fall within the fundamental miscarriage of justice exception to the procedural bar of this claim. Thus, the Court finds the double jeopardy claim procedurally barred.

Even if the double jeopardy claim were not procedurally barred, Petitioner has failed to state a federal constitutional claim cognizable in a federal habeas proceeding. Id. Petitioner claims that "the state alleged the elements of robbery in the murder information, and again alleged the same crimes in separate [robbery] counts of the information" in violation of the Fifth Amendment (incorporated by the Fourteenth

Amendment) protection against double jeopardy. However, Petitioner does not identify any factual basis for his claim, i.e., which robbery count or counts is a lesser-included crime of the felony murder count so as to constitute double jeopardy. Because of Petitioner's failure to state any factual basis for his claimed double jeopardy, the Court requested that Respondent provide the Court with the entire state court record, including the subject informations to ascertain whether Petitioner's bald assertion had any merit.¹ After reviewing the subject informations, the Court finds Petitioner's double jeopardy claim is entirely without merit.

All four informations to which Petitioner pled, charged separate and distinct offenses. The information in CRF-81-2403 for Murder in the First Degree makes the following charge:

... that WAYMON ALLEN EASTER, VICTOR MILLER and KENNETH MARTIN WALLACE on or about the 24th day of June, A.D., 1981, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did unlawfully, feloniously and wilfully while acting in concert each with the other, and without authority of law, did effect the death of IFTI KHAR AHMED by shooting him with a certain gun, to-wit: a .22 caliber pistol while engaged in the commission of the crime of Robbery With Firearms in the manner and form as follows, to wit:

That on or about the 24th day of June, 1981, in Tulsa County, State of Oklahoma, the above named defendants did unlawfully, feloniously and wrongfully while acting in concert each with the other, rob one IFTI KHAR AHMED by wrongfully taking and carrying away certain money belonging to SUPER STOP CONVENIENCE STORE and in the possession of said IFTI KHAR AHMED and in his immediate presence, without his consent and against his will, said robbery being accomplished by said defendants

¹ Petitioner objects to the expansion of the record (Docket No. 19). The Court finds no merit to Petitioner's objection.

with the use of a certain firearm, to-wit: a pistol and which they used to menace and threaten the said IFTI KHAR AHMED with harm if he resisted, and by said assault, threats and menace did then and there put the said IFTI KHAR AHMED in fear of immediate and unlawful injury to his person and overcame all his resistance, and while so intimidating him, did then and there wrongfully take and obtain from him the money aforesaid.

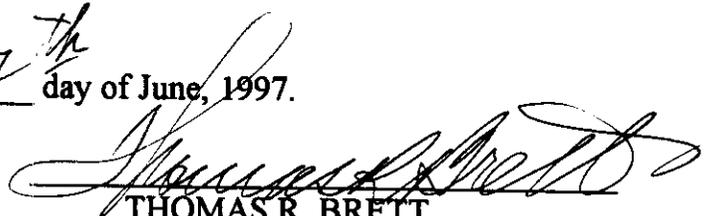
None of the three armed robberies charged in Case Nos. CRF-81-2326, CRF-81-2442 and CRF-81-2372 involved the acts set forth in the information charging first degree murder. In Case No. CRF-81-2326, Petitioner was charged with an armed robbery which occurred on June 28, 1981 when Petitioner, together with Andrew Maurice Smith and Victor Cornell Miller, robbed Gary Eugene Michie at the U-Totem #47. In Case No. CRF-81-2442, Petitioner, together with Andrew Maurice Smith and Victor Cornell Miller, was charged with the armed robbery of Rose A. Willard d/b/a U Totem Store which occurred on June 28, 1981. In Case No. CRF-81-2372, Petitioner and Victor Cornell Miller were charged with the armed robbery of Jeffrey J. Miller d/b/a Quick Trip #20 which occurred on May 8, 1981. Based on the face of the informations before the Court, the facts supporting the armed robbery charges to which Petitioner pled are clearly separate and distinct from those of the predicate robbery in the felony murder information as they involve different times, places and victims. Thus, on the merits, the Court finds no double jeopardy in Petitioner's pleas to the three armed robbery and one first degree murder charges.

III. CONCLUSION

After a careful review of the record in this case, the Court finds that Petitioner has

failed to show cause and prejudice or a fundamental miscarriage of justice to excuse his procedural default and has failed to state a cognizable federal constitutional claim of double jeopardy. The petition for a writ of habeas corpus (Docket No. 1) is therefore denied.

IT IS SO ORDERED this 17th day of June, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

JUN 18 1997

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

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

ANTHONY WAYNE MOORE,)
)
 Plaintiff,)
)
 vs.)
)
 AFFILIATED TRUCKERS OF AMERICA,)
 a foreign corporation, and)
 CLARENDON AMERICAN INSURANCE)
 COMPANY, a foreign insurance)
 corporation,)
)
 Defendants.)

Case No. 97-CV-116-K

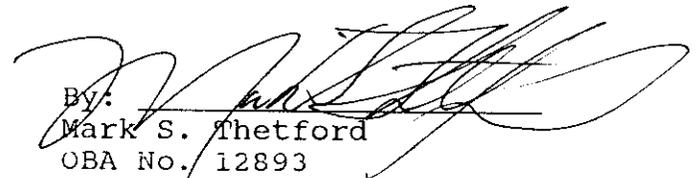
FILED 6-18-97

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Comes now the Plaintiff, Anthony Wayne Moore, and the Defendants, Affiliated Truckers of America and Clarendon America Insurance Company, and stipulate that Affiliated Truckers of America shall be dismissed without prejudice as a party defendant in the captioned matter.

Respectfully submitted,

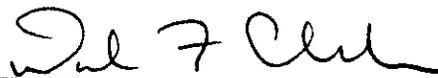
STIPE LAW FIRM



By: Mark S. Thetford
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Muskogee, OK 74402
(918) 683-5050
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Attorneys for Plaintiff

APPROVED AS TO FORM AND CONTENT:


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LOONEY, NICHOLS & JOHNSON
Attorneys for Defendants

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RECEIVED ON DAY
6-18-97

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 PATRICIA MICHELLE JAGGERS;)
 UNKNOWN SPOUSE OF Patricia Michelle)
 Jagers, if any; RONALD DEAN JAGGERS)
 aka Ronnie Dean Jagers aka Ron D. Jagers;)
 UNKNOWN SPOUSE OF Ronald Dean Jagers)
 aka Ronnie Dean Jagger aka Ron D. Jagers,)
 if any; COMMONWEALTH MORTGAGE)
 CORPORATION OF AMERICA successor by)
 merger to Commonwealth Mortgage Company of)
 America, L.P.;)
 KENNETH E. WAGNER;)
 JEANNE R. WAGNER;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

F I L E D

JUN 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 95-C-432-K ✓

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 18th day of June, 1997, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on April 21, 1997, pursuant to an Order of Sale dated January 23, 1997, of the following described property located in Tulsa County, Oklahoma:

Lot Five (5), Block Four (4), WESTFUL VISTA, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat No. 1601

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Patricia Michelle Jagers and

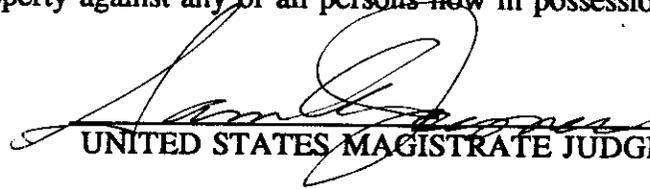
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Ronald Dean Jagers, through their attorney Charles Whitman; the Defendant, Commonwealth Mortgage Corporation of America, successor by merger to Commonwealth Mortgage Company of America, L.P., through its attorney Richard A. Hipp; the Defendants, Kenneth E. Wagner and Jeanne R. Wagner, through their attorney Georgenia A. Brown; the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to James A. Parker, 3350 South Allegheny Avenue, Tulsa, Oklahoma 74135, he being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

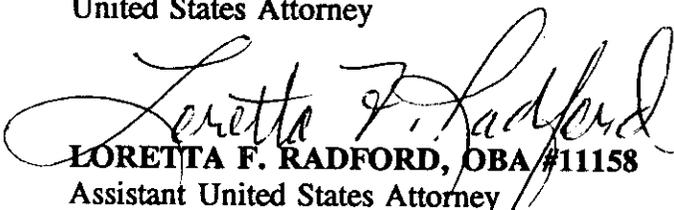
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, James A. Parker, 3350 South Allegheny Avenue, Tulsa, Oklahoma 74135, a good and sufficient deed for the property.

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


UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney


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

Report and Recommendation of United States Magistrate Judge
Case No. 95-C-432-K (Jagers)

LFR:cm

RECORDED ON DOCKET
6-18-97

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
 vs.)
)
 SHELBY STANSILL; UNKNOWN)
 SPOUSE IF ANY OF SHELBY)
 STANSILL; JOE C. STANSILL;)
 UNKNOWN SPOUSE IF ANY OF JOE)
 C. STANSILL; BANCOKLAHOMA)
 MORTGAGE CORP.; COUNTY)
 TREASURER, Tulsa County, Oklahoma;)
 BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

FILED

JUN 18 1997 *PL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Case No. 96-CV-146-K ✓

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 18th day of June, 1997, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on March 17, 1997, pursuant to an Order of Sale dated December 20, 1996, of the following described property located in Tulsa County, Oklahoma:

Lot Thirty-two (32), Block Three (3), WEST HIGHLANDS IV, an Addition in Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given to the Defendants, Shelby Stansill, Unknown Spouse if any of Shelby Stansill, Joe C. Stansill, and Unknown Spouse if any of Joe C. Stansill, by publication; the Defendants, BancOklahoma Mortgage Corp., through its attorney Robert W. Carroll; County Treasurer, Tulsa County, Oklahoma and Board of County

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Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma, and the Purchaser, Stowers Properties L.L.C., by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to Stowers Properties L.L.C., Route 3, Box 892-3, Pawnee, Oklahoma 74058, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

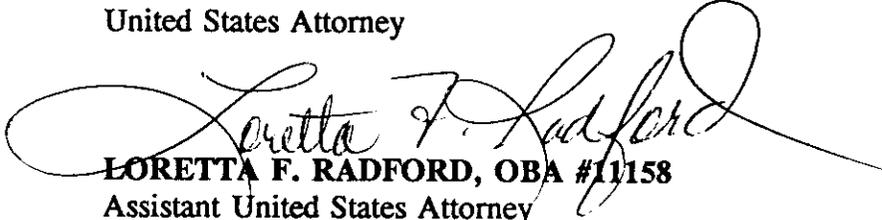
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, Stowers Properties L.L.C., Route 3, Box 892-3, Pawnee, Oklahoma 74058, a good and sufficient deed for the property.

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


UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

A large, elegant handwritten signature in black ink, reading "Loretta F. Radford". The signature is written in a cursive style with a prominent loop at the end of the last name.

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

LFR:cas

Report and Recommendation of United States Magistrate Judge
Civil Action No. 96-CV-146-K (Stansill)

6-18-97

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

GARLAND LANE,)
)
 Plaintiff,)
)
)
 vs.)
)
 ELEMENTARY SCHOOL DISTRICT,)
 NO. 30 OF DELAWARE COUNTY,)
 OKLAHOMA a/k/a KENWOOD PUBLIC)
 SCHOOLS; JOHNNIE BACKWATER,)
 and JERRY WHITEDAY, individually; and)
 JOHNNIE BACKWATER, as a member)
 of the Board of Education of Elementary)
 School District No. 30 of Delaware)
 County, Oklahoma;)
)
 Defendants.)

No. 96-CV-541-K

FILED

JUN 17 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of the parties' cross-motions 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 April 14, 1997, the Court found summary judgment appropriate in favor of Defendant, Jerry Whiteday on all claims. Additionally the Court found summary judgment appropriate in favor of Plaintiff, Garland Lane, as to his Due Process Claim against Elementary School District No. 30 of Delaware County, Oklahoma a/k/a Kenwood Public Schools and Johnnie Backwater. Summary judgment was denied in all other respects, and the issue of damages for the Plaintiff's Due Process Claim was submitted to the jury.

This action came on for jury trial before the Court, the Honorable Terry C. Kern, District Judge,

presiding. On May 2, 1997, the jury returned its verdict for the Plaintiff and against the Defendants Elementary School District No. 30 of Delaware County, Oklahoma a/k/a Kenwood Public Schools and Johnnie Backwater as to the Plaintiff's First Amendment and Open Meetings Act claims, and the jury awarded \$140,000 in back pay, \$10,000 in emotional distress, and \$65,000 in front pay damages to the Plaintiff, as to his Due Process and First Amendment claims. Additionally, the jury awarded \$1,000 in punitive damages against Defendant Johnnie Backwater. The punitive damages amount, pursuant to the stipulation of the parties, was remitted by the Court to \$100.

The parties were ordered at the conclusion of trial to submit briefs as to the remedy for the Defendants' violation of the Oklahoma Open Meetings Act. Defendants contend that because the Defendants did not violate the Oklahoma Open Meetings Act when they voted to non-renew the Plaintiff's employment contract, the Plaintiff suffered no loss as a result of the Defendants' Oklahoma Open Meetings Act violation. Plaintiff argues that the violations of the Oklahoma Open Meetings Act rendered the termination vote invalid, and thus the Plaintiff suffered the loss of his position as School Superintendent as a result of the Defendant's violations. The Plaintiff, in lieu of reinstatement, which the parties stipulated would be inappropriate, argues that he is entitled to additional back pay.

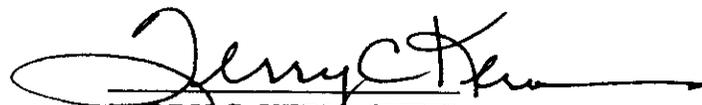
The Court has determined that there is no need to resolve the disputed interpretation of the loss incurred as a result of the Defendants' Open Meetings Act violations because either interpretation has no impact on the remedy to which the Plaintiff is entitled. The jury determined that the Plaintiff lost his position as a result of the Defendants' violation of his First Amendment rights, and the Court determined that the Plaintiff lost his position as a result of the Defendants' violation of the Plaintiff's Due Process rights. Assuming arguendo that the Defendants' violations of the Oklahoma Open Meetings Act also caused the termination decision of the Defendants to be invalidated, the resulting harm would be that the Plaintiff would be entitled to back pay and reinstatement or front pay. The jury determined the amount of damages

that the Plaintiff was entitled to as a result of the loss of his position, and the Court finds the amount to be appropriate in light of the evidence presented at trial.

Judgment is therefore ENTERED for the Plaintiff and against the Defendants as to the Plaintiff's Due Process claim, First Amendment claim, and Open Meeting Act claim.

IT IS THEREFORE ORDERED that the Plaintiff Garland Lane recover from the Defendants the sum of \$215,000, with post-judgment interest thereon at the rate of 5.88 percent as provided by law. IT IS FURTHER ORDERED that the Plaintiff Garland Lane recover from the Defendant Johnnie Backwater the sum of \$100.

IT IS SO ORDERED THIS 17 DAY OF JUNE, 1997.


TERRY C. KERN, CHIEF
United States District Judge

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

ENTERED ON DOCKET
DATE 6-18-97

SAMUEL D. VANOVER,
an individual,

Plaintiff,

vs.

HAZEL O'LEARY, Secretary of
the Department of Energy,

Defendant.

No. 95-CV-916-K ✓

FILED

JUN 17 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Now before the Court is Defendant's Motion for Summary Judgment. Plaintiff has brought this cause of action alleging that he was not promoted in violation of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16, 42 U.S.C. § 1981A, and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* Additionally, Plaintiff claims that he was ultimately discharged without just cause in violation of the Civil Service Reform Act, 5 U.S.C. § 7513, and in violation of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16, and the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*

I. Statement of Facts

Plaintiff first began his employment with Southwestern Power Administration ("SWPA"), at it's Gore office, in December, 1968. The SWPA is an agency of the federal Department of Energy, which markets federally generated hydroelectric power in six states: Kansas, Missouri, Arkansas, Texas, Oklahoma, and Louisiana. The headquarters of the SWPA is located in Tulsa, Oklahoma, with area offices located in Springfield, Missouri; Gore, Oklahoma; and Jonesboro, Arkansas. The

facts and occurrences constituting this cause of action arose from the SWPA location in Gore, Oklahoma.

The office manager and EEO officer in the Gore office at the relevant times was Aleta Wallace. Wallace was supervised by Thomas Green, *Deposition of Aleta Wallace, Plaintiff's Exhibit 10, p. 10*, and Dallas Cooper served as the superior of both Green and Wallace. *Id. at 11; Deposition of Thomas Green, Plaintiff's Exhibit 4, p. 16*. Thomas Green was personal friends with both Dallas Cooper and Aleta Wallace. *Deposition of Thomas Green, Plaintiff's Exhibit 4, p. 16; Deposition of Aleta Wallace, Plaintiff's Exhibit 10, p. 10*.

A. Facts Relevant to Plaintiff's Retaliation Claims

In 1985, Plaintiff was denied a promotion to a position as general foreman at the SWPA's Gore facility, and was subsequently dismissed from his employment as a lineman at SWPA allegedly on the grounds that he had incurred disabilities which would prohibit him from performing his job as a lineman, and because there were no positions available to accommodate his limitations. *EEOC Report, Plaintiff's Exhibit 1*. Plaintiff filed a formal EEOC complaint on December 13, 1985. *Id.* Plaintiff was later not selected for a position as foreman one at the Gore facility which became available in 1986. *Id.* The same result occurred when the Plaintiff applied for the same position at the Tupelo, Oklahoma location on March 31, 1986. *Id.* The Plaintiff succeeded in his EEOC complaint, was reinstated, and returned to work at the Gore office in October, 1992 as general foreman. *Id.*

In the early 1990s, the Defendant began considering reorganization of the SWPA field offices. In 1993, at least two reorganization meetings were held with SWPA employees in which the future manager positions were discussed. In the first meeting, Dallas Cooper stated something to the effect

of "Sam doesn't come into this, he's as good as gone," or "the same as gone". *Deposition of Donna Hause, Plaintiff's Exhibit 6, p. 15.* This statement was made in reference to the position of team leader, which was the position into which the current general foremen were anticipated to transfer. *Deposition of Donna Hause, Defendant's Reply, Exhibit 7, p. 12-15.*

In 1993, Plaintiff alleges that he was contacted by Shirley Nichols, a woman who had sought employment by SWPA. *Deposition of Samuel Vanover, Plaintiff's Exhibit 9, p. 17.* According to the Plaintiff, Ms. Nichols was interested in bringing sexual harassment charges against Dallas Cooper. On or about September 15, 1993, Plaintiff informed Thomas Green of his intent to help Ms. Nichols pursue her claim, and Mr. Green told Dallas Cooper about this conversation. *Deposition of Dallas Cooper, Plaintiff's Exhibit 3, p.47-52.* Dallas Cooper admitted that he referred to Plaintiff as a "copperhead snake" to Ms. Nichols. *Id. at 49.* Cooper also testified that he told his supervisor, J.M. Schaffer and Tom Green that he thought that the Plaintiff was encouraging or involved in encouraging Shirley Nichols to file sexual harassment charges against Cooper.¹ *Id. at 55-56.*

In June, 1992, a woman named Veronica McGuire began employment with the SWPA in the Gore office working part-time as a "Stay in School" employee. Ms. McGuire, during part of the time she was employed at SWPA, was involved in an affair with a lineman at SWPA, John Farrell. *Deposition of Veronica DaNeile Anderson (aka Veronica McGuire), Plaintiff's Exhibit 7, p. 30.* Plaintiff had, at some point during 1993, disciplined Mr. Farrell, and Mr. Farrell and Plaintiff did not get along well. *Id. at 60; Deposition of Gary Gregory, Plaintiff's Exhibit 5, p. 30, 37.* Mr. Farrell was the first to report an alleged incident of sexual harassment between Plaintiff and Ms. McGuire

¹ A jury returned a verdict in the Defendant's favor on June 7, 1996 in Ms. Nichols' sexual harassment suit. *Defendant's Reply, Exhibit 6.*

to Ms. Wallace. *Id.*; *Deposition of Aleta Wallace, Plaintiff's Exhibit 10, p. 30.* Ms. McGuire resigned her position with SWPA on August 31, 1993, and filed a formal complaint of sexual harassment against the Plaintiff on November 8, 1993, alleging that she had been harassed by the Plaintiff from September of 1992 through August of 1993. *Defendant's Exhibit 2(B).* As a result of Ms. McGuire's complaint, an EEOC investigation was initiated. The United States Department of Energy and SWPA, at the relevant time, had in place policies prohibiting sexual harassment in the workplace. *Defendant's Exhibit 2(C).*

On June 13, 1994, pursuant to the above-mentioned reorganization efforts, SWPA advertised vacancies for three positions, described as "Transmission System Maintenance Manager", to be filled at each of three locations: Gore, Oklahoma; Springfield, Missouri; and Jonesboro, Arkansas. The closing date for this vacancy was July 5, 1994. *Defendant's Exhibit 1(A).* Applicants from within the federal government were targeted in this advertisement. *Id.* Another advertisement was issued on June 27, 1994 for these same positions, but this advertisement was not limited to those with federal government experience. *Defendant's Exhibit 1(B).* The decision to seek applicants outside of the federal government was made by Dallas Cooper. *Deposition of Margaret Skidmore, Plaintiff's Exhibit 8, p. 28.* The Plaintiff applied for the positions open at Gore and Springfield.

Margaret Skidmore was in charge of referring the applicants qualified for the advertised positions to the selecting official, Thomas Green. Mr. Green was chosen as selecting official by Dallas Cooper. *Deposition of Thomas Green, Plaintiff's Exhibit 4, p. 15-16.* Thomas Green was aware, at the time he was appointed as selecting official, that Plaintiff was returned to SWPA pursuant to an EEOC order of reinstatement, and was generally aware of a rumor that management was resistant to Plaintiff's return. *Deposition of Thomas Green, Plaintiff's Exhibit 4, p. 14-15.*

All individuals within the agency who previously occupied the general foreman positions, including Plaintiff, were considered best qualified and were automatically referred to Mr. Green without having to submit to the qualification process. *Id. at 38*. Eventually, the list of applicants referred to Thomas Green contained 23 names, which were then referred to an interview panel composed of Bob Inman, Otis Keller, Joe Malinovsky, and Thomas Green. Thomas Green served as chairman of the interview panel.

Interviews for the transmission system maintenance manager positions were conducted by Thomas Green and the interview panel on September 12, 13, 14, and 19, 1994, and each interviewee was asked the same 26 questions, and was independently ranked by each panel member. *Defendant's Exhibits 1(E), (F), and (G)*. The Plaintiff was given an overall ranking of 16 of 23 by panel member Bob Inman; a ranking of 9 of 23 by Thomas Green; a ranking of 21 of 23 by Otis Keller, and a ranking of 9 of 23 by Joe Malinovsky. *Defendant's Exhibit 1(F), p.54*. Each of the panel members indicated that neither age, nor prior EEO activity affected their ranking decisions. *Defendant's Exhibits 1(G), (I), (J), and (K)*. These rankings were then submitted to Thomas Green as the selecting official, and he converted the rankings into percentages, and formulated over-all rankings based on those percentages, *Defendant's Exhibits 1(F), p.55, and 1(G)*. Mr. Green then evaluated the rankings in conjunction with telephonic reference checks, work experience, and knowledge, skills, and abilities. *Defendant's Exhibit 1(G)*. Dallas Cooper did not receive the applications at any time during the selection process. *Deposition of Dallas Cooper, Plaintiff's Exhibit 3, p.6*.

After determining his proposed selections pursuant to the procedure described above, Thomas Green submitted them to Dallas Cooper, the approving official. *Id.* According to Cooper's deposition testimony, Plaintiff's name never came up during this discussion because Mr. Green had

already determined who the best candidates were, and the Plaintiff was not among those presented to Mr. Cooper for approval. *Deposition of Dallas Cooper, Plaintiff's Exhibit 3, p. 9-11; Defendant's Exhibits 1 (G),(M)*. Upon receiving Cooper's approval for his preferred candidates, Mr. Green selected Jerry Murr for the position in Gore, Steven Ray for the position in Springfield, and Tony Weir for the position in Jonesboro. Mr. Murr achieved an overall ranking of 2 of 23, Mr. Ray was ranked 3 of 23, and Mr. Weir was ranked 8 of 23. *Defendant's Exhibit 1(F), p.55*. Plaintiff received an overall rank of 16 of 23, and was notified of his non-selection on or about October 14, 1994.

Plaintiff's position, general foreman, was dissolved pursuant to the reorganization plan, and Plaintiff was subsequently reassigned to a position as maintenance coordinator at the Gore facility on October 30, 1994 by Colin Kelley, SWPA Personnel Officer. *Defendant's Exhibit 2(A)*. Plaintiff filed an EEOC complaint regarding his non-selection on December 20, 1994.

On July 24, 1995, a Final Agency Decision regarding Ms. McGuire's sexual harassment claim was issued, finding that Ms. McGuire was the victim of sexual harassment. *Defendant's Exhibit 2(D)(3)*. On August 24, 1995, Thomas Green was appointed proposing official by Forrest E. Reeves, Acting Administrator of the Department of Energy, and was ordered to conduct an independent review of the agency decision. *Defendant's Exhibit 2(F)*. Mr. Reeves also selected Mr. Francis R. Gajan as the Deciding Official in the event that Mr. Green's investigation concluded that discipline should be imposed. *Id.* On October 30, 1995, one year after Plaintiff's reassignment to a maintenance coordinator position, and one month after Plaintiff filed this lawsuit, Thomas Green notified Plaintiff that he had completed his independent review of the agency decision regarding his alleged sexual harassment of Veronica McGuire, and that he was going to propose that Plaintiff be removed from his position as maintenance coordinator with SWPA within 30 days. *Defendant's Exhibit 2(D)(30)*.

After a third review of the relevant documentation, Francis Gajan notified Plaintiff that he was officially removed on February 1, 1996 for violating company policy and Title VII regarding sexual harassment. *Defendant's Exhibit 2(G)*.

B. Facts Relevant to Plaintiff's Age Discrimination Claim

During a meeting held in 1993 regarding the reorganization of the SWPA offices, the Plaintiff has testified that Dallas Cooper stated to those assembled that "he was going to weed out" the older employees. *Deposition of Samuel Vanover, Plaintiff's Exhibit 9, p. 15*. Plaintiff also contends that Dallas Cooper later made a similar statement to the Plaintiff privately. *Id.*

Additionally, the three candidates who were selected for the positions of Transmission System Maintenance Manager in 1994 were all younger than the Plaintiff. At the time of the selection, Jerry Murr, who was hired for the position in Gore, was 41. Steven Ray, who was selected for the position in Springfield, was 40. Tony Weir, who was selected for the position in Jonesboro, was 53. Plaintiff was 54 at the relevant time.

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, 249-52 106 S.Ct. 2505, 2510-12, 91 L.Ed.2d 202 (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

Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000(e) *et seq.*, prohibits an employer from discharging, failing to promote, or otherwise discriminating against any individual because that individual opposed an employer's unlawful employment practice, or because that individual made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under Title VII.

To establish a *prima facie* claim of retaliation, the Plaintiff must show that he engaged in protected activity, that he was subsequently subjected to an adverse employment action, and that there was a causal link between the protected activity and the adverse action. *Cole v. Ruidoso Mun. Schools*, 43 F.3d 1373, 1381 (10th Cir. 1994). Once a plaintiff has established a *prima facie* case, the defendant must articulate a legitimate, non-discriminatory reason for the adverse action taken against the plaintiff. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S. Ct. 1089, 1094, 67 L.Ed.2d 207 (1981). This burden is merely one of production, rather than persuasion. The burden then shifts back to the Plaintiff to show that the Defendant's stated reasons were merely a pretext for retaliation.

Similarly to Title VII, the ADEA prohibits employers from failing to promote an individual 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

failure to promote 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 for the employer's adverse action, 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 both approaches.

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 qualified for a promotion; (3) he was not promoted despite his qualification for the position; and (4) a younger person was promoted. *Greene*, 98 F.3d at 558. 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. *Id.*

For purposes of this motion, the Defendant has conceded that the Plaintiff has established a *prima facie* case with regard to both his age discrimination and retaliation claims.

A. Plaintiff's Non-Selection to the Transmission System Maintenance Manager Position

Plaintiff has offered, as direct proof of discrimination, the statements of Dallas Cooper that he intended to use the reorganization to "weed out" the older employees. As for the *McDonnell Douglas/Burdine* analysis, the Defendant contends that the Plaintiff was not selected to be the transmission system maintenance manager either in Gore or Springfield because other, more highly

qualified candidates were selected. The Court finds that the Defendant has met its burden of production with regard to both the age and retaliation claims under the *McDonnell Douglas/Burdine* analysis. Thus, the presumption of discrimination drops from the case, and the Plaintiff bears the burden of providing sufficient evidence that the Defendant's stated reasons are pretextual.

As proof of pretext in his retaliation and age claims, Plaintiff makes a number of assertions. First, he contends that the selection process for the transmission system maintenance manager positions were "manipulated" by Dallas Cooper in that Cooper, in "an unusual step", advertised the positions on a nationwide basis to avoid having the Plaintiff be the only qualified applicant. The Plaintiff fails to present any evidence that this was an unusual step, and Margaret Skidmore testified that the decision to advertise nationwide was made to ensure that the SWPA would receive candidates from every source, and thus the best applicants for these "very critical positions", "critical to SWPA's mission". *Deposition of Margaret Skidmore, Plaintiff's Exhibit 8, p. 28*. Additionally, Skidmore testified that the agency is not required to show that there were insufficient candidates within the government before seeking candidates outside the government. *Id.*

Second, Plaintiff alleges that the interview panel used in the selection of the transmission system maintenance managers was "an elaborate ruse" because (1) Cooper had announced to the employees that Plaintiff was "as good as gone"; (2) Cooper announced that he was going to use the reorganization to "weed out" older employees, including Plaintiff; (3) at the time the selection was made, Cooper was angry at Plaintiff because of his involvement in the Shirley Nichols' case; (4) Thomas Green did not rely on the interview panel rankings, but rather made his selection only after "touching base" with Dallas Cooper; (5) Otis Keller, a member of the interview panel, was named as a discriminating official in Plaintiff's 1985 complaint, and was present at a management meeting where

resistance to Plaintiff's return as general foreman was discussed; and (6) Thomas Green had "repeatedly acted out his animosity toward Plaintiff on behalf of Cooper".

There are numerous problems with Plaintiff's arguments. First, although Cooper stated that Plaintiff was as "good as gone", this statement was made in April 1993, which was five months prior to the interview process. Second, Dallas Cooper did not make any decisions regarding the selection process. He did not see the applications, and his only role in the selection process was to approve the proposed selections made by Thomas Green, none of which included the Plaintiff. Thus, the fact that Cooper was angry with the Plaintiff, and that he made the statement that the reorganization was going to be used to "weea out" older employees is insufficient to create an issue of fact because Dallas Cooper was not the decision-maker.

To raise an inference of discrimination, age-related, or retaliatory comments must have been made by the decision-maker, and must have some nexus to plaintiff, his position, or the employment decision. *Edwards v. Liberty National Bank & Trust Company of Oklahoma City*, 89 F.3d 849, 1996 WL 353784, **2 (10th Cir.) citing *Cone v. Longmont United Hospital Association*, 14 F.3d 526, 531 (10th Cir. 1994) ("Isolated comments, unrelated to the challenged action, are insufficient to show discriminatory animus in termination decisions.").

The third problem with Plaintiff's argument is that, although Plaintiff contends otherwise, Plaintiff has provided no evidence that Green did not rely on the interview panel rankings in making his selection decisions.² Fourth, Plaintiff's assertion that Otis Green was present at the meetings

² Although Plaintiff refers to page 74 of Green's deposition, no such page was included among Plaintiff's exhibits. The Court has determined, based on the evidence presented, that Green did not rely *solely* on the panel's rankings in making his selection decision; however, he did consider the rankings in formulating an overall ranking, which was a crucial element in the decision-making process.

discussing management's resistance to Plaintiff's return is not supported by any evidence on the record.³ Fifth, Plaintiff has provided absolutely no evidence whatsoever regarding Thomas Green "acting out his animosity toward Plaintiff on behalf of Cooper."

Additionally, Plaintiff's response brief contends that he was the "best qualified" for the position of transmission system maintenance coordinator. As with most of Plaintiff's assertions, there is no evidence to support this. Plaintiff submits that Gary Gregory testified that, in his opinion, the Plaintiff was the most qualified, but Plaintiff failed to submit this alleged testimony to the Court.

Because the Plaintiff has failed to present any evidence of pretext or discriminatory or retaliatory motive attributable to the decision-maker in this case, Thomas Green, Defendant's motion for summary judgment must be granted as to the Plaintiff's retaliation claims.⁴

B. Plaintiff's Discriminatory Discharge Claims

The SWPA asserts that the Plaintiff was terminated from his position because he sexually harassed Veronica McGuire, a SWPA employee. The Court finds that the Defendant has met its burden of producing a legitimate, non-retaliatory reason for Plaintiff's discharge, thus the presumption of discrimination is rebutted and drops from the case. 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.

According to the record, Veronica McGuire filed a formal EEOC complaint in November,

³ Once again, Plaintiff refers to Otis Keller's deposition, page 25, but no such deposition was included in Plaintiff's exhibits.

⁴ The Court rejects Plaintiff's conspiracy theory, of which there is no evidence, which attempts to attribute Dallas Cooper's retaliatory or discriminatory motives to Thomas Green as a result of Thomas Green's relationship with Dallas Cooper and Aleta Wallace. This is discussed more fully in the subsequent section of this order addressing Plaintiff's discharge claims.

1993 asserting that she had been sexually harassed from September, 1992 through August, 1993. According to McGuire's complaint, she alleged that in November, 1992, the Plaintiff reached up from behind her and grabbed her breasts. On another occasion, McGuire alleged that the Plaintiff had a polish sausage hanging out of his zipper. Ms. McGuire also alleged that the Plaintiff gave her a t-shirt that said "Your hole is our goal". Ms. McGuire alleged that other, lesser incidents of harassment occurred throughout her tenure at SWPA.

Plaintiff's first evidence of pretext is that there was no evidence that he sexually harassed Veronica McGuire. However, Aleta Wallace confirmed the polish sausage incident, and several employees, including Plaintiff, confirmed that that Plaintiff distributed the t-shirt with the "Your hole is our goal" message to several female employees. There were no witnesses to the breast-grabbing incident, but several female employees either experienced or witnessed the Plaintiff pinching the buttocks of female employees. Although the Plaintiff denied the allegations of harassment in an affidavit submitted to the EEOC investigator, there is evidence on the record that he first stated "no comment" when questioned by the EEOC investigator about each of these incidents.

Additionally, in support of his claim that his termination was pretextual, the Plaintiff claims that sexual harassment was tolerated by the SWPA, and that he was singled out for discipline. In support of this assertion, Plaintiff indicates that a sign was posted on the Gore office wall stating that sexual harassment wasn't a problem, but a "benefit" of working there. This was confirmed by evidence on the record. Plaintiff also indicated that he and several other male employees complained about sexual harassment, but nothing was done; however, Plaintiff failed to submit any evidence of

this allegation.⁵ Plaintiff also contends that the SWPA didn't fire Dallas Cooper when he was charged with sexual harassment; however, a jury found in the Defendant's favor in the Dallas Cooper case. Finally, the Plaintiff points to evidence in the record indicating that the atmosphere at the SWPA office in Gore was "open" and that off-color jokes were regularly told.

While the foregoing paragraph contains ample evidence that the SWPA ran a rather loose organization, the record reflects that Ms. McGuire is the only one who complained, and that she found Plaintiff's actions to be unwelcome. Additionally, whether other employees tolerated such activities is irrelevant to the issue of whether Ms. McGuire was sexually harassed. Plaintiff has not presented any evidence that other employees, against whom harassment complaints were proven, were treated better than he.

In further support of his claim that his discharge was motivated by retaliation,⁶ the Plaintiff has propounded an elaborate conspiracy theory. First, Plaintiff contends that John Farrell, a subordinate employee, wanted to "use" Veronica McGuire to "get" Plaintiff because the Plaintiff had counseled Farrell about his affair with Ms. McGuire. Plaintiff has offered the deposition testimony of Gary Gregory in support of his claim that Farrell "manufactured" the incidents leading to the sexual harassment charges, and convinced McGuire to report Plaintiff. However, Plaintiff's purported "evidence", as produced through the Gregory deposition is inadmissible hearsay. The one piece of admissible evidence in support of this conspiracy is the fact that Farrell is the individual who first

⁵ This allegation is allegedly supported by deposition testimony which was not submitted to the Court.

⁶ The Court has been informed that the age discrimination issue was not brought before the Merit Systems Protection Board, therefore the discharge section of this order will address only Plaintiff's retaliation claims.

reported, sometime in the Fall of 1992, to Aleta Wallace that Plaintiff had grabbed McGuire's breasts. Additionally, Plaintiff points out that Ms. McGuire subsequently complained to Wallace about the incident shortly thereafter, but that she chose not to file a formal complaint until a year later - November, 1993. According to the Plaintiff, the timing of this formal complaint is the key to his retaliation complaint because it was in September, 1993, just two months earlier, that Dallas Cooper discovered that the Plaintiff was assisting Shirley Nichols, a former SWPA job applicant, in her sexual harassment complaint against Dallas Cooper. According to the Plaintiff, it was after this discovery that the attempts to get rid of him "kicked into overdrive". Plaintiff contends that after Dallas Cooper found out about Plaintiff's involvement in the Nichols' case, McGuire was "encouraged" by the "Cooper, Green and Wallace cabal" to pursue her harassment complaint. There is no direct evidence of this conspiracy, but Plaintiff contends that there is ample circumstantial evidence. Plaintiff contends that, at the time the sexual harassment complaint was lodged against him, and throughout the investigation, Dallas Cooper was angry with Plaintiff because of his involvement with Nichols, and called Plaintiff a "copperhead snake". Further, Plaintiff has presented evidence that Dallas Cooper was good friends with Thomas Green, and Thomas Green was good friends with Aleta Wallace. Plaintiff's theory is as follows: John Farrell, motivated by his dislike for the Plaintiff, concocted a plan to use McGuire to "get" the Plaintiff. Farrell contrived the November, 1992 incident involving the Plaintiff "grabbing" McGuire's breasts, and encouraged Veronica McGuire to complain to Aleta Wallace, and to pursue the charges.⁷ Plaintiff maintains that John Farrell then applied pressure on Thomas Green to investigate the charges. Dallas Cooper, angry over Plaintiff's

⁷ This segment of Plaintiff's conspiracy theory is not supported by any admissible evidence and is merely Plaintiff's assertions presented in his response brief.

involvement in the Nichols' case, confided in his good friend Thomas Green that Plaintiff was behind Nichols' EEOC charges. According to the Plaintiff's theory, because Aleta Wallace was friends with McGuire, and good friends with Thomas Green, she lied to EEOC investigators, and corroborated the "polish sausage" incident to help Thomas Green assist his friend Dallas Cooper discriminate against Plaintiff. However, the only admissible evidence on the record suggests that Ms. McGuire was motivated to file her formal complaint against Plaintiff because she had discovered that Plaintiff was helping another woman file harassment charges against Dallas Cooper. McGuire testified that she thought that Plaintiff's actions were hypocritical, and that his hypocrisy motivated her to ask Wallace if it were too late to file charges against Plaintiff. *Deposition of Veronica Anderson, Plaintiff's Exhibit 7, p. 59.*

Plaintiff advances many other allegations in support of his conspiracy theory including that the Defendant clearly did not credit McGuire, and that there was substantial evidence that the Plaintiff had not sexually harassed McGuire; however, Plaintiff again has failed to support these contentions with any admissible evidence. Most of Plaintiff's evidence relating to retaliatory motive come from either John Farrell or Dallas Cooper, neither of which were involved in the decision to terminate the Plaintiff. Thomas Green, pursuant to an appointment and after receiving an agency decision finding that the Plaintiff had sexually harassed Ms. McGuire, conducted his own investigation and determined that the Plaintiff should be terminated. The final decision rested with Francis Gajan. Additionally, although the Plaintiff contends that the EEOC and agency investigations were "tightly controlled", the Plaintiff has failed to present any evidence in support of this contention. Specifically, the Plaintiff asserts on page 12 of his response brief, that Veronica McGuire had Gary Gregory's remarks regarding the atmosphere at SWPA "excluded" from his affidavit. There is no evidence supporting

this statement whatsoever. Further, on that same page Plaintiff contends that the investigation did not address the fact that McGuire and Farrell had a relationship, or that Farrell was the source of the original charges. This assertion is clearly without basis. The record of the EEOC investigation clearly indicates that the McGuire-Farrell relationship was thoroughly revealed and discussed. *See Defendant's Exhibits 2(D)(3), p.7 & 2(D)(4)*. Additionally, the administrative record is replete with references to the fact that John Farrell initially complained about the harassment to Wallace. *See Defendant's Exhibits 2(D)(4)(Affidavit of Veronica McGuire), 2(D)(5)(Affidavit of Aleta Wallace), 2(D)(12)(Affidavit of John Farrell), p. 13*. Further, Plaintiff was given an opportunity at the investigatory stage to present his conspiracy theory. The entire EEO investigatory file was considered by Thomas Green when he conducted his second "independent" investigation, thus it seems incredible for the Plaintiff to now assert that such things were not taken into consideration simply because these items weren't discussed in the final agency decision or in Thomas Green's proposal memorandum.

The Plaintiff has failed to present any admissible evidence either that the Defendant's stated reason for Plaintiff's termination is unworthy of belief, or in support of his allegations that the Defendant terminated his employment out of retaliation. For this reason, the Defendant's motion for summary judgment must be granted as to Plaintiff's retaliatory discharge claim.

C. Plaintiff's Civil Service Claim

In February, 1996, Plaintiff was notified by Francis Gajan that his employment with the Department of Energy was terminated. Pursuant to 5 U.S.C. § 7513, a federal agency may only terminate an employee for such cause as will promote the efficiency of the service. Plaintiff appealed his termination to the Merit System Protection Board ("MSPB") pursuant to 5 U.S.C. §7702

asserting that his termination was not for such cause as would promote the efficiency of the service. Additionally, Plaintiff claimed that he was terminated in retaliation for participating in EEOC activities. Although the MSPB held a hearing on Plaintiff's claim, they failed to issue an opinion within 120 days as required by statute. 5 U.S.C. § 7702(a)(1). Plaintiff seeks judicial review in this court of his termination by the Department of Energy.

Ordinarily, when an individual employed by a federal agency is terminated, if he does not assert a discrimination claim against the terminating agency, an appeal is taken to the MSPB pursuant to §7701 of the Civil Service Reform Act. A final decision by the MSPB is then directly appealable to the United States Court of Appeals for the Federal Circuit ("the Federal Circuit") pursuant to §7703. However, in cases in which a terminated employee asserts a discrimination claim in addition to claiming that his termination was not for the efficiency of the service, the case is termed a "mixed" case, and appeals of an MSPB decision are to be directed to the federal district court. The federal district court has the authority to conduct a *de novo* review of an employee's discrimination claim. As a matter of judicial economy, the federal appellate courts have determined that concurrent with a district court's authority to conduct *de novo* review of a federal employee's discrimination claim, the district court should also act as an appellate court, and conduct a review of the MSPB record on the issue of whether the termination was for the efficiency of the service. *See e.g., Williams v. Rice*, 983 F.2d 177, 179-180 (10th Cir. 1993); *Cristo v. Merit Systems Protection Bd.*, 667 F.2d 882 (10th Cir. 1981).

A federal employee's discrimination claim can arrive in a district court by another method as well. Under §7702(e)(1)(B), if the MSPB fails to issue a decision on a federal employee's "mixed" claim within 120 days as required by §7702(a)(1), an aggrieved employee is entitled to file a

complaint with a district court notwithstanding the lack of a final MSPB decision. That is what has occurred in this case. In addition to bringing his retaliation claim before this Court, the Plaintiff also requests that the Court review the Department of Energy's termination decision to determine whether or not the Plaintiff was terminated "for the efficiency of the service." The parties contend that this Court has the jurisdiction to review the termination decision of the Department of Energy, pursuant to the judicially created "concurrent" authority discussed in the preceding paragraph. Plaintiff asserts that the Court must conduct a *de novo* review of his termination, whereas Defendant contends that the Court should review the administrative record that was before the MSPB. The Court finds that neither of these options are consistent with its interpretation of the statute.

Although §7702(e)(1)(B) entitles an aggrieved employee to file a complaint with the district court where the MSPB fails to issue a decision within 120 days, the Court finds that, under those circumstances, the district court is not empowered with the same concurrent jurisdiction to review the termination decision as in the case when the MSPB has issued a final opinion in a "mixed" case. The concurrent jurisdiction to review MSPB termination decisions was created by the federal courts to promote judicial efficiency. Rather than having the district courts conduct *de novo* review of the discrimination issue and having the Federal Circuit review the MSPB agency record of the just cause termination decision, when the MSPB has issued a decision in a mixed case, it is more efficient to have the district court review the entire claim. When a district court undertakes this review, it merely stands in the shoes, so to speak, of the Federal Circuit. The Federal Circuit, pursuant to §7703, has the authority to review only *final* orders or decisions of the MSPB. It follows that the same holds true of district courts reviewing termination decisions pursuant to §7702. Thus, in cases such as this where the MSPB has not issued a final decision, neither the Federal Circuit, nor the district court

would have the expertise to address the issue of whether a federal employee's termination was for the efficiency of the service.

This Court finds that when an employee files a discrimination claim with the district court 120 days after filing an appeal with the MSPB pursuant to §7702(e)(1)(B), the MSPB retains a continuing obligation to issue an opinion as to agency's termination decision, and if such opinion is issued prior to the termination of the district court discrimination case, the district court may review the MSPB ruling. If the MSPB fails to issue a decision prior to the termination of the district court discrimination case, the final decision of the MSPB should be appealed directly to the Federal Circuit as is contemplated by the statute. To hold otherwise would allow terminated employees to circumvent MSPB review altogether simply by asserting discrimination claims, and would result in district courts conducting reviews of agency decisions under the strictures of §7701, a task for which district courts are ill-suited. *See*, Peter B. Broida, *A Guide to Merit System Protection Board Law & Practice*, Ch. 12, at I(G)(1) (3d ed. 1997).

For the foregoing reasons, the Court has determined that Plaintiff's Civil Service Reform Act claim is not properly before this Court, and should be DISMISSED.

IV. Conclusion

Summary judgment is hereby GRANTED on behalf of the Defendant as to Plaintiff's failure to promote and discriminatory discharge claims. Plaintiff's Civil Service Act claim is DISMISSED for failure to exhaust administrative remedies.

ORDERED this 13 day of June, 1997.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

6-18-97

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

SAMUEL D. VANOVER,)
 an individual,)
)
 Plaintiff,)
)
 vs.)
)
 HAZEL O'LEARY, Secretary of)
 the Department of Energy,)
)
 Defendant.)

No. 95-CV-916-K

F I L E D

JUN 17 1997

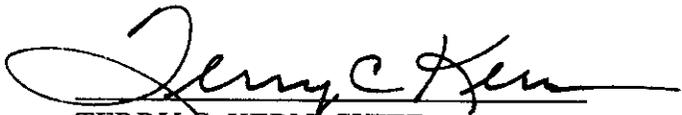
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of the Defendant Hazel O'Leary'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 17, 1997, the Court finds summary judgment is appropriate in favor of Defendant Hazel O'Leary.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Hazel O'Leary and against the Plaintiff.

ORDERED this 13 day of June, 1997.


 TERRY Q. KERN, CHIEF
 UNITED STATES DISTRICT JUDGE

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

ELDON E. ROSE,)
)
 Plaintiff,)
)
 v.)
)
 JOHN J. CALLAHAN,)
 COMMISSIONER OF SOCIAL)
 SECURITY,¹)
)
 Defendant.)

Case No. 96-C-138-B

FILED
JUN 16 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
JUN 18 1997

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed May 9, 1997, in which the Magistrate Judge recommended that the decision of the Administrative Law Judge be affirmed and Plaintiff's Motion for Judgment on the Pleadings (Docket #4) be denied. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

IT IS THEREFORE ORDERED that the decision of the Administrative Law Judge is affirmed and Plaintiff's Motion for Judgment on the Pleadings (Docket #4) is denied.

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).

9

Dated this 16th day of June, 1997.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett".

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

F I L E D

MELINDA MILLIGAN,)
)
 Plaintiff,)
)
 vs.)
)
 TRASE MILLER TECHNOLOGIES, INC.,)
)
 Defendant.)

JUN 17 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-C-139-B

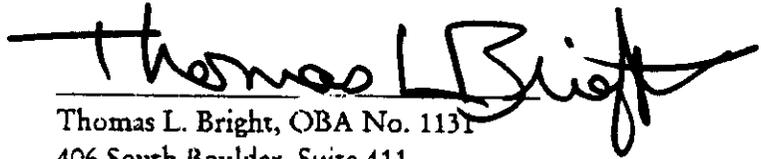
ENTERED ON DOCKET
DATE JUN 18 1997

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, Plaintiff Melinda Milligan and Defendant Trase Miller Technologies, Inc., by and through their respective counsel, hereby stipulate to the dismissal of the captioned case with prejudice, each party to bear its or her own costs.



Victor E. Morgan, OBA No. 12419
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A handwritten signature in black ink that reads "Thomas L. Bright". The signature is written in a cursive style with a long horizontal line extending to the left of the first letter.

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

FILED

JUN 16 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FARM BUREAU MUTUAL INSURANCE)
COMPANY OF ARKANSAS, INC.,)
a foreign insurance company,)

Plaintiff,)

v.)

No. 96-CV-1000-B

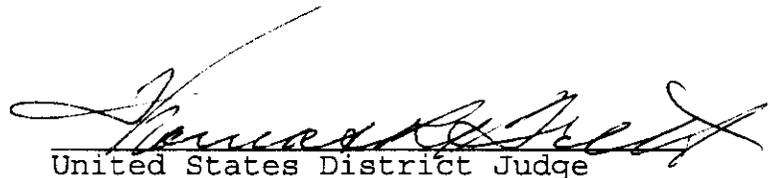
EXPRESS METAL FABRICATORS, INC.)
an Oklahoma Partnership; and)
TERRY COWAN, JERRY COWAN,)
and RALPH GIBSON, as partners)
of Express Metal Fabricators,)

Defendants.)

MAILED ON BOOKLET
JUN 17 1997

ORDER OF DISMISSAL WITHOUT PREJUDICE

Upon stipulation of the parties and for good cause shown, the court hereby orders Plaintiff's declaratory judgment action dismissed without prejudice pursuant to Fed. R. Civ. P. 41.


United States District Judge

Counsel for Plaintiff

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

F I L E D
JUN 16 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHIRLEY REDNOUR,)
)
 Plaintiff,)
)
 vs.)
)
 PROTECTIVE LIFE INSURANCE)
 COMPANY CORPORATION OF)
 ALABAMA, a foreign insurance company,)
)
 Defendant.)

Case No. 97-CV-132-B

ENTERED ON DOCKET
DATE JUN 17 1997

ORDER

At issue before the Court is Protective Life Insurance Corporation of Alabama's ("Protective Life") Motion to Dismiss or in the Alternative Motion for Stay (Docket # 6). After careful consideration of the record and applicable legal authorities, the Court hereby **GRANTS** Protective Life's Motion to Dismiss.

Plaintiff Shirley Rednour ("Rednour") is the widow of Delbert Rednour, deceased. In January, 1996, Delbert Rednour applied for and was issued a credit life insurance policy through Protective Life. The policy's intended purpose was to reduce or pay Delbert Rednour's debt with regard to a 1995 Chevrolet pick-up to the lienholder, General Motors Acceptance Corporation ("GMAC"). The eventuality upon which the policy was based was Delbert Rednour's loss of life. In September, 1996, Delbert Rednour passed away.

Contending the pick-up passed to her by intestate succession, Rednour sought benefits under the policy of insurance. Protective Life refused to pay insurance benefits to Rednour, claiming Delbert Rednour misrepresented certain material facts concerning his medical history. In a January 2, 1997, letter to Rednour, Protective Life stated "we are rescinding the insurance coverage as of the

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date of issue, January 25, 1996.” A refund check for the premium charged was sent to Rednour. Rednour claims the death was a result of natural causes, while Protective Life contends the death was a result of a pre-existing condition, deep venous thrombosis.

Rednour filed the instant action alleging bad faith in the District Court in and for Tulsa County, Oklahoma. Protective Life timely removed the matter to this Court. This Court is vested with subject matter jurisdiction as Rednour is a citizen of the State of Oklahoma, Protective Life is a Tennessee corporation, and the amount in controversy is represented to exceed \$75,000.00. See 28 U.S.C. § 1332. Protective Life is licensed to do business in Oklahoma.

The issue for determination here is whether Protective Life can invoke a provision of the insurance policy Application requiring binding arbitration in the event of a dispute arising from or related to the insurance policy.

Applicable Law

The conflict of laws rules of Oklahoma must be applied to determine whether Alabama or Oklahoma law governs the interpretation of the subject insurance policy. See Rhody v. State Farm Mutual Ins. Co., 771 F.2d 1416, 1418 (10th Cir. 1985). In Oklahoma, the general rule is that the validity, interpretation, application, and effect of the contract should be determined in accordance with the laws of the state in which the contract was made. See Bohannon v. Allstate Ins. Co., 820 P.2d 787 (Okla. 1991); see also Telex Corp. v. Hamilton, 576 P.2d 767 (Okla. 1978). The law of the place of contracting will be applied, absent a specific manifestation of the parties intent to be bound by the laws of a particular jurisdiction. See Rhody, 787 F.2d at 1420; see also Okla.Stat. Ann. tit 15, § 162 (1993).

Protective Life claims the contract was entered into in the State of Alabama. Rednour's

Response brief does not dispute that assertion and the citation to Alabama law leads the Court to believe Rednour agrees with Protective Life on the point. Further, on the Application for insurance, Delbert Rednour listed his address as 22155 Gorgas Road, Berry, Alabama 35546. With no evidence to the contrary, the Court is of the opinion the contract was entered into in the State of Alabama. The record is void of a choice of law clause. Therefore, Alabama law controls the validity, interpretation, application, and effect of the contract.

Alabama Law on Arbitration

Alabama's prohibition on enforcement of an agreement to submit a controversy to arbitration, Ala.Code § 8-1-41(3), is preempted by the Federal Arbitration Act ("the Act") when an arbitration agreement is voluntarily entered into and is contained in a contract that involves interstate commerce. See Coastal Ford v. Kidder, 1997 WL 187098 (Ala.) (not yet released for publication) (citing Ex parte Jones, 628 So.2d 316 (Ala. 1993); A.G. Edwards & Sons v. Syvrud, 597 So.2d 197 (Ala. 1992)).

A Court examining whether a contract involves interstate commerce should simply look to whether the transaction involves interstate commerce "in fact." Coastal Ford, 1997 WL 187098, *2 (citing Allied-Bruce Terminix Companies v. Dobson, 513 U.S. ----, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995)). "[A]n arbitration provision in a contract that, in fact, involves interstate commerce is put on 'the same footing' as other terms of a contract." Coastal Ford, 1997 WL 187098, at *2 (citing Ex parte Phelps, 672 So.2d 790, 793 (Ala. 1995) (quoting Allied-Bruce Terminix, 513 U.S. at ----, 115 S.Ct. at 840, 130 L.Ed.2d at 769)). Section 2 of the Act should be read broadly to extend the Act's reach to the limits of Congress' Commerce Clause power. Allied-Bruce Terminix, 513 U.S. at ----, 115 S.Ct. at 839-41.

The disputed insurance policy was written by a Tennessee corporation with a general office in Pacific Palisades, California, and its principal place of business in Alabama. The purchaser of the policy was an Alabama resident. The purpose of the policy was to reduce or eliminate the debt on Delbert Rednour's 1995 Chevrolet pick-up in the event of his death, such payment to be in favor of GMAC. GMAC has an office in Hudson, Ohio. See Protective Life's Reply, Exhibit 1, Docket # 8. Additionally, although not dispositive, the Application contained a provision that the parties agree the issuance of the insurance takes place in and substantially affects interstate commerce. See Application, Protective Life's Motion to Dismiss, Exhibit 1. The Court is of the opinion the subject insurance contract does, in fact, involve interstate commerce.

Scope of the Arbitration Provision

The arbitration provision of the Application reads as follows:

I have read and understand this Application and represent that I am insurable for the coverage requested in the Schedule. I understand this insurance is not required to obtain credit. I agree that the issuance of this coverage takes place in and substantially affects interstate commerce. I agree that any dispute arising out of or relating in any way to this insurance, or the sale or solicitation of, this insurance shall be settled by arbitration. I agree to give up my right to seek remedies in court, including the right to a jury trial. I understand and agree that I am insured only if I have signed below and agree to pay the additional cost of the insurance. I have detached and retained the "INSURED'S COPY" of this form and Certificate for my records.

As a matter of contract interpretation, this Court must determine whether the contract's arbitration clause requires arbitration of this dispute. See Coastal Ford, 1997 WL 187098, at *3 (citations omitted). First, the Court notes the federal policy favoring arbitration. Id. Second, the Court notes the clear and unequivocal language of the Application calling for arbitration in the event

of a dispute arising from or related to the insurance. Such terminology is located directly above the signature line and printed in bold letters. See Application, Protective Life's Motion to Dismiss, Exhibit 1.

As evidenced by the extensive language on the face of the Application concerning an applicant's health, it is reasonable to assume the physical health of an applicant is important to an insurer's decision whether or not to issue insurance. This is especially true when the insurance is based on the expected life of the insured. It is also reasonable to assume that from time to time disputes will arise concerning the accuracy and/or completeness of information provided by an applicant relevant to his/her health. The Court is of the opinion the scope of the subject arbitration clause includes such potential disputes.

Conclusion

The Federal Arbitration Act preempts Alabama's contradictory prohibition against enforcing arbitration clauses. The insurance contract at the center of this dispute does, in fact, involve interstate commerce. The scope of the arbitration clause includes disputes concerning representations of an applicant as to his/her health. For these reasons, the Court hereby **GRANTS** Protective Life's Motion to Dismiss. The dismissal is without prejudice. Protective Life's Motion to Stay is **MOOT**.

IT IS SO ORDERED this 16th day of June, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

F I L E D

JUN 16 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AARON D. HABBEN,)
)
 Plaintiff,)
)
 vs.)
)
 STANLEY GLANZ,)
)
 Defendant.)

Case No. 95-CV-1194-B ✓

ENTERED ON DOCKET
JUN 17 1997

ORDER

At issue before the Court is Defendant Sheriff Stanley Glanz's ("Glanz") Motion to Dismiss or in the Alternative Summary Judgment (Docket # 10). The Court is in receipt of the Court-ordered Special Report (Docket # 12) filed simultaneous with the Motion. Plaintiff Aaron Habben ("Habben") has filed a Rebuttal to Glanz's Motion (Docket # 14). After a careful review of the record and applicable legal authorities, the Court hereby **GRANTS in part and DENIES in part** Glanz's Motion to Dismiss and **GRANTS** Glanz's Motion for Summary Judgment on all issues except Habben's claim of denial of clean clothing. A ruling on that issue is **DEFERRED** pending receipt of further information described herein.

Background

Habben was a federal pretrial detainee in the Tulsa County Jail for approximately six and one half (6½) months. Habben alleges during said incarceration, July 19, 1995 through January 30, 1996, his civil rights were violated. Bringing this action pursuant to 42 U.S.C. § 1983, Habben's Complaint alleges two (2) counts of constitutional violations; (1) denial of access to a law library (First, Fifth, and Fourteenth Amendments) and, (2) cruel and unusual punishment (First, Fifth, Eighth, and

Fourteenth Amendments). The allegations of count two include:

- (a) the denial of exercise opportunities outside the cell;
- (b) excessive use of force through the overuse of pepper gas;
- (c) being forced to sleep on the floor;
- (d) being forced to eat on the floor;
- (e) overcrowding;
- (f) cold food;
- (g) lack of privacy;
- (h) lack of cleaning supplies;
- (i) insufficient supervision;
- (j) faulty plumbing;
- (k) moldy sinks, showers, and toilets;
- (l) fire code violations;
- (m) lack of clean clothing (42 days in the same uniform) and bed linens; and
- (n) being the victim of random violence.

Habben contends that Gianz, as his custodian, is directly responsible for the unconstitutional conditions of his confinement. See Complaint, p. 1. Habben seeks compensatory damages in the sum of one million dollars (\$1,000,000.00), punitive damages in an unspecified amount, immediate injunctive relief as to exercise, library, overcrowding, and safety issues, a permanent injunction forcing the closure of the eighth and ninth floors, and a temporary restraining order for retaliation. See Complaint, p. 5.

On April 1, 1996, Habben filed a Notice of Change of Address showing he was being

incarcerated in Beaver, West Virginia (Docket # 4). On April 1, 1997, Habben filed another Notice of Change of Address reflecting Lexington, Kentucky as his current place of confinement (Docket # 33). Thus, the requests for injunctive relief and a temporary restraining order are **MOOT**.

Undisputed Facts

1. Habben was incarcerated at the Tulsa County Jail ("TCJ") from July 19, 1995, to January 30, 1996, where he was being held on Fraud charges for the United States Marshal. Habben was released to the custody of the United States Marshal and is currently located at the Federal Correctional Institute in Lexington, Kentucky.

2. Glanz is the duly elected and acting Sheriff of Tulsa County and has held that position since January 1, 1989.

3. During Habben's incarceration, inmates who sought legal materials were required to submit a written Inmate Request for Legal Materials. See Special Report, Ex. 1. Habben contends these forms were not widely available and no secure means of ensuring delivery were available.

4. During Habben's incarceration, Deputy Cynthia Johnston, who has an Associates Degree in Paralegal Studies, was assigned to address the Inmate Requests for Legal Materials. See Special Report, Ex. D.

5. The records maintained by the Sheriff's Department indicate that Habben submitted two (2) requests for legal materials, dated November 18 and 28, 1995, that were made on the forms provided for such requests. Each of the requests were granted and the request form was signed by Habben indicating he had received the material. See Special Report, Ex. A. Habben contends these requests were filled only because inmate Robert Wirtz submitted the requests. Habben claims he submitted at least three (3) requests per week which were ignored.

6. Habben submitted a Grievance form on October 26, 1995, concerning legal materials. Habben stated he submitted a Grievance form for legal materials a week earlier. The jail law librarian responded in writing to the grievance indicating that she had filled out the Grievance form and returned it to Habben along with law library slips. The response was dated November 1, 1995. See Special Report, p. 27. Habben questions the whereabouts of the Grievance form and contends he would never fill out a Grievance form when requesting legal materials as he knows legal materials can only be requested on an Inmate Request for Legal Materials form. The October 26, 1995, Grievance form clearly refutes Habben's contention.

7. Habben was represented by Craig Bryant, who is employed by the Federal Public Defender's Office, while he was incarcerated at the TCJ. See Special Report, p. 4. Habben contends he was acting as co-counsel per a verbal agreement with Craig Bryant.

8. Paper, envelopes, writing implements, and postage were available to inmates during Habben's incarceration at the TCJ. See Special Report, p. 6.

9. Inmate Robert Wirtz filed requests for law library services on behalf of Habben that were granted. Inmate Wirtz also wrote the pleadings in this case for Habben. See Special Report, pp. 43 and 44.

10. Habben was never discouraged from using the assistance of Robert Wirtz, or any other inmate, in preparing or filing pleadings during his incarceration at the TCJ. See Special Report, p. 45.

11. Habben was not classified as an "indigent" during his incarceration at the TCJ. See Special Report, pp. 46 and 47.

12. Habben was incarcerated at the TCJ for one hundred and ninety five (195) days, one

hundred and fifty (150) of which were spent in cell S-2-9. See Special Report, Ex. J.

13. Habben was held in the "general population" of the TCJ and was eligible for mail service, television, access to library books for recreational reading, games, religious services, and visitors. Habben also had access to a telephone twenty four (24) hours per day. See Special Report, pp. 8 and 9.

14. During a nineteen (19) week time frame in which Habben was incarcerated in cell S-2-9, TCJ records indicate the average inmate count for cell S-2-9 was 28.1. Cell S-2-9 is designed for twenty four (24) inmates and has nine hundred and eight (908) square feet. See Special Report, pp. 8 and 9. Habben contends the 28.1 figure is distorted due to the overflow of inmates from cell S-1-9.

15. TCJ records indicate that while Habben was incarcerated he received nineteen (19) laundry change-outs. On three (3) occasions there were shortages of sheets and blankets which were remedied three (3) days later. See Special Report, p. 11 and Ex. L. Habben alleges he was issued one set of clothing upon his arrival at TCJ, July 19, 1995, and was not granted another change out until August 29, 1995. TCJ records indicate Habben did not receive a change of clothing on August 29, 1995.

16. TCJ records indicate Habben filed seven (7) grievances. The seven (7) grievances were responded to in an average of two (2) days. See Special Report, p. 12 and Ex. B. Habben contends the seven (7) grievances were the only ones to make it to the intended party(s) due to an alleged inefficient system by which grievances are filed and returned.

17. TCJ records indicate Habben submitted seven (7) requests for medical services and received examinations and four (4) different types of prescription medications that included antibiotics and pain medication during his incarceration. See Special Report, Ex. G. Habben claims to have

submitted several sick call slips a day for over three (3) weeks before seeing a doctor on August 22, 1995. Habben claims this alleged delay prevented him from consulting with his lawyer due to severe laryngitis.

18. TCJ records indicate pepper gas was used one hundred and twenty three (123) times from July, 1995, through January, 1996. See Special Report, pp. 170 and 171. Glanz claims that during this time there were no incidents where pepper gas was used in cell S-2-9. Habben does not dispute this, but claims that when one cell is sprayed with pepper gas surrounding cells are saturated with the gas due to the design of the ventilation system.

19. Inmates at the TCJ are given a mattress, sheet, blanket, towel, shirt, and slippers. See Special Report, Ex. O.

20. Cell S-2-9 was equipped with tables. The only cell where Habben was held without a table was TPD-19 and Habben was present in that cell for only one (1) day. See Special Report, Ex. O.

21. Inmates at the TCJ are responsible for the sanitary conditions in the cells. Each cell is issued cleaning supplies, such as a mop, a mop bucket, and water, for about fifteen (15) minutes each day. See Special Report, Ex. O. Habben claims the practice of the jailers is to put the cleaning supplies in the cell in the "wee hours" of the morning. Time logs of when the cleaning supplies are provided the inmates are not included in the Special Report.

22. Deputy United States Marshal Robin Fagala informed Glanz, and/or his employees, that Habben was wanted in other jurisdictions and therefore considered an escape risk. The United States Marshal's Service requested the Tulsa County Sheriff's Office not allow Habben exercise privileges outside of his cell. See Special Report, p. 18.

23. A fire escape and evacuation plan have been in effect for the TCJ since April 10, 1986. See Special Report, p. 19, and Ex. R.

24. Food prepared for the inmates of the TCJ is also eaten by many of the Detention Officers of the TCJ. See Special Report, Ex. O.

Analysis

Glanz, sued in his individual and official capacity, has moved to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12 (b)(6) and to dismiss as frivolous under 28 U.S.C. § 1915 (d), in the alternative for summary judgment under Fed.R.Civ.P. 56. Habben has submitted a brief and affidavits in opposition to Glanz's Motion for Summary Judgment (Docket # 14).

Dismissal for Failure to State a Claim

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. See Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint are presumed true and construed in a light most favorable to plaintiff. Id.; see also Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, *pro se* complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. See Haines v. Kerner, 404 U.S. 519, 520 (1972).

Because Habben was a pretrial detainee during the events at issue, he is not entitled to relief under the Eighth Amendment. The Fourteenth Amendment Due Process Clause, not the Eighth Amendment's protections against cruel and unusual punishment protect a pretrial detainee such as Habben. See Bell v. Wolfish, 441 U.S. 520 (1979). Therefore, even liberally construing Habben's

Complaint in accordance with his *pro se* status, the Court concludes Habben can show no set of facts entitling him to relief under the Eighth Amendment.

Further, the Court concludes that Habben has failed to state a claim against Glanz in his individual capacity. Habben has not alleged any facts in support of his claim that Glanz caused or participated in any alleged constitutional violations. It is well established that a defendant may not be held individually liable under 42 U.S.C. § 1983 unless the defendant caused or participated in the alleged constitutional deprivation. See Meade, 841 F.2d at 1527-28. Mere supervisory status, without more, will not create liability in a section 1983 action. Accordingly, Glanz's Motion to Dismiss for failure to state a claim must be **GRANTED** as to Habben's Eighth Amendments claims and all claims brought against Glanz in his individual capacity.

The Standard of Fed.R.Civ.P. 56 Motion for Summary Judgment

The court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. See Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Id. The court cannot resolve material factual disputes at summary judgment based on conflicting affidavits. See Hall, 935 F.2d at 1111. However, the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S.

242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. See Hali, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, viewed in the light most favorable to the nonmovant, fails to show that there exists a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

Where a *pro se* plaintiff is a prisoner, a court authorized "Martinez Report" (Special Report) prepared by prison officials may be necessary to aid the court in determining possible legal bases for relief for unartfully drawn complaints. See Hall, 935 F.2d at 1109. The court may treat the Martinez Report as an affidavit in support of a motion for summary judgment, but may not accept the factual findings of the report if the plaintiff has presented conflicting evidence. Id. at 1111. The plaintiff's complaint may also be treated as an affidavit if it is sworn under penalty of perjury and states facts based on personal knowledge. Id. The court must also construe plaintiff's *pro se* pleadings liberally for purposes of summary judgment. See Haines, 404 U.S. at 520. When reviewing a motion for summary judgment it is not the judge's function to weigh the evidence and determine the truth of the matter, but only to determine whether there is a genuine issue for trial. See Anderson, 477 U.S. at 249.

Rights of Pretrial Detainees

"There is no iron curtain drawn between the Constitution and the prisons of this country." Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974). Even convicted prisoners do not forfeit all constitutional rights by reason of their conviction and confinement in prison. See Bell, 441 U.S. at 545. The court has recognized that pretrial detainees retain at least those constitutional rights as

those retained by convicted prisoners. See Bell, 441 U.S. at 545. However, these rights are not immune from restrictions or limitations pursuant to lawful incarceration. Id. at 545-46. Detainees do not possess the full range of freedoms as unincarcerated individuals. Id. at 546. Courts must accommodate both the legitimate needs of the institution and the rights of the incarcerated. See id. Courts should ordinarily defer their judgment in the day-to-day operations of a corrections facility to the appropriate officials unless there is substantial evidence that the response is exaggerated. Id. at 546-47.

Conditions or restrictions which implicate only the detainee's liberty interest are evaluated under the Due Process Clause. Id. at 535. Because a detainee cannot be punished without adjudication of guilt in accordance with due process of law, restrictions which amount to punishment are invalid. See id. Loss of freedom of choice and privacy are inherent incidents of lawful confinement and, while they interfere with the detainee's desire to live as comfortably as possible, do not amount to punishment. Id. at 537. Absent a showing of intent to punish on the part of corrections officials, if a condition or restriction is reasonably related to a legitimate government objective, without more, it is valid. Id. at 538-39. However, if the restriction is arbitrary, purposeless, or appears excessive in relation to the purpose assigned to it, the court may infer a punitive purpose. Id. Such a restriction, although not imposed with the expressed intent to punish, contravenes a detainee's rights under the Fourteenth Amendment. See id.

Access to the Law Library

Habben alleges that Glanz interfered with his constitutional right of access to the law library. Habben contends he was forced to use an "exact cite" paging system in order to receive legal materials. See Complaint, p. 3. Habben claims he has no way to obtain cites and has been denied

legal guidance and assistance. Id. Habben further asserts the system of providing legal materials used by the TCJ was unreliable and often resulted in his numerous requests being ignored. See Response, p. 9.

A detainee, just like a convicted inmate, has a constitutional right to adequate, effective, and meaningful access to the courts and the law library. See Love v. Summit County, 776 F.2d 908, 912 (10th Cir. 1985), cert. denied, 479 U.S. 814 (1986).

The right is one of the privileges and immunities accorded citizens under article 4 of the Constitution and the Fourteenth Amendment. It is also one aspect of the First Amendment right to petition the government to redress grievances. Finally, the right of access is founded on the due process clause and guarantees the right to present to a court of law allegations concerning the violation of constitutional rights.

Smith v. Maschner, 899 F.2d 940, 947 (10th Cir. 1990) (citation omitted).

In Bounds v. Smith, 430 U.S. 817, 828 (1977), the Supreme Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."

After reviewing the Special Report and Habben's Response, the Court concludes Habben has not demonstrated a deprivation of legal materials of a constitutional magnitude. Habben was represented by Mr. Craig Bryant of the Federal Public Defender's Office during his incarceration in the TCJ. Habben admits inmate Robert Wirtz assisted him in his legal research endeavors and did much of the work necessary to bring this action. Wirtz was described by Deputy Johnston as a very capable assistant who was used by many of the inmates. See Special Report, pp. 44-45. The TCJ was staffed with two (2) Deputies with Associate Degrees in Paralegal/Legal Assistant studies. The TCJ records reflect Habben submitted only two (2) Inmate Request for Legal Materials forms.

Habben's attempt to dispute this by way of his own affidavit and that of inmate David Grubb (Docket ## 15 and 16) falls short as the proffered evidence does not speak to Inmate Request for Legal Material forms. Further, it is alleged by Glanz that Habben sought legal materials on Grievance Forms, as opposed to Inmate Request for Legal Materials. Habben so much as admits this in a Grievance form submitted October 26, 1995. See Special Report, p. 27. Perhaps if Habben had properly followed the policy of the TCJ, his requests for legal materials, if made, would have been more fruitful.

Even if Habben was denied access to the TCJ law library, the Court concludes Habben has not shown any actual injury as a result of the denial. The only mention of an alleged injury in conjunction with this claim is a two (2) point enhancement in the calculation of his sentence, pursuant to the United States Sentencing Guidelines, for assuming a leadership role in the offense charged. See Response, p. 9. Habben offers no evidence the two (2) point enhancement would have been avoided had he been allowed to use the library at his leisure. Since actual injury is an essential element for maintaining a claim for denial of access to the courts, Lewis v. Casey, 116 S.Ct. 2174 (1996), Habben's claim for denial of access to the courts must fail.

General Conditions of Confinement

The remainder of Habben's Complaint centers around general conditions of his confinement. The treatment a detainee receives in jail and the conditions under which he is confined are subject to constitutional scrutiny under the Fourteenth Amendment. See Bell, 441 U.S. at 535. A detainee may not be subject to conditions which amount to punishment or otherwise violate the constitution. Id. at 537. Conditions which are intended as punitive or are not reasonably related to a legitimate governmental interest violate a detainee's due process rights. Id. at 538-39.

Plaintiff alleges that he was (1) denied the opportunity to exercise outside the cell, (2) the victim of excessive use of force through the overuse of pepper gas, (3) forced to sleep on the floor, (4) forced to eat on the floor, (5) housed in an overcrowded cell, (6) forced to eat cold food, (7) denied privacy, (8) not provided adequate cleaning supplies, (9) not provided adequate supervision, (10) housed in a cell with faulty plumbing, (11) housed in a cell with moldy sinks, showers, and toilets, (12) forced to live in an institution that was in violation of the fire code, (13) denied clean clothing and bed linens, and (14) the victim of random violence.

The majority of Habben's complaints, save the alleged denial of clean clothing, do not amount to punishment. While prison overcrowding may violate the Constitution where it is so egregious that it endangers the safety of inmates, Habben has failed to show that the crowded condition at the TCJ caused Plaintiff any physical injury. The Court does not believe an average of 28.1 inmates in a cell designed for twenty four (24) is so egregious that it endangers the safety of the inmates. Thus, the overcrowding claim is without merit.

Habben's claim he was forced to sleep on a mattress on the floor does not provide a basis for relief. Even if Habben was forced to sleep on a mattress on the floor, the Constitution is indifferent as to whether the mattress a detainee sleeps on is on the floor or on a bed absent some aggravating circumstances. See Mann v. Smith, 796 F.2d 79, 85 (5th Cir. 1986); see also Castillo v. Bowles, 687 F.Supp. 277, 281 (N.D. Tex. 1988). Habben does not allege nor provide evidence of aggravating circumstances. Accordingly, this claim must fail.

Similarly, the Court concludes that the unsupported allegations of fire code violations do not amount to punishment in violation of the Fourteenth Amendment. Contrary to Habben's allegations, the record shows the TCJ has fire alarms, fire extinguishers, and an evacuation plan. See Special

Report, Ex. R and S. Habben does not allege a fire occurred during his incarceration at the TCJ, or that he suffered injury as a result of the alleged fire code violations. This claim fails.

The Court concludes no genuine issues of material fact remain as to the lack of outdoor exercise. Glanz's policy of prohibiting high-escape risk inmates from participating in the TCJ's exercise program is reasonably related to a legitimate penological interest. See Martin v. Tyson, 845 F.2d 1451, 1457 (7th Cir. 1988) (denial of outdoor exercise was related to legitimate prison concern in security, based on escape charge pending against detainee, and thus was not a constitutional deprivation). Habben was a federal pretrial detainee wanted in other jurisdictions who was being held without bond. The United States Marshal's Office considered Habben an escape risk. See Special Report, pp. 17-18. Glanz's contention the United States Marshal's Office withheld permission for Habben to exercise outside is uncontroverted. Further, Habben has not shown it was necessary to be outside in order to exercise as other inmates regularly exercise in their cells. See Special Report, Ex. O. Since the limitation on his access to the outdoors is related to a legitimate prison concern, Habben has suffered no constitutional deprivation.

The remainder of Habben's complaints arise to nothing more than conclusory allegations of discomfort inherent in a prison setting. The record contains much evidence to the contrary and, as such, the claims must fail.

The Court concludes that there remain genuine issues of material fact as to whether Habben was denied a clean uniform for more than a temporary period of time. Although the Special Report reveals Habben was given a change of uniform at least nineteen (19) times between September 7, 1995 and January 23, 1996, the Special Report does not include data from July 19, 1995 through August 28, 1995. See Special Report, pp. 145-165. Habben claims he was denied a change of

uniform from July 19, 1995 through August 29, 1995, over forty (40) days. Interestingly, the laundry logs included in the Special Report indicate Habben was not provided a change of uniform on August 29, 1995. See Special Report, p. 145. Further, nothing in the record prior to his Response indicates Habben complained of being in the same clothing for over forty (40) days, notwithstanding the inconclusive, generalized allegation in his Complaint describing the period between laundry change-outs as "extended."

Nevertheless, because the failure to regularly provide prisoners with clean clothing constitutes a denial of personal hygiene and sanitary living conditions, see, e.g., Dawson v. Kendrick, 527 F.Supp. 1252, 1288-89 (S.D.W.Va. 1981); see also Williams v. Hart, 930 F.2d 36, 1991 WL 47118, at *2 (10th Cir. 1991) (unpublished opinion), the Court defers a ruling on Glanz's Motion for Summary Judgment as to this issue pending the receipt of laundry logs, if any, relating to Habben from the time period of July 19, 1995 through August 28, 1995. Counsel for Glanz is directed to supplement the Special Report with the requested information, if any. In the event no laundry logs exist for the stated time period, counsel for Glanz shall so notify the Court. The supplemental material or notice of lack thereof shall be filed no later than June 30, 1997.

Conclusion

After liberally construing Habben's Complaint and Response for purposes of Glanz's Motion to Dismiss, the Court concludes that Glanz's Motion to Dismiss should be **GRANTED** as to Habben's claim under the Eighth Amendment and as to all claims against Glanz in his individual capacity. Viewing the evidence in the light most favorable to the Habben for purposes of Glanz's Motion for Summary Judgment, the Court concludes that Glanz is entitled to judgment as a matter of law on all of Habben's remaining claims, except as to the claim he was denied a clean uniform. A ruling on that

claim is **DEFERRED** pending receipt of supplemental laundry logs, if any, or a notice of lack of further evidence, due June 30, 1997.

SO ORDERED THIS 16th day of June, 1997.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

I. PROCEDURAL BACKGROUND

On January 11, 1985,^{2/} Petitioner was convicted of robbery with a firearm and was sentenced to 50 years imprisonment. Petitioner did not timely appeal this conviction. Petitioner filed an application for post-conviction relief requesting leave to file a direct appeal out of time. This relief was granted, and Petitioner filed a direct appeal in the Oklahoma Court of Criminal Appeals on February 14, 1986, arguing three points of error: (1) that the trial court erred in allowing trial counsel to stipulate to Petitioner's prior convictions without Petitioner's knowing, intelligent and voluntary personal consent; (2) that the trial court improperly admitted photographs into evidence; and (3) that the trial court erred by acting as an advocate for the state. The appellate court found no merit to Petitioner's appeal, and filed its judgment on December 9, 1987. See Wallace v. State, 747 P.2d 324 (Okla. Cr. 1987). The record shows no indication of a petition for a writ of *certiorari* in the United States Supreme Court. Therefore, Petitioner's armed robbery conviction became final on December 9, 1987. See United States of America v. Cuch, 79 F.3d 987, 991 n.9 (10th Cir. 1996); and Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987) (defining final as "a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.").

^{2/} The Judgment and Sentence on Conviction was filed January 14, 1985. See Doc. No. 6, Exhibit "A."

Petitioner filed a second application for post-conviction relief,^{3/} which was denied on January 31, 1995.^{4/} Petitioner appealed to the Oklahoma Court of Criminal Appeals and argued that his sentence was illegally enhanced with an inapplicable former conviction,^{5/} that his failure to raise this issue in his first petition for post conviction relief was based on a change in state law,^{6/} and that the doctrine of *res judicata* did not bar his claim. The Court of Criminal Appeals dismissed the appeal as time-barred on April 21, 1995.

Petitioner then filed this action on June 6, 1996, seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner argues that "newly discovered facts in the law" excused him from raising certain issues in his "first" petition for post-conviction relief;^{7/} and that the state's use of certain felonies for sentence enhancement purposes is a jurisdictional matter that could not be waived. [Doc. No. 1, p. 6]. Respondent has moved to dismiss this action as barred by 28 U.S.C. § 2244(d)'s one year statute of limitations. Petitioner filed a response to the

^{3/} The date of this filing is not indicated in the record. Petitioner may be referring to this document as his "first" application for post-conviction relief. The record reflects, however, that this is in fact Petitioner's second application for post-conviction relief.

^{4/} The Order was filed February 2, 1995. See Doc. No. 6, Exhibit "C."

^{5/} The record indicates that this was the first instance in which Petitioner raised the theory of improper sentence enhancement. However, petitioner referenced the use of his prior convictions in the waiver argument he made on direct appeal.

^{6/} Petitioner cites Coleman v. Saffle, 912 F.2d 1217, 1229 (10th Cir. 1990) as the authority that changed state law.

^{7/} Petitioner probably means his "second" petition for post-conviction relief.

Respondent's motion to dismiss. [Doc. No. 7]. Petitioner did not, however, address the statute of limitations issue.

The issue presented by Respondent's motions to dismiss is whether the one-year filing limitation in 28 U.S.C. § 2244(d), effective on April 24, 1996, applies to the instant Petition which was filed on June 6, 1996. The following analysis of the law demonstrates that § 2244(d) does not bar the Petition in this case.

II. DISCUSSION

A. SECTION 2244(d)'S STATUTE OF LIMITATIONS

The Antiterrorism and Effective Death Penalty Act amended 28 U.S.C. § 2244(d) by adding a one year statute of limitations for § 2254 petitions. Section 2254(d) provides as follows:

- (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of
 - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; [or]
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d) (emphasis added). The effective date of the amendment adding § 2244(d) was April 24, 1996. Petitioner filed his § 2254 Petition on June 6, 1996. Therefore, § 2244(d)'s one year statute of limitations was in effect at the time the Petition was filed.

Section 2244(d)(1)(D) refers to the date on which the "factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Throughout his pleadings, Petitioner refers to "newly discovered facts in the law." Petitioner does not, however, present a new factual predicate as the basis for his challenge to the armed robbery conviction. Rather, Petitioner presents new judicial opinions upon which he desires to raise new legal arguments by applying the intervening judicial opinions retrospectively. Section 2244(d)(1)(D) does not apply to this situation, and is not, therefore, considered as an alternative for determining the date triggering § 2244(d)'s one year limitation period.

As discussed above, Petitioner's direct appeal of his armed robbery conviction was denied on December 9, 1987. Petitioner could have filed a petition for a writ of *certiorari* in the United States Supreme Court within 90 days from the denial of his direct appeal. Rule 13 of Rules for the United States Supreme Court. "Since review of a state criminal conviction by the Supreme Court of the United States is considered direct review of the conviction . . . the time period in which [Petitioner] could have filed his petition for a writ of certiorari in the Supreme Court of the United States must be considered in calculating the time period in which the petitioner could have sought direct review of his conviction for purposes of § 2244(d)(1)." Flowers v. Hanks, 941 F. Supp. 765, 769-70 (N.D. Ind 1996). The one year time period under § 2244(d)(1)(A) would, therefore, have expired no later than March 10, 1988 (i.e., 90 days after December 9, 1987). The Petition in this case was filed June 6, 1996, more

than eight years after § 2244(d)'s one year statute of limitations expired.^{8/} Thus, absent some exception, § 2244(d) bars this action.

B. REASONABLE GRACE PERIOD.

Petitioner should be granted an opportunity to present his claims because his claims accrued prior to the effective date of the amendment adding § 2244(d)'s statute of limitations. The United States Supreme Court has provided guidance on this matter in a non-habeas case which involved a complaint filed less than two months after a limitation period became effective. The Supreme Court held that the Constitution requires that a party be given a reasonable time or grace period in which to file suit in situations where a new statute of limitations is created that would bar pre-accrued claims. See Block v. North, 461 U.S. 273, 285-286 n.23 (1982). See also Flowers v. Hanks, 941 F.Supp. 765, 769 (7th Cir. 1996) (citing Block). In Texaco v. Short, 454 U.S. 516, 527 n. 21 (1982), the Court stated that "all statutes of limitation must proceed on the idea that a party has full opportunity" to bring his suit. Otherwise, the purported statute of limitations would be an "unlawful attempt to extinguish rights arbitrarily." Id. Any statute of limitations which applies to interests created before the enactment of the statute must allow a reasonable time in which to file pre-accrued claims. Id.

^{8/} **Alternative calculation:** Petitioner may be under the impression that February 2, 1995, the date of the Order denying his second application for post-conviction relief was the date his judgment became final. Petitioner is not correct. However, even using this date, the Petition in this case would be barred by § 2244(d)'s one year statute of limitations.

The Ninth Circuit has held that § 2244(d)(1)'s statute of limitations may not be applied retroactively to bar claims which had no time bar when the claims accrued. See Kelly v. Burlington Northern RR Co., 896 F.2d 1194, 1198 (9th Cir. 1990). Kelly was a case of first impression in which the court allowed a reasonable grace period. Id. A case of first impression in the Seventh Circuit, Flowers v. Hanks, 941 F. Supp. 765, 769 (N.D. Ind. 1996), held that a party's reliance interests requires that no habeas petition filed within one year of the AEDPA's effective date (i.e., within April 23, 1997) should be dismissed under § 2244(d). The Court in Flowers held that § 2244(d)'s new one year statute of limitations did not apply to bar petitioners whose habeas actions accrued before the effective date of AEDPA. Such petitioners are entitled to a one year grace period to file pre-accrued claims. Id. See also Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir. 1996) (Easterbrook, J.) (*en banc*) (reaching a similar conclusion in dictum), cert. granted in part, ___ U.S. ___, 117 S.Ct. 726 (1997).

In a case of first impression, the Northern District of Georgia ruled that a § 2254 habeas petition should not be denied based on the one year time limitation in 28 U.S.C. § 2244(d). See Holmes v. Wharton, 1997 W.L. 115837 (N.D. Ga., Feb. 27, 1997). In Holmes, the District Court rejected the Magistrate's Report and Recommendation recommending dismissal of the petition. The court aligned itself with "the emerging majority position" embracing a reasonable grace period. Id.

The Tenth Circuit has ruled on whether the AEDPA bars a *pending* motion filed under 28 U.S.C. § 2255. The instant petition was filed under 28 U.S.C. § 2254, and it was not pending on the date the amendment to § 2244(d) became effective.

However, a review of the following cases suggests a conclusion similar to the treatment of a pending § 2255 motion.

Section 2255, as revised by the AEDPA, precludes the filing of a § 2255 motion more than one year after a conviction. See United States v. Lopez, 100 F.3d 113, 116 (10th Cir. 1996). Prior to this amendment, a party could bring a § 2255 motion at any time. Id.; 28 U.S.C. § 2255. Similarly, before the amendment to § 2244(d), a party could bring a § 2254 petition for habeas corpus at any time. The Court in Lopez decided that the one year limitation for a § 2255 motion was not applicable to the petitioner's case because the amended statute would have retroactive effect in contravention of Landgraf v. USI Film Prods., 511 U.S. 244 (1994). Lopez, 100 F.3d at 116; United States v. Simmonds, 111 F.3d 737 (10th Cir. 1997).

In Simmonds the Tenth Circuit determined that application of a new statute of limitations to a petitioner's § 2255 motion would be an impermissible retroactive application. Simmonds, 1997 W.L. 177560, at * 4. Quoting Landgraf, the Court in Simmonds emphasized concerns of "fair notice, reasonable reliance, and settled expectations." Id. "Generally, retroactivity concerns do not bar a changed limitation period's application to a suit filed after the amendment's effective date." Id. (citing Forest v. United States Postal Serv., 97 F.3d 137, 139-40 (6th Cir. 1996); and Vernon v. Cassadaga Valley Cent. Sch. Dist., 49 F.3d 886, 890 (2d Cir. 1995)). "However, a new time limitation cannot be so unfairly applied to bar a suit before the claimant had a reasonable opportunity to bring it." Simmonds, 1997 W.L. 177660, at * 4. The court then quoted Texaco v. Short for the proposition that existing rights

should not be extinguished while petitioners are relying on those rights. Id. (citing Texaco, 454 U.S. 516, 527 n.21 (1982) (additional citations omitted)).

Applying § 2244(d)'s new statute of limitations to this case would be an unfair retroactive application. Simmonds, 1997 W.L. 177560, at *4. Prior to the effective date of the amendment to § 2244(d), Petitioner had a right to bring a petition for a writ of habeas corpus pursuant to § 2254 without a time limitation. Applying the new time limitation to extinguish his petition filed less than two months after the amendment's effective date would strip Petitioner of his fair expectation, which existed at the time his claims accrued. Therefore, in the case at bar, Petitioner should be allowed a reasonable grace period to file his pre-accrued claims and this action should not be barred by § 2244(d)'s one year statute of limitations.

Section § 2244, silent on the existence of a grace period, is also silent as to what would be a "reasonable time" in which to file pre-accrued claims following the effective date of the amendment. However, a reasonable time must be established if the statute is to be constitutionally sound. See Texaco, 454 at 527 n. 21. The Flowers and Lindh cases discussed supra, provide for a one year grace period, so as to deem all pre-accrued claims filed before April 24, 1997 as timely. The Tenth Circuit found one year to be a reasonable grace period in Simmonds, 1997 W.L. 177560, a § 2255 case. The Holmes court found it unnecessary to address the duration of a reasonable grace period where the petitioner filed his pre-accrued claims within one week after the enactment of the AEDPA, deeming one week a reasonable time under any grace period. See Holmes, 1997 W.L. 115837, at * 3. In the instant case,

Petitioner filed his pre-accrued claims less than two months after the enactment of the AEDPA. The undersigned finds that two months also fits within any definition of a reasonable grace period.

CONCLUSION

This undersigned recommends that Petitioner be granted an opportunity to pursue his pre-accrued claims. The instant Petition for a Writ of Habeas Corpus should be deemed timely because it deals with pre-accrued claims. These pre-accrued claims are not barred by § 2244(d)'s one year statute of limitations because they were filed within a reasonable time after the effective date of the amendment to § 2244(d). The undersigned further recommends that Respondent's motion to dismiss be **DENIED**.

TIME FOR OBJECTIONS

If the parties so desire, they may file with the District Judge assigned to this case, within 10 days from the date they are served with a copy of this Report and Recommendation, objections to the undersigned's recommended disposition of Respondent's motion to dismiss. See 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b). **Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's order. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991).**

RESPONDENT'S RESPONSE

If no objections to this Report and Recommendation are filed, Respondent shall file a response to the Petition for Writ of Habeas Corpus, responding on the merits or otherwise, within 30 days from the date this Report and Recommendation is filed. If an objection is filed, Respondent's response will be due 30 days from the date of the Order resolving the objection. Petitioner's reply to Respondent's response shall be due 30 days from receipt of Respondent's response.

Dated this 16 day of June 1997.


Sam A. Joyner
United States Magistrate Judge

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

FILED
JUN 16 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

Case No. 96CV 688BU ✓

ENTERED ON CLERK'S
JUN 17 1997
DATE _____

STIPULATION FOR DISMISSAL WITH PREJUDICE

Come now the parties to this agreement and stipulate and agree as follows:

1. The parties have, through meetings with the Adjunct Magistrate appointed in this matter, reached a settlement after extensive negotiations. The terms and conditions of the settlement agreement are set forth hereinafter.

2. On or before May 15, 1997, Defendants shall pay to Plaintiff the sum of Four Thousand and No/100 (\$4,000.00) Dollars at the offices of Plaintiff's counsel.

3. Defendant shall execute a promissory note and security agreement in the form which is attached to this Stipulation as Exhibit "A" and made a part hereof by incorporation and reference. Defendant shall also execute, file and deliver to Plaintiff the proper Uniform Commercial Code forms necessary to perfect Plaintiff's security interest under Missouri law at the closing hereof. Predator Props, Inc. represents that it has title to the goods to be delivered to Plaintiff and can sell the same free and

clear of any liens or claims and warrants title to the same. Defendant will notify Plaintiff of the whereabouts of the goods subject to the Security Agreement and execute any additional Uniform Commercial Code filings necessary to perfect Plaintiff's security interest in the same.

4. Plaintiff has on hand finished goods which, at the prices as hereinafter specified, total no more than Ten Thousand and No/100 (\$10,000.00) Dollars which are ready to be shipped. Within ninety (90) days of the date of execution of this Stipulation, Ozark Marine Design, Inc. shall, in one or more orders, purchase all of this finished inventory. Defendant Ozark Marine Design, Inc. shall issue its purchase order directly to Plaintiff's offices in Ponca City, Oklahoma. Thereafter, Defendant Ozark Marine Design, Inc. shall cause collected funds to be placed in the account of Plaintiff and, thereafter, Plaintiff shall cause the goods to be delivered to Defendant F.O.B. Ponca City, Oklahoma. The goods will be sold as is and without any warranties of any kind which are expressly disclaimed. Defendant shall have fifteen (15) days from date of receipt to notify Plaintiff of any defects and if no notification or revocation of acceptance is made within fifteen (15) days from the date the goods are received by the Defendant, then it is waived.

5. Attached hereto and marked as Exhibit "B" and made a part hereof by incorporation and reference are a list of the goods which are to be purchased by Defendant Ozark Marine Design, Inc. The purchase price of these goods is as follows:

- (a) V-4 barrels, \$45.00.
- (b) V-6 barrels, \$55.00.
- (c) All blades, \$9.48 per blade.

6. Plaintiff has certain tooling in its possession which Defendant Predator Props, Inc. has asserted is owned by it. With regard to that tooling, the following has been agreed:

(a) The tooling in which Plaintiff is being granted a security interest shall remain the property of Predator Props, Inc.; upon payment by Ozark Marine Design, Inc. for all of the finished goods described in Exhibit "B" above, Plaintiff shall cause these tools to be shipped F.O.B. Ponca City, Oklahoma to such address as Ozark Marine Design, Inc. shall designate.

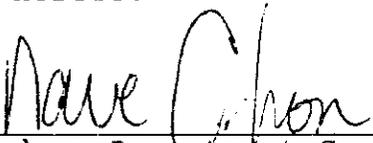
(b) The balance of the tooling shall be tendered to Plaintiff by Defendant Predator Props, Inc.; a list of the tooling to be so tendered is attached to this Stipulation, marked as Exhibit "C", and made a part hereof by incorporation in the form of a proposed bill of sale which shall be executed simultaneously with the execution of this Stipulation and delivered to the Plaintiff.

7. Upon execution of this Stipulation by the parties, this cause shall be dismissed with prejudice both as to the issues raised in the Complaint and the pending Counterclaim. The parties further acknowledge and agree that they release each other from any claim which arises out of the fact situation or the theories asserted in the pleadings. Plaintiff and Defendants (and Gary A. Love, an individual by reason of a co-maker on the promissory note executed in conjunction herewith), mutually release each other and their officers, directors, shareholders, agents, attorneys, and employees from any and all claims, demands, grievances, causes of action, indebtedness, obligations or liabilities of whatsoever nature whether known or unknown which each of them have had, may

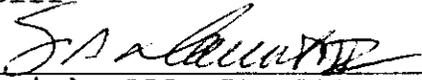
have, or may acquire relating to the subject matter of the aforesaid civil proceeding, and covenant not to sue or take any action pertaining thereto.

8. The parties to this action shall bear their respective costs and attorney fees.

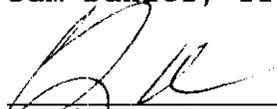
9. This agreement shall be binding on the heirs, successors and assigns of the parties hereto.



Modern Investment Casting Company
Plaintiff



Sam Daniel, III, Its Attorney



Predator Props, Inc.
Ozark Marine Design, Inc.
Defendants



Terry D. Ragsdale, Their Attorney

PROMISSORY NOTE AND SECURITY AGREEMENT

\$44,000.00

April 15, 1997

FOR VALUE RECEIVED, the undersigned as co-makers, jointly and severally, promise to pay to the order of **MODERN INVESTMENT CASTING COMPANY**, an Oklahoma corporation, the sum of **FORTY-FOUR THOUSAND and No/100 (\$44,000.00) DOLLARS**, as hereinafter specified from date as follows:

(a) Payments shall be One Thousand and No/100 (\$1,000.00) Dollars per month commencing on July 15, 1997 and ending on the 15th day of march, 2001. Payments are due and owing and payable on the 15th day of each month.

(b) Payments shall be made directly to Modern Investment Casting Company at its business address of P. C. Box 707, Ponca City, Oklahoma 74602; payments shall be timely made. Provided, however, that a ten (10) day grace period is allowed to the makers of this note within which to make this payment.

(c) If the timely payments are made, this note shall not bear interest; in the event of a default in payment, from and after that date of default, this note shall bear interest at the rate of ten (10%) per cent per annum.

In the event of default of payment when due of any installment on either principal or interest under this note, the holder hereof may exercise the option of treating the remainder of the debt as due and collectible at once. Failure to exercise this option shall not constitute a waiver of the right to exercise it at any other time.

Promissors waive demand, presentment, notice of acceleration, notice of dishonor and protest.

Privilege is reserved to pay the debt in whole or in part at any time without further penalty or interest.

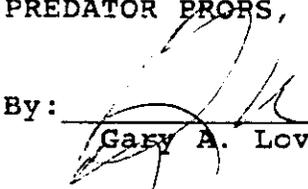
In the event that the makers of this note shall fail to pay the same, or any installment payment thereof, when the same becomes due and payable, and it is placed in the hands of an attorney at law for collection, makers shall pay all costs of collecting this note, including a reasonable attorney's fee.

As security for payment of this promissory note, Predator Props, Inc. does hereby grant to Modern Investment Casting Company a security interest in certain tooling owned by Predator and currently held in the State of Oklahoma, a list of which is

attached to this promissory note and security agreement, marked as Exhibit "A", and made a part hereof by incorporation and reference. In the event of default under the payment obligations described herein, the holder of this note shall have the right to realize upon the security described herein and shall have available to it all of the rights allowable under the Uniform Commercial Code. Predator Props, Inc. agrees to execute Uniform Commercial Code filings as requested by the holder of this note to give notice of the security interest granted herein.

This promissory note and security agreement shall be construed and interpreted, and the legal relations created herein shall be determined, in accordance with the laws of the State of Oklahoma, and venue in any action to enforce the same will be within the proper forum located in the State of Oklahoma.

PREDATOR PROPS, INC.

By: 

Gary A. Love, President



Gary A. Love, Individually

EXHIBIT A

Investment casting molds for blades for boat propellers more accurately described as follows:

- (a) Eagle epoxy mold
- (b) Long R aluminum mold
- (c) Left (counter-rotation) TM epoxy mold
- (d) TM-2 aluminum mold
- (e) Eagle blade aluminum mold
- (f) TM blade aluminum mold

BILL OF SALE

FOR VALUE RECEIVED, the receipt of which is hereby acknowledged, the undersigned does hereby convey to **Modern Investment Casting Company**, an Oklahoma Corporation, all of its right, title and interest in the list of tools which is Exhibit "A" to this bill of sale.

IN WITNESS WHEREOF, the undersigned has caused this instrument to be executed on this 15th day of April, 1997.

PREDATOR PROPS, INC.

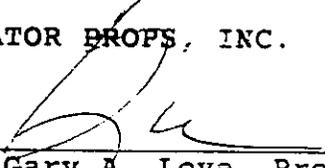
By: 
Gary A. Love, President

EXHIBIT A

Hubs:

OMC V-4 aluminum mold
V-4 Mercury aluminum mold
V-6 tall aluminum mold
V-6 Mercury aluminum mold

Blades:

R-2 aluminum mold
Hooter aluminum mold

Miscellaneous:

391-TW aluminum mold
357-TW aluminum mold
357-TW aluminum mold
350-TW aluminum mold

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

JUN 13 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TIMOTHY ATKINS,
Plaintiff,
vs.
PUBLIC DEFENDERS OFFICE, DAMOND
CANTRELL,
Defendants.

Case No. 97-C-85-H/

ENTERED ON DOCKET
DATE JUN 16 1997

REPORT & RECOMMENDATION

Plaintiff filed a motion for leave to proceed in forma pauperis on January 30, 1997, which was granted by the Court. Plaintiff was instructed to pay an initial filing fee of \$9.64 by February 28, 1997. By Order dated March 17, 1997, Plaintiff was directed to show cause for his failure to pay the initial filing fee. Plaintiff was cautioned that a failure to respond to the Order to show cause could result in the dismissal of his case without further notice. As of June 13, 1997, Plaintiff has still not paid his initial filing fee of \$9.64, and has not notified the Court of any reason for his failure to pay such a fee.

RECOMMENDATION

The United States Magistrate Judge recommends that the District Court dismiss Plaintiff's action without prejudice due to Plaintiff's failure to pay the requisite filing fee.

Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days of service of this notice. Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's legal and factual findings. See, e.g., Talley v. Hesse, 91 F.3d 1411, 1412 (10th Cir. 1996), Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 13 day of June 1997.


Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the

16th day of June, 1997.

T. Poitello, Deputy Clerk

SEARCHED ON 06/02/97

6-16-97

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

FILED

JUN 05 1997

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

LORI HEATH,

Plaintiff,

v.

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

Defendant.

CASE NO. 96-cv-693-K

JUDGMENT

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

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

11

ENTERED ON DOCKET
6-16-97

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

FILED

JACKIE L. MARTIN,)
)
 Plaintiff,)
)
 vs.)
)
 ROBIN FAGALA, STANLEY GLANZ,)
 and WEXFORD HEALTH SERVICES,)
)
 Defendant.)

JUN 13 1997 M

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 97-CV-39-K

REPORT & RECOMMENDATION

Plaintiff filed a motion for leave to proceed in forma pauperis on January 14, 1997, which was granted by the Court. Plaintiff was instructed to pay an initial filing fee of \$1.92 by February 18, 1997. By Order dated March 17, 1997, Plaintiff was directed to show cause for his failure to pay the initial filing fee. Plaintiff was cautioned that a failure to respond to the Order to show cause could result in the dismissal of his case without further notice. As of June 13, 1997, Plaintiff has still not paid his initial filing fee of \$1.92, and has not notified the Court of any reason for his failure to pay such a fee.

RECOMMENDATION

The United States Magistrate Judge recommends that the District Court dismiss Plaintiff's action without prejudice due to Plaintiff's failure to pay the requisite filing fee.

Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days of service of this notice. Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's legal and factual findings. See, e.g., Talley v. Hesse, 91 F.3d 1411, 1412 (10th Cir. 1996), Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 13 day of June 1997.


Sam A. Joyner
United States Magistrate Judge

FILED ON DOCKET
6-16-97

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

JUN 13 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TIMOTHY ATKINS,)
)
 Plaintiff,)
)
 vs.)
)
 JOHNNY PRICE, and TULSA POLICE DEPT.,)
)
 Defendants.)

Case No. 96-C-1117-K

REPORT & RECOMMENDATION

Plaintiff filed a motion for leave to proceed in forma pauperis on December 4, 1997, which was granted by the Court. Plaintiff was instructed to pay an initial filing fee of \$11.00 by February 28, 1997. By Order dated March 17, 1997, Plaintiff was directed to show cause for his failure to pay the initial filing fee. Plaintiff was cautioned that a failure to respond to the Order to show cause could result in the dismissal of his case without further notice. As of June 13, 1997, Plaintiff has still not paid his initial filing fee of \$11.00, and has not notified the Court of any reason for his failure to pay such a fee.

RECOMMENDATION

The United States Magistrate Judge recommends that the District Court dismiss Plaintiff's action without prejudice due to Plaintiff's failure to pay the requisite filing fee.

Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days of service of this notice. Failure to file objections within

9

the specified time will result in a waiver of the right to appeal the District Court's legal and factual findings. See, e.g., Talley v. Hesse, 91 F.3d 1411, 1412 (10th Cir. 1996), Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 13 day of June 1997.


Sam A. Joyner
United States Magistrate Judge

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

FILED

JUN 12 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FARM BUREAU MUTUAL INSURANCE)
COMPANY OF ARKANSAS, INC.,)
a foreign insurance company,)
)
Plaintiff,)

v.)

No. 96-CV-1000-B

EXPRESS METAL FABRICATORS, INC.)
an Oklahoma Partnership; and)
TERRY COWAN, JERRY COWAN,)
and RALPH GIBSON, as partners)
of Express Metal Fabricators,)
)
Defendants.)

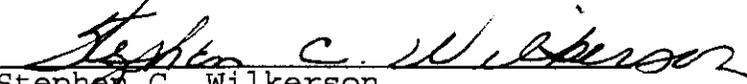
EOD 6/13/97

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, Farm Bureau Mutual Insurance Company of Arkansas, Inc., by and through its attorney of record, Marthanda J. Beckworth, of the law firm of Atkinson, Haskins, Nellis, Boudreaux, Holeman, Phipps & Brittingham, Tulsa, Oklahoma, and Defendants, Express Metal Fabricators, Inc., Terry Cowan, Jerry Cowan and Ralph Gibson, by and through their attorney of record, Stephen C. Wilkerson, of the law firm of Knight, Wilkerson, Parrish & Wassall, and pursuant to Fed. R. Civ. P. 41, hereby stipulate to an Order Of Dismissal Without Prejudice of Plaintiff's claims. Because of a settlement in Stable v. Express Metal Fabricators, No. 95-C-815-B, United States District Court for the Northern District of Oklahoma, Plaintiff's declaratory judgment action appears to be moot at this time.

WHEREFORE, the parties request an order of this court dismissing Plaintiff's claims without prejudice to refiling.


Marthanda J. Beckworth
Attorney for Plaintiff


Stephen C. Wilkerson
Attorney for Defendants

336\421\stip.dlb\MJB

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

BOARD OF TRUSTEES OF)
RESILIENT FLOOR COVERERS)
LOCAL #1533 PENSION PLAN)
and MARLIN HEIM, Plan)
Administrator,)

Plaintiffs,)

vs.)

HOWARD CAVANESS; THOMAS ODLE;)
EDDIE L. BRIMMER; MARLIN L. HEIM;)
WILLIAM ODLE; ORVAL COTHRAN;)
FERLIEGH JONES; CLARENCE ROSE; TRAVIS)
SANFORD; PAUL M. JONES; LEON ROSE;)
LOUIS SPRINGSTUBE; WALLACE JONES; L. V.)
SEWELL; JOSEPH GARBER; JAMES KORNE;)
NATHAN WILSON; SUE EMLER; JACK KROLL;)
JOE DANIEL HURD; JUDY ANN GRAGG; W.)
C. MAHANES, JR.; LUTHER ROGERS; LEOLA)
HENDERSON; LUTHER MCALISTER;)
SYLVESTER SMITH; BILLIE JONES; EDWARD)
R. NEVEL; JIMMY SHAW; JUANITA MOORE;)
GAYNOLD TACKETT; PAULINE WHITE; JANE)
WILLIS; LOVITA YOCOM; BEVERLY OWENS;)
BOB BURNHAM; CLARK BISHOP; DANNY)
BOWMAN; WELDON BREWER; DOUGLAS)
DRULLINGER; BILLY FISHER; GENE H.)
GRAYSON; WILLIAM HAMPTON; GARY D.)
HUCKABY; NORMAN HUGHES; CURTIS D.)
JONES; ROBERT G. JONES; HOWARD O.)
LUPER; PAUL EDDIE MILLS; MARK NOLEN;)
WILLIAM R. RAMSEY; EDWIN WILKINSON;)
DAVID J. YELTON; TERRY DEWEESE;)
DONALD FELTZ; LYNN JONES; LARRY)
MUSHRUSH; LARRY PIFER; EDDIE J.)
BRIMMER; ROGER SYVERSON; GARY)
BOWMAN; TERRY BOWMAN; MARK EMLER;)
LESTER PRIEST; JERRY BURKE, The)
Participants of the Resilient Floor)

F I L E D

JUN 12 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97CV-338 C

EOD 6/13/97

210

CERTIFICATE OF SERVICE

I hereby certify that on this 12 day of June, 1997, I mailed a true and correct copy of the above and foregoing Dismissal Without Prejudice to: Mr. Charles M. Jackson, U.S. Department of Labor, Office of the Solicitor, Plan Benefits Security Division, P.O. Box 1914, Washington, D.C., 20013 in the U.S. mail, postage prepaid.



THOMAS F. BIRMINGHAM

ENTERED ON DOCKET
JUN 13 1997
DATE _____

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 12 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 ALL KINDS OF TRUCKS,)
)
 Defendant.) Civil Action No. 97CV519H(M)

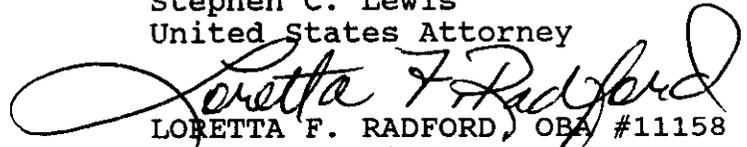
NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Loretta F. Radford, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action with prejudice.

Dated this 12th day of June, 1997.

UNITED STATES OF AMERICA

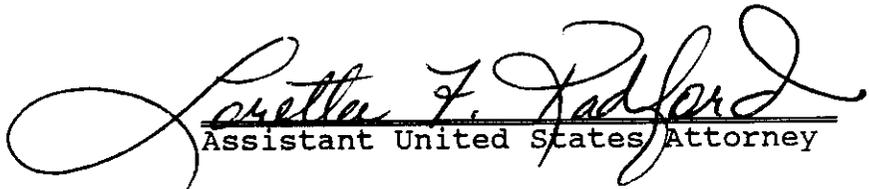
Stephen C. Lewis
United States Attorney



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

CERTIFICATE OF SERVICE

This is to certify that on the 12th day of June, 1997, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: All Kinds of Trucks, Inc., c/o Fred Rahal, Jr., Riggs, Abney, Neal, Turpen, Orbison & Lewis, 502 W. 6th St., Tulsa, OK 74119-1010.


Assistant United States Attorney

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

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

Plaintiffs,)

v.)

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

Defendants.)

Case No. 95-CV-1126-H

FILED

JUN 11 1997

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

ENTERED ON DOCKET

JUN 13 1997

DATE

~~JUN 13 1997~~

ORDER

This matter comes before the Court on Motion of Defendants G. David Gordon and Henshaw, Klenda, Gordon & Getchel, P.C. to Dismiss the Amended Complaint (Docket #23).

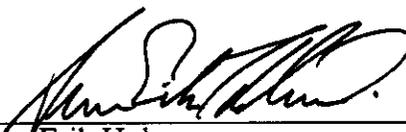
The Court held a hearing in this matter on June 4, 1997. The Amended Complaint contains only two allegations dealing with Defendant Henshaw, Klenda, Gordon & Getchel, P.C. ("HKGG"). These allegations state in their entirety that "[t]he Stock Purchase Agreements further provide that the stock was being held in trust by defendant HKGG and was to be delivered to Plaintiffs by HKGG after November 16, 1992. HKGG is a Tulsa, Oklahoma law firm in which David Gordon is a shareholder and Managing Partner." Amended Complaint at ¶ 16. The Court holds that these allegations fail to meet the particularity requirements of Fed. R. Civ. P. 9(b). Therefore, Defendant HKGG will be dismissed without prejudice.

100

With respect to the remaining Defendants, Plaintiffs have fifteen (15) days from the file date of this order within which to file a second amended complaint that complies with the requirements of Fed. R. Civ. P. 9(b). Such second amended complaint shall not name HKGG as a defendant. However, if subsequent discovery reveals a basis for a claim against HKGG, then Plaintiffs may move for permissive joinder of HKGG as an additional party defendant. Any such motion for joinder shall be tested under the requirements of Fed. R. Civ. P. 20.

IT IS SO ORDERED.

This 10TH day of June, 1997.


Sven Erik Holmes
United States District Judge

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

FILED

JUN 11 1997

ERNESTINE HARRISON,

Plaintiff,

v.

BRISTOW HOUSING AUTHORITY, et al.,

Defendants.

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

Case No. 93-C-638-H /

ENTERED ON DOCKET

DATE JUN 13 1997

JUDGMENT

This matter came before the Court on a motion for summary judgment by Defendant. The Court duly considered the issues and rendered a decision in an Order entered on May 8, 1997.

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

IT IS SO ORDERED.

This 10TH day of June, 1997.



Sven Erik Holmes
United States District Judge

35

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

FILED

JUN 11 1997

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

JACQUIE YOUNG,
Plaintiff,

v.

KIMBERLY-CLARK CORPORATION,
a Delaware corporation, and
GARY GOWER, an Individual,
Defendants.

§
§
§
§
§
§
§
§
§
§

CASE NO. 96-C-402-H

ENTERED ON DOCKET

DATE JUN 13 1997

AGREED FINAL JUDGMENT

On this day came on to be heard the Joint Motion For Entry of Agreed Final Judgment filed by Plaintiff and Defendants, and the Court, after considering the pleadings, is of the opinion that said Motion should be granted in its entirety. It is accordingly,

ORDERED, ADJUDGED and DECREED that all claims and causes of action asserted or which could have been asserted against Defendants by Plaintiff are hereby dismissed with prejudice. It is further

ORDERED, ADJUDGED and DECREED that all costs of court shall be taxed against the party incurring same.

SIGNED this 10TH day of JUNE, 1997.


UNITED STATES DISTRICT JUDGE

13

APPROVED AS TO FORM AND SUBSTANCE
AND ENTRY REQUESTED:



Dennis King, Esq.
Neil D. Van Dalsem, Esq.
Knowles King & Taylor
603 Expressway Tower
2431 East 51st Street
Tulsa, OK 74105
(918) 749-5566
(918) 749-9531 (Fax)

ATTORNEYS FOR PLAINTIFF

McFALL LAW FIRM



John E. McFall
Texas Bar No. 13596000
Steven L. Rahhal
Texas Bar No. 16473990
460 Preston Commons
8117 Preston Road
Dallas, Texas 75225
(214) 987-3800
(214) 987-3927 (Fax)

Timothy A. Carney, Esq.
Gable Gotwals Mock Schwabe
Bank VI Center
15 West 6th Street
Suite 2000
Tulsa, Oklahoma 74119
(918) 582-9201
(918) 586-8383 (Fax)

ATTORNEYS FOR DEFENDANT
KIMBERLY-CLARK CORPORATION

AGREED FINAL JUDGMENT - Page 2



Charles Plumb, Esq.

Doerner, Saunders, Daniel & Anderson

320 South Boston Avenue

Suite 500

Tulsa, Oklahoma 74103-3725

(918) 582-1211

(918) 591-5360 (Fax)

ATTORNEY FOR DEFENDANT

GARY GOWER

6/9/97
6/9/97

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

FILED

JUN 11 1997

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

CHARLES A. SWAKE,)

Plaintiff,)

v.)

Case No. 96-CV-283-H

GREDE-PRYOR, INC.,)

a corporation,)

Defendant.)

ENTERED ON DOCKET
JUN 13 1997

DATE _____

FINAL JUDGMENT

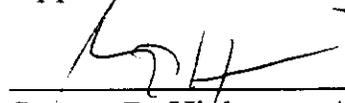
NOW on this 11TH day of June, 1997, the Court enters final judgment in favor of Plaintiff and against Defendant in the above styled and numbered cause based upon the jury verdict returned in this case and the post trial motions of the parties.

IT IS ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff, Charles A. Swake, recover of Defendant, Grede-Pryor, Inc., the sum of \$21,209.00, with the interest at the rate of 5.88% provided by law, and his costs of action.

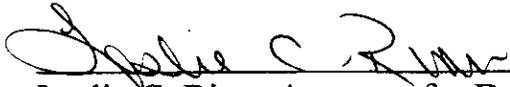
IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Defendant reinstate Plaintiff to his job at Defendant, with seniority, benefits and other perquisites of his job.


Sven Erik Holmes, United States District Judge

Approved as to form:



Steven R. Hickman, Attorney for Plaintiff



Leslie C. Rinn, Attorney for Defendant

FILED ON DOCKET
e-13-97

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

F I L E D

JUN 13 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

INTERNATIONAL MARINE &)
GAMING, INC., a Delaware corporation,)

Plaintiff,)

vs.)

Case No. 95 C 626 K ✓

HELVETIA FINANCE, S.A.B.V.I., a British)
Islands corporation,)

HELVETIA FINANCE, S.A., a Swiss)
corporation,)

BURLINGAME AND FRENCH, a California)
partnership;)

DAISY BURLINGAME, an individual,)

ELLIE FRENCH, an individual,)

JACK B. STOOKEY, an individual,)

ANDRE MOERLEN, an individual, and)

CARL L. GODFREY, an individual, and)

THE AUSTIN COMPANY, an Ohio corporation,)

Defendants.)

ORDER GRANTING JOINT APPLICATION FOR DISMISSAL WITH PREJUDICE

Pursuant to the Joint Application For Dismissal With Prejudice by the Plaintiff International Marine & Gaming, Inc. and Defendant, the Austin Company, the Court hereby dismisses with prejudice all claims against all parties herein.

Dated this 12 day of June, 1997.

JUDGE OF THE DISTRICT COURT

125

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

MYRA RICHARDS,

Plaintiff,

v.

UNITED PARCEL SERVICE, INC.

Defendant.

Case No. 96-CV-691-H

FILED
JUN 12 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE JUN 13 1997

ORDER

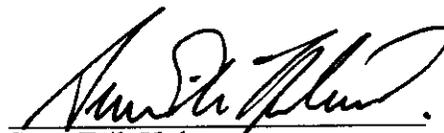
This matter comes before the Court on Defendant's Motion for Summary Judgment (Docket #11), Defendant's Motion to Dismiss with Prejudice for Lack of Prosecution or, in the Alternative, Motion in Limine and Supporting Brief (Docket #14), and Defendant's Motion for Defendant's Motion for Summary Judgment to be Deemed Confessed by Plaintiff and/or Motion for Judgment and Brief in Support (Docket #15).

Plaintiff's complaint alleges that Defendant discriminated against her in violation of the Americans with Disabilities Act ("ADA"). 42 U.S.C. §12101 et seq. Defendant filed a motion for summary judgment in this matter on May 8, 1997. Plaintiff's response was due on or before May 28, 1997. Furthermore, pursuant to the Court's scheduling order, the parties were to exchange witness lists and exhibit lists on April 1, 1997. While Defendant has complied with this order, Plaintiff has failed to do so.

Under Local Rule 7.1(C), the Court may deem a matter confessed if a response has not been filed within fifteen (15) days. Plaintiff has failed entirely to respond to Defendant's motion for summary judgment. The Court deems the matter confessed. Defendant's motion for summary judgment (Docket #11) is hereby granted. Defendant's remaining two pending motions are moot.

IT IS SO ORDERED.

This 12TH day of June, 1997.



Sven Erik Holmes
United States District Judge

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

ENTERED ON DOCKET
6-13-97

RSR, L.L.C., an Indiana Limited Liability Company,

Plaintiff,

vs.

HELVETIA FINANCE, S.A.B.V.I. a British Islands corporation,
HELVETIA FINANCE, S.A., a Swiss corporation,
BURLINGAME AND FRENCH, a California partnership,
DAISY BURLINGAME, an individual,
ELLIE FRENCH, an individual,
ANDRE MOERLEN, an individual,
LUC WENGER, an individual,
ERNIE MARIER, an individual,
and THE AUSTIN COMPANY, an Ohio corporation,

Defendants.

Case No. 96 CV 1204 K ✓

FILED

JUN 13 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER GRANTING JOINT APPLICATION FOR DISMISSAL WITH PREJUDICE

Pursuant to the Joint Application for Dismissal With Prejudice by the Plaintiff RSR, L.L.C. and Defendant, the Austin Company, the Court hereby dismisses with prejudice all claims against all parties herein.

Dated is 12 day of June, 1997.

JUDGE OF THE DISTRICT COURT

9

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JERY D. FULTZ,

Plaintiff,

v.

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

Defendant.

JUN 12 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

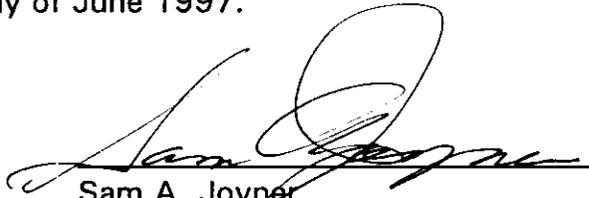
No. 96-C-570-J

ENTERED ON DOCKET
DATE JUN 13 1997

JUDGMENT

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

It is so ordered this 12 day of June 1997.



Sam A. Joyner
United States Magistrate Judge

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

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 12 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOYCE M. DILLEY,
SS# 585-66-8717

Plaintiff,

v.

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

Defendant.

No. 96-C-497-J

ENTERED ON DOCKET

DATE JUN 13 1997

JUDGMENT

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

It is so ordered this 12 day of June 1997.



Sam A. Joyner
United States Magistrate Judge

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

11

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA JUN 11 1997

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

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

Case No. 95-C-1126-H ✓

REGISTERED ON DOCKET
DATE 6-13-97

ORDER

UPON the Motion to Dismiss and Brief in Support of Plaintiffs, Howard Collins, Charles W. Buck, Al Bryson, and Mary Bryson, and good cause having been shown, it is hereby

ORDERED that all claims of the aforesaid against Robert L. Miller and Robert L. Miller, Inc. d/b/a Northern Ohio Engineering Co. are hereby dismissed with prejudice.



Judge of the District Court

99

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 11 1997

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

UNITED STATES OF AMERICA,

Plaintiff

v.

SHERI L. BOOTH,

Defendant.

)
)
)
)
)
)
)
)
)
)
)

Civil Action No. 96CV1179H ✓

ENTERED ON DOCS

DATE 6-13-97

DEFAULT JUDGMENT

This matter comes on for consideration this 10TH 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, Sheri L. Booth, appearing not.

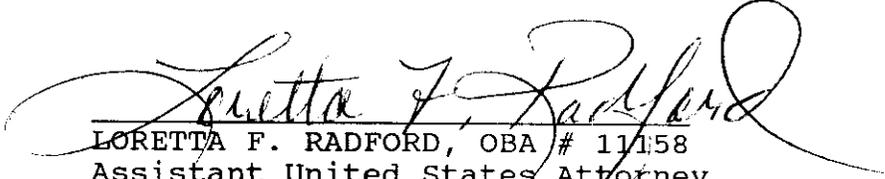
The Court being fully advised and having examined the court file finds that Defendant, Sheri L. Booth, was served with Summons and Complaint on December 23, 1996. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The 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, Sheri L. Booth, for the principal amount of \$4,453.01, plus accrued interest of \$2,478.45, plus administrative charges in the amount of \$18.84, plus interest thereafter at the rate of 7.51 percent per annum

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

ENTERED ON DOCKET
6-13-97

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

JUN 11 1997

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

SINCLAIR OIL CORPORATION, a)
Wyoming corporation,)

Plaintiff,)

vs.)

WILLIAM R. THOMAS, d/b/a SINCLAIR)
GAS MARKETING CO., and SINCLAIR)
OIL & GAS COMPANY,)

Defendant.)

Case No. 94-C-795-H ✓

ORDER

This matter comes before the Court on Plaintiff's motion to assess attorneys' fees (Docket # 96).

Plaintiff Sinclair Oil Corporation brought this action against Defendant William R. Thomas alleging trademark infringement in violation of both the Lanham Act, 15 U.S.C. §§ 1114, 1125, and state trademark infringement law. The case was tried to a jury. On November 20, 1996, the jury returned with a verdict of intentional infringement against Defendant and awarded damages to Plaintiff.

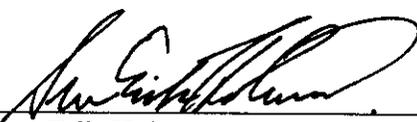
Plaintiff now seeks attorneys' fees pursuant to 15 U.S.C. § 1117(a)(b) and Okla. Stat. 78, § 54(b). In his response, Defendant concedes that the fees requested by Plaintiff are "fair and reasonable." However, Defendant asserts that "Plaintiff received a 15% discount in legal fees from its counsel" and that Defendant "should not be responsible for payment of this 15% discount"

In reply, Plaintiff states that “[t]he detail of the Hall, Estill attorneys’ fees submitted to the Court already reflect the discounted amount charged to Sinclair. Accordingly, Sinclair is not seeking from Defendant anything more than it actually paid in attorneys’ fees for the prosecution of its claims against Defendant.”

Relying on this representation that the discount is reflected in the attorneys’ fees requested by Plaintiff, and noting that Defendant has conceded that the amount requested by Plaintiff is “fair and reasonable”, the Court grants Plaintiff’s motion for attorneys’ fees. Attorneys’ fees in the amount of \$86,068 are hereby awarded to Plaintiff.

IT IS SO ORDERED

This 10TH day of June, 1997



Sven Erik Holmes
United States District Judge

6-13-97

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 11 1997 *MD*

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

Civil Action No. 97CV 241H ✓

UNITED STATES OF AMERICA,)
)
 Plaintiff)
)
 v.)
)
 CURTIS L. JONES,)
)
 Defendant.)

DEFAULT JUDGMENT

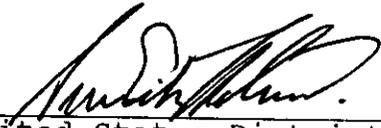
This matter comes on for consideration this 10TH day of JUNE, 1997, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Curtis L. Jones, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Curtis L. Jones, was served with Summons and Complaint on March 19, 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, Curtis L. Jones, for the principal amount of \$563.84, plus accrued interest of \$319.50, plus interest thereafter at the rate of 12 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

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

FILED

JUN 11 1997 *mw*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ANTONIO J. MATHEWS,)
)
Plaintiff,)
)
vs.)
)
TONY FUGATE, LARRY FUGATE,)
)
Defendants.)

Case No. 95-C-1207-E ✓

ENTERED ON DOCKET
JUN 12 1997

ORDER

Pursuant to previous Order of this Court at the Status Hearing dated March 20, 1997, and because no Application to Enter Schedule has been filed, this matter is dismissed without prejudice.

SO ORDERED this 11th day of June, 1997.

James O. Ellison

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Michael G. Burnworth

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

Jeannie C. Henry

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

Kevin T. Gassaway

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

ENTERED ON DOCKET
DATE 6-12-97

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

CHRISTOPHER TRUESDELL,)
CHRIS ANN TRUESDELL, and)
LAKESIDE STATE BANK,)

Plaintiffs,)

vs.)

STATE FARM FIRE AND CASUALTY)
COMPANY,)

Defendant.)

Case No. 96 CV 648K ✓

F I L E D
JUN 12 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT OF DISMISSAL WITH PREJUDICE

This cause came on for hearing on this 11 day of June, 1997, upon the Application of Plaintiffs for Judgment of Dismissal With Prejudice. The Court finds that the Plaintiffs, Christopher Truesdell, Chris Ann Truesdell, and Lakeside State Bank, have heretofore settled all of their claims and causes of action against the Defendant, State Farm Fire and Casualty Company, and that the claims herein asserted are now moot and the Plaintiffs' claims and causes of action should be dismissed with prejudice.

NOW, THEREFORE, BE IT ORDERED, ADJUDGED AND DECREED by the Court that Plaintiffs, Christopher Truesdell, Chris Ann Truesdell, and Lakeside State Bank, have settled all of their claims and causes of action against the Defendant, State Farm Fire and Casualty company, and the Application of the Plaintiffs to dismiss their claims and causes of action with prejudice be and the same is hereby sustained and the

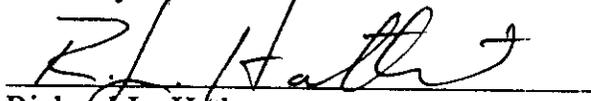
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claims and causes of action of the Plaintiffs be and the same are hereby dismissed with prejudice, and the Defendant is dismissed with prejudice.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

APPROVED:


David H. Sanders
Attorney for Plaintiffs


Richard L. Hathcoat
Attorney for Defendant

DATE 6-12-97

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

KAREN STONE,
Plaintiff,
vs.
PHILLIPS PETROLEUM COMPANY, INC.
a Delaware Corporation,
Defendant.

JUN 12 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-C-341-K

ORDER DISMISSING SUIT WITH PREJUDICE

For good cause shown, IT IS ORDERED that Plaintiff's lawsuit be dismissed with prejudice as to 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.

DATED this 11 day of June, 1997.

Derry C. Kern
Judge of the District Court

Allen J. Autrey, P.C.
15 W. 6th St., Suite 1608
Tulsa, OK 74119
(918) 582-0101
Attorney for Plaintiff

Ms. Kimberly Love
Mary L. Lohrke
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Attorney for Defendant

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

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6-12-97

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

VALERIE COMAN,)
)
 Plaintiff,)
)
 vs.)
)
 UNITED STATES OF AMERICA,)
 substituted for Paul A. Comeau,)
)
 Defendant.)

No. 97-CV-118-K ✓

FILED

JUN 12 1997

ORDER OF DISMISSAL WITH PREJUDICE Phil Lombardi, Clerk
U.S. DISTRICT COURT

NOW, on this 11 day of June, 1997, the parties having jointly stipulated for a Dismissal With Prejudice, and the Court being otherwise fully advised in the premises, finds and orders as follows:

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff's Complaint should be and is hereby dismissed with prejudice to the bringing of any further action.


Terry C. Kern
Chief Judge
United States District Court

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 11 1997 *[Signature]*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOYCE M. DILLEY,
SS# 585-66-8717

Plaintiff,

v.

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

Defendant.

No. 96-C-497-J

ENTERED ON DOCKET

DATE JUN 12 1997

ORDER^{2/}

Plaintiff, Joyce M. Dilley, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.^{3/} Plaintiff asserts error because (1) Plaintiff meets Listing 1.05C, and the ALJ failed to address the Listings, (2) the ALJ improperly concluded that Plaintiff could perform her past relevant work without the testimony of a vocational expert, (3) the ALJ failed to properly consider Plaintiff's mental impairment, and (4) the ALJ improperly concluded

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

^{2/} This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

^{3/} Plaintiff filed an application for disability and supplemental security insurance benefits. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge Thomas E. Bennett (hereafter, "ALJ") was held November 30, 1994. [R. at 41]. By order dated July 28, 1995, the ALJ determined that Plaintiff was not disabled. [R. at]. Plaintiff appealed the ALJ's decision to the Appeals Council. On April 17, 1996, the Appeals Council denied Plaintiff's request for review, and denied Plaintiff's request to reopen its prior decision denying review. [R. at 4].

that Plaintiff could perform light and sedentary work. For the reasons discussed below, the Court **reverses and remands** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on July 28, 1955, and was 39 years old at the time of the hearing before the ALJ. [R. at 46]. Plaintiff attended high school until the eighth grade, and obtained her GED. [R. at 46]. Plaintiff additionally completed courses at Tulsa Welding School in 1990, and worked as a welder for approximately five weeks. [R. at 48]. Plaintiff also worked as a secretary and a bartender. [R. at 48].

Plaintiff testified that her back causes her constant pain. [R. at 50]. Plaintiff had surgery on her back in June of 1983, but was released to return to work on July 19, 1983. [R. at 138-39]. Plaintiff was admitted on January 19, 1987 for back and leg pain. [R. at 176]. Plaintiff's surgical history indicated that she had previously had two back surgeries. [R. at 179]. Plaintiff was again admitted after complaints of severe pain on March 26, 1990. [R. at 231]. Plaintiff is insured for the purpose of social security disability status only through December 31, 1991.

Plaintiff had a lumbar laminectomy in October of 1993. [R. at 144]. Plaintiff's doctor noted that Plaintiff was physically disabled at that time. [R. at 158]. Plaintiff was addicted to pain medicine but is able to use a TENS unit. [R. at 52].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{4/} See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

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

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

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

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by

^{4/} Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

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

"The finding of the Secretary^{5/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

^{5/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

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

III. THE ALJ'S DECISION

In this case, the ALJ determined that Plaintiff had a degenerative spinal disease, a history of marijuana and prescription drug abuse, and mental disorders. The ALJ found, however, that Plaintiff was not precluded from performing semi-skilled light work which involved detailed to moderately complex job instructions. The ALJ concluded that Plaintiff could perform her past relevant work as a store clerk or a secretary.

IV. REVIEW

Past Relevant Work

Plaintiff initially asserts that the ALJ erred by finding that Plaintiff could perform her past relevant work because the ALJ failed to consider all of Plaintiff's exertional and non-exertional requirements.

Social Security Regulation 82-62 requires an ALJ to develop the record with respect to a claimant's past relevant work.

The decision as to whether the claimant retains the functional capacity to perform past work which has current relevance has far-reaching implications and must be developed and explained fully in the disability decision.

....

[D]etailed information about strength, endurance, manipulative ability, mental demands and other job requirements must be obtained as appropriate. This information will be derived from a detailed description of the work obtained from the claimant, employer, or other informed source. Information concerning job titles, dates work was performed, rate of compensation, tools and machines used, knowledge required, the extent of supervision and independent judgment required, and a description of tasks and responsibilities will permit a judgment as to the skill level and the current relevance of the individual's work experience.

Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982). The ALJ must make specific factual findings detailing how the requirements of claimant's past relevant work fit the claimant's current limitations. The ALJ's findings must contain:

1. A finding of fact as to the individual's RFC.
2. A finding of fact as to the physical and mental demands of the past job/occupation.
3. A finding of fact that the individual's RFC would permit a return to his or her past job or occupation.

Soc. Sec. Rep. Serv., Rulings 1975-1982, SSR 82-62 (West 1982); Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994); Henrie v. United States Dep't of Health & Human Services, 13 F.3d 359, 361 (10th Cir. 1993).

The ALJ found that Plaintiff had a degenerative spinal disease and mental disorders. [R. at 26]. The ALJ completed the Psychiatric Review Technique form and concluded that Plaintiff had slight to moderate restrictions of activities of daily living, slight to moderate difficulties in maintaining social functioning, seldom to often deficiencies of concentration, persistence or pace, and no episodes of decompensation. [R. at 35]. However, the ALJ does not sufficiently detail the physical or mental

demands of Plaintiff's past relevant work.^{6/} Rather, the ALJ summarily concludes that "the severity of claimant's mental and emotional impairments did not preclude her from performing work involving detailed to moderately complex job instructions." [R. at 25]. Such conclusory findings are insufficient to meet the dictates of the social security regulations or Henrie. On remand, the ALJ should delineate the specific mental and physical requirements of Plaintiff's past relevant work and explain how Plaintiff retains the residual functional capacity to perform such work. If the ALJ concludes that Plaintiff is unable to perform her past relevant work, the ALJ should proceed to Step Five.

Failure to Discuss Listings

Plaintiff additionally asserts that the ALJ erred in failing to find that Plaintiff met Listing 1.05(C). Listing 1.05 provides:

Other vertebrogenic disorders (e.g., herniated nucleus pulposus, spinal stenosis) with the following persisting for at least three months despite prescribed therapy and expected to last 12 months. With both 1 and 2:

1. Pain, muscle spasm, and significant limitation of motion of spine; and
2. Appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss.

^{6/} The ALJ did note that Plaintiff's past relevant work, as Plaintiff performed it, was at the "medium" exertional level, and that the Department of Transportation description of the physical demands for a secretary is "sedentary," and the physical demands for a store clerk is "light." The ALJ does not describe the mental requirements of either Plaintiff's past relevant work as Plaintiff performed it, or as it was performed in the national economy.

20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.05(C). Plaintiff notes that she suffered from a herniated disc, has had two surgeries for her back, has pain from a spinal disorder, has a decreased range of motion, weakness, muscle spasms and reflex loss. Plaintiff states that she therefore meets Listing 1.05(C) and is disabled.

In Clifton v. Chater, 79 F.3d 1007 (10th Cir. 1996),^{7/} the ALJ did not discuss the evidence or his reasons for determining that the claimant was not disabled at Step Three, or even identify the relevant listing. The ALJ merely stated a summary conclusion that the claimant's impairments did not meet or equal any listed impairment. In Clifton, the Tenth Circuit held that a bare conclusion was beyond any meaningful judicial review. Clifton, 79 F.3d at 1009.

In particular, the Tenth Circuit held as follows:

Under the Social Security Act,

[t]he Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based.

42 U.S.C. 405(b)(1). . . .

^{7/} The Court notes that the ALJ's decision was rendered on July 28, 1995. The Clifton opinion was not issued until March 26, 1996. Thus, neither the Commissioner nor the ALJ had the benefit of the Tenth Circuit's analysis in Clifton at the time the underlying decision was rendered.

This statutory requirement fits hand in glove with our standard of review. By congressional design, as well as by administrative due process standards, this court should not properly engage in the task of weighing evidence in cases before the Social Security Administration. 42 U.S.C. 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive."). . . . Rather, we review the [Commissioner's] decision only to determine whether her factual findings are supported by substantial evidence and whether she applied the correct legal standards. . .

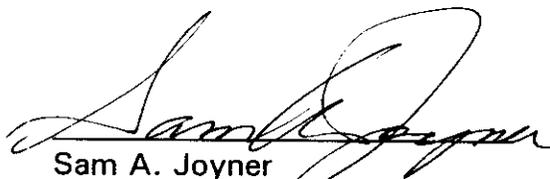
In the absence of ALJ findings supported by specific weighing of the evidence, we cannot assess whether relevant evidence adequately supports the ALJ's conclusion that [the claimant's] impairments did not meet or equal any Listed Impairment, and whether he applied the correct legal standards to arrive at that conclusion. The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence. . . . Rather, in addition to discussing the evidence supporting his decision, the ALJ also must discuss the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects. . . . Therefore, the case must be remanded for the ALJ to set out his specific findings and his reasons for accepting or rejecting evidence at step three.

Clifton, 79 F.3d at 1009-10 (internal case citations omitted).

On remand, the Commissioner should evaluate Plaintiff's claim that she meets a Listing giving due consideration to the concerns the Tenth Circuit raised in Clifton. The Court is in no way expressing an opinion as to whether Plaintiff actually meets or equals Listing 1.05.

Accordingly, the Commissioner's decision is **REVERSED AND REMANDED** for further proceedings consistent with this order.

Dated this 11 day of June 1997.


Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 10 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IVANIA D. LAWRENCE,)
)
Plaintiff,)
)
vs.)
)
STATE FARM FIRE AND CASUALTY)
COMPANY,)
)
Defendant.)

No. 95-C-639-E

ENTERED ON DOCKET

DATE JUN 11 1997

J U D G M E N T

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 Defendant, State Farm Fire and Casualty Company, and against the Plaintiff, Ivania D. Lawrence. Plaintiff shall take nothing of her claim. Costs may be awarded upon proper application.

DATED this 10th day of June, 1997.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUN 10 1997 *fw*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IVANIA D. LAWRENCE,)
)
Plaintiff,)
)
vs.)
)
STATE FARM FIRE AND CASUALTY)
COMPANY,)
)
Defendant.)

No. 95-C-639-E ✓

ENTERED ON DOCKET

DATE JUN 11 1997

O R D E R

Now before the Court is the Motion for Summary Judgment (Docket # 16) of the Defendant State Farm Fire and Casualty Company (State Farm).

This is an action for recovery on a policy of property casualty insurance and bad faith breach of that contract. The home of plaintiff, Ivania Lawrence, and its contents, were destroyed by fire. Plaintiff and her daughter, Gina, both submitted sworn proofs of loss and gave their examination under oath to plaintiff's insurer, State Farm. Defendant, however, refused to pay on plaintiff's claim for loss of the contents of the house. Lawrence then brought this action for breach of contract on the policy of property casualty insurance and bad faith. State Farm claims that it has no obligation to pay because of Gina's subsequent statement dated June 23, 1995 wherein she claims that her sworn statement greatly exaggerated the extent of her loss and that she lied in her sworn statement because asked to do so by her mother.

State Farm now seeks summary judgment on plaintiff's claim, arguing that the policy, by its terms, is void because of the misrepresentations of Gina Lawrence. State Farm argues that it is

33

immaterial when Gina Lawrence lied, but that it is inescapable that at least one of her statements is a misrepresentation.

Legal Analysis

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, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

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

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

The State Farm policy provides:

Concealment or Fraud. This policy is void as to you and any other insured, if you or any other insured under this policy has intentionally concealed or misrepresented any material fact or circumstance relating to this insurance, whether before or after a loss.

State Farm asserts that Gina Lawrence made an intentional misrepresentation voiding the policy either when she gave a false

sworn statement, or when she recanted her statement at the behest of her stepmother.

Plaintiff does not argue with State Farm's interpretation of the policy provision, nor does plaintiff assert that the misrepresentation would not be material. Rather, plaintiff argues that the provision of the policy in question is void as against public policy on two grounds. First, plaintiff argues that the above-quoted policy provision does not comply with Okla.Stat.tit.36, §4803 on standard provisions of a fire insurance policy. The standard provision on concealment or fraud, as allowed by statute is:

Concealment, fraud. This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or case of any fraud or false swearing by the insured relating thereto.

Okla.Stat.tit.36, §4803(G). Oklahoma law provides that a policy may vary from the standard policy provisions only in the following circumstances:

The Insurance Commissioner may approve for use within the state a form of policy which does not correspond to the standard fire insurance policy as provided by this section, if the coverage of said approved policy form with respect to the peril of fire shall not be less than that contained in the standard fire insurance policy as provided in this section.

Okla.Stat.tit.36, 4803(F)(1). Plaintiff argues that the language in the State Farm policy on concealment or fraud violates §4803(F)(1) because it provides less coverage than the statutory language because the phrase "you or any other insured" in the State

Farm policy is broader than the phrase "the insured" in the statutory language.

Plaintiff's argument misinterprets §4803(F)(1). The coverage referred to "with respect to the peril of fire" is not referring to any limitations based on misrepresentation, but rather on limitations as to what perils will be covered. The Court is convinced that the State Farm policy, which has been approved by the Insurance Commissioner, does not violate §4803.

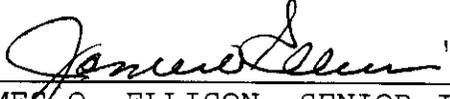
Plaintiff's second argument is that even if valid, the fraud or concealment provision cannot be invoked against Ivania Lawrence because State Farm has a duty to deal fairly and in good faith with Ivania Lawrence. Plaintiff relies on Okla.Stat.tit.25, §9 for the definition of "good faith:"

Good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious.

Plaintiff asserts, without argument or authority, that to allow State Farm to invoke the fraud or concealment provision against Ivania Lawrence, would be to allow State Farm to work "unconscionable advantage through the forms and technicalities of the law." The Court is not convinced that State Farm gains any "unconscientious advantage" through the use of the provision. Short v. Oklahoma Farmers Union Insurance Company, 619 P.2d 588 (Okla. 1980).

State Farm's Motion for Summary Judgment (Docket #16) is granted.

DATED this 10th day of June, 1997.



JAMES O.-ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

FILED

JUN 10 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

STATE FARM FIRE & CASUALTY)
COMPANY,)

Plaintiff,)

vs.)

DAVID VAN HORN and PORTIA)
VAN HORN,)

Defendants.)

Case No. 96-CV-1144-B ✓

ENTERED ON DOCKET

DATE JUN 11 1997

JUDGMENT

In accordance with this Court's Order granting Summary Judgment in favor of Plaintiff State Farm Fire & Casualty Company, Judgment is hereby entered in favor of Plaintiff State Farm Fire & Casualty Company and against Defendants David and Portia Van Horn.

IT IS SO ORDERED this 6th day of June, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

BT

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

FILED

JUN 10 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STATE FARM FIRE & CASUALTY)
COMPANY,)

Plaintiff,)

vs.)

DAVID VAN HORN and PORTIA)
VAN HORN,)

Defendants.)

Case No. 96-CV-1144-B

ENTERED ON DOCKET
DATE JUN 11 1997

Order

Before the Court for consideration are cross-Motions for Summary Judgment (Docket # 21, Defendants; Docket # 24, Plaintiff), and Plaintiff's Motion in Limine (Docket # 24). After careful review of the record and applicable legal authorities, the Court hereby **DENIES** Defendants' Motion for Summary Judgment, **GRANTS** Plaintiff's Motion for Summary Judgment, thereby rendering Plaintiff's Motion in Limine **MOOT**.

Statement of Case

Defendants, David and Portia Van Horn, contracted with Plaintiff, State Farm, whereby State Farm promised to provide insurance coverage ("Homeowners Policy") for certain real and personal property of the Van Horn's in exchange for the Van Horn's promise to pay the premiums for said coverage. For approximately two (2) years the Van Horns paid the premiums, billed quarterly, although not always in a timely manner. A premium payment was due December 14, 1995, which the Van Horns failed to pay. On June 1, 1996, a fire damaged certain real and personal property of the Van Horn's.

State Farm moves the Court for summary judgment contending it effectively canceled the Homeowners Policy for non-payment of premiums on January 11, 1996, in strict compliance with the

cancellation terms of the Homeowners Policy. In support of their claim, State Farm submits documentary evidence of one of their Cancellation Clerks, Mr. Tim Elliott, detailing the procedures employed in processing the Van Horn's Cancellation Notice. A copy of the Homeowners Policy is also before the Court.

While admitting they failed to pay the required premium, the Van Horns claim they never received the Cancellation Notice. The Van Horns argue actual notice of cancellation is required under Oklahoma law before a policy of insurance can be canceled. Thus, the issue before the Court is whether actual notice of cancellation is required under the cancellation terms of the Homeowners Policy and/or Oklahoma law.

The Court has jurisdiction over this declaratory judgment action pursuant to 28 U.S.C. § 1332.

Uncontroverted Material Facts

1. State Farm had a contract of insurance covering real and personal property of David Van Horn and Portia Van Horn at their home in Pryor, Oklahoma. (See State Farm Homeowners Policy, Policy No. 36-03-1804-2, Plaintiff's App., Exhibit 1).

2. The Homeowners Policy provided in part as follows:

HOMEOWNERS POLICY - EXTRA FORM 5

DECLARATIONS CONTINUED

We agree to provide the insurance described in this policy:

1. based on your payment of premium for the coverages you chose;
2. based on your compliance with all applicable provisions of this policy;
and
3. in reliance on your statements in these **Declarations**.

You agree, by acceptance of this policy, that:

1. you will pay premiums when due and comply with the provisions of the policy :

(See State Farm Homeowners Policy, Policy No. 36-03-1804-2, p.1, Plaintiff's App., Exhibit 1) (emphasis added).

3. On June 9, 1994, Defendant David Van Horn signed a State Farm Multi-Mode Payment Plan Application (the "Payment Plan Application"). Pursuant to the Payment Plan Application, the Defendants were required to pay the Homeowners Policy premiums on a quarterly basis. (See Application for State Farm Multi-Mode Payment Plan, Plaintiff's App., Exhibit 2; Defendants' Responses to Plaintiff's First Requests for Admissions No.3, Plaintiff's App., Exhibit 3).

4. The Payment Plan Application provides as follows:

The Multi-mode Payment Plan is provided as a convenience to policyholders to allow for periodic payments of premiums. Upon acceptance of this application the Sate Farm Mutual Automobile Insurance Company or affiliate insurer's ("State Farm") agree that if insurance coverage is issued such coverage will be provided in exchange for periodic premium amounts plus applicable service charges made for such coverage. The providing of coverage is subject to (1) timely receipt of payments as billed by State Farm. (2) the conditions applicable to and as stated in such application for insurance coverage or in each policy, and (3) such conditions stated in this application form.

THIS PAYMENT PLAN AND ANY INSURANCE COVERAGE TO WHICH THIS PLAN RELATES MAY BE CANCELED AT ANY TIME WITH NO FURTHER OBLIGATION. Provisions specifying how you may cancel are set forth in each policy. Coverage may also lapse or it may be canceled by State Farm for non-payment of premium in accordance with the applicable policy provisions. Upon cancellation prior to the end of any period for which premiums have been paid. [sic] State Farm will refund (or credit this account) any unearned premium in accordance with the provision of each policy. Service charges are earned when received and are non-refundable. If a policy is not issued, any applicable premium and membership fee will be refunded to you or credited to this account.

THIS PAYMENT PLAN APPLICATION FORM IS NOT AN APPLICATION FOR ANY POLICY OF INSURANCE AND IS SUBJECT IN ALL RESPECTS TO THE TERMS AND CONDITIONS OF ANY APPLICATION OR ANY

POLICY TO WHICH THIS PAYMENT PLAN RELATES. (Emphasis added).

(See Application for State Farm Multi-Mode Payment Plan, Plaintiff's App., Exhibit 2).

5. At his deposition, Defendant David Van Horn testified that he has been an attorney licensed in Oklahoma for approximately twenty-seven and one-half (27 ½) years, and while an attorney he has not signed a contract, to which he has been a party, without first reading it and understanding its contents, except for the Payment Plan Application. (See Deposition of David Van Horn, p.3 lines 11-12; p.4 lines 15-20; p.24 line 20 through p.25 line 6, Plaintiff's App., Exhibit 4).

6. Pursuant to the Payment Plan Application, the quarterly premium payments were to be made by the Defendants in the following months of each policy year: March, June, September, and December. (See Defendant's Response to Plaintiff's First Requests for Admissions No. 4, Plaintiff's App., Exhibit 3).

7. On both June 23, 1995, and September 25, 1995, State Farm mailed to the Defendants Cancellation Notices pertaining to the Homeowners Policy for non-payment of premium, which the Defendants admit receiving. In each case, the Defendants paid the premium due prior to the effective date of cancellation. (See File Copies of Cancellation Notices dated June 23, 1995, and September 25, 1995, Plaintiff's App., Exhibit 5; Deposition of Portia Van Horn, p.8 line 9 through p.9 line 8, Plaintiff's App., Exhibit 6).

8. The Defendants knew a quarterly premium payment was due on or before December 14, 1995. (See Defendants' Responses to Plaintiff's First Requests for Admissions No. 5, Plaintiff's App., Exhibit 3).

9. The Defendants did not make their quarterly premium payment, which was due on or before December 14, 1995. (See Defendants' Response to Plaintiff's First Requests for Admissions

No. 6, Plaintiff's App., Exhibit 3).

10. The mailing address as reflected on the Declarations Page of the Homeowners Policy, P.O. Box 1045, Pryor, Oklahoma, was the Defendant's correct mailing address on December 27, 1995. (See Declarations page of State Farm Homeowners Policy, Policy No. 36-03-1804-2, p.1, Plaintiff's App., Exhibit 1; Defendants' Responses to Plaintiff's First Requests for Admissions No. 11, Plaintiff's App., Exhibit 3).

11. The Homeowner's Policy provides in part:

SECTION I AND SECTION II CONDITIONS

5. Cancellation . . .

b. We may cancel this policy only for the reasons stated in this condition. We will notify you in writing of the date cancellation takes effect. This cancellation notice may be delivered to you, or mailed to you at your Mailing address shown in the Declarations. Proof of mailing shall be sufficient proof of notice:

(1) When you have not paid the premium, we may cancel at any time by notifying you at least 10 days before the date cancellation takes effect. This conditions applies whether the premium is payable to us or our agent or under any finance or credit plan . . .

(See State Farm Homeowners Policy, Policy No. 36-03-1804-2, p.19, Plaintiff's App., Exhibit 1)

(emphasis added).

12. At his deposition, State Farm employee, Tim Elliott testified that on December 27, 1995, he adhered to the following procedures when he served as Cancellation Clerk and processed the Defendants' Cancellation Notice sent by State Farm Payment Plan:

- a. he received the Cancellation Notice from the electronic inserting machine operator,
- b. he received a file copy of the Cancellation Notice from State Farm Payment Plan,

- c. he verified that the envelope containing the Cancellation Notice was sealed,
- d. he verified that the address showing through the window of the sealed envelope was the same as that contained on the file copy of the Cancellation Notice he received from State Farm Payment Plan,
- e. he verified that the post mark date on the envelope containing the Cancellation Notice matched the date of the file copy of the Cancellation Notice,
- f. he placed the sealed envelope containing the Cancellation Notice in a locked cabinet for which he had the only key, and
- g. later that day he gave the Cancellation Notice to a United States Postal Service Mail Carrier after he removed it from the locked cabinet.

(See Deposition of Tim Elliott, (a) p. 14 lines 2-20; p. 17 lines 19-21; (b) p. 15 lines 2-8; p. 16 lines 7-9; (c) p. 17 line 19 through p. 18 line 4; (d) p. 14 line 24 through p. 16 line 19; (e) p. 16 line 20 through p. 17 line 18; (f) p. 20 lines 1-10; p. 52 lines 8-11; p. 55 lines 1-10; (g) p. 20 lines 7-22; p. 52 lines 8-22; p. 22 line 20 through p. 23, Plaintiff's App., Exhibit 7).

13. At his deposition, Tim Elliott testified that on December 27, 1995, he initialed the file copy of the Cancellation Notice adjacent to the 'date sent' reflected at the top of the Cancellation Notice. His initials signify that on December 27, 1995, he delivered to a United States Mail Carrier the Cancellation Notice. (See File Copy of Cancellation Notice, dated December 27, 1995, Plaintiff's App., Exhibit 8; Deposition of Tim Elliott, p. 40 line 2 through p. 41 line 4; p. 51 line 1 through p. 52 line 6, Plaintiff's App., Exhibit 7.)

14. At his deposition, Tim Elliott testified that:

- a. he was trained in the procedures he utilized in verifying cancellation notices, and
- b. he has never changed his procedure in placing his initials on cancellation notices for nonpayment of premium.

(See Deposition of Tim Elliott, (a) p. 21 line 23 through p. 22 line 9; (b) p. 21 lines 3-16; p. 55 line

25 through p. 56 line 13, Plaintiff's App., Exhibit 7).

15. At his deposition, David Van Horn testified he did not open the mail and pay the bills and that he had no knowledge of having received the Cancellation Notice. (See Deposition of David Van Horn, p.12 line 11 through p. 14 line 4., Plaintiff's App., Exhibit 4).

16. At her deposition, Portia Van Horn testified she has no facts to contradict State Farm's testimony that it mailed the Cancellation Notice. (See Deposition of Portia Van Horn, p. 16 lines 7-13; p. 19 line 22 through p. 20 line 7, Plaintiff's App., Exhibit 6).

17. At her deposition, Portia Van Horn testified it was not possible that she received the Cancellation Notice of December 27, 1995, and did not remember it. (See Deposition of Portia Van Horn, p. 16, lines 2-6, Plaintiff's App., Exhibit 6).

18. The Cancellation Notice stated as follows:

WE HAVE NOT RECEIVED THE PAYMENTS REQUIRED TO KEEP THIS POLICY IN FORCE. IN ACCORDANCE WITH ITS CANCELLATION PROVISIONS, YOUR POLICY IDENTIFIED IN THIS NOTICE IS HEREBY CANCELED EFFECTIVE 12:01 A.M. STANDARD TIME ON THE CANCELLATION DATE SPECIFIED DUE TO NON-PAYMENT OF THE PREMIUM.

WE WELCOME THE OPPORTUNITY TO PROVIDE YOUR FUTURE INSURANCE PROTECTION. SHOULD YOU WISH TO REINSTATE THIS POLICY, PLEASE FORWARD YOUR PAYMENT IMMEDIATELY. PAYMENT PRIOR TO THE DATE AND TIME OF CANCELLATION WILL REINSTATE YOUR POLICY. IF PAID AFTER THAT DATE AND TIME, YOU WILL BE INFORMED WHETHER YOUR POLICY HAS BEEN REINSTATED AND IF SO, THE EXACT DATE AND TIME OF REINSTATEMENT. THERE IS NO COVERAGE BETWEEN THE DATE AND TIME OF CANCELLATION AND THE DATE AND TIME OF REINSTATEMENT. (Emphasis added).

(See File Copy of Cancellation Notice, dated December 27, 1995, Plaintiff's App., Exhibit 8).

19. On June 1, 1996, a fire occurred at the Van Horn's residence damaging certain real and personal property. (See Sworn Statement in Proof of Loss, Plaintiff's App., Exhibit 9).

20. The Van Horn's last quarterly premium payment on the Homeowners Policy was made

in October 1995. (See Defendants' Responses to Plaintiff's First Requests for Admissions No. 8, Plaintiff's App., Exhibit 3).

21. At their deposition, David and Portia Van Horn testified that they were but two (2) of seven (7) people who picked up their personal and business mail from Post Office Box 1045, Pryor, Oklahoma, between June 1995 and January 1996. (See Deposition of David Van Horn, p. 14 line 12 through p. 18 line 4, Plaintiff's App., Exhibit 4; Deposition of Portia Van Horn, p. 7 line 16 through p.8 line 8, Plaintiff's App., Exhibit 6).

Analysis

As previously stated, the issue before the Court is whether actual notice of cancellation is required under the cancellation terms of the Homeowners Policy and/or Oklahoma law.

State Farm's Requirements Under the Homeowners Policy

Oklahoma law governs this insurance contract dispute. Initially, this Court must determine as a matter of law whether the terms of the contract of insurance are unambiguous, clear, and consistent. See Phillips v. Estate of Greenfield, 859 P.2d 1101, 1104 (Okla. 1993). If so, the Court must accept the terms in their ordinary sense and enforce the terms to carry out the expressed intentions of the parties. Id. In such a case, this Court is not free to rewrite the terms of the contract. Id.

The Van Horns admit the terms of the Homeowners Policy required them to pay quarterly premiums to keep the insurance policy in force. See Uncontroverted Material Fact No. 2, 3, and 4. Further, the Van Horns admit the Homeowners Policy provides State Farm may cancel the policy for non-payment of premium by mailing a cancellation notice to the Van Horns at their Pryor, Oklahoma address at least ten (10) days before the cancellation takes effect. See Uncontroverted Material Fact

No. 11. It is undisputed the Homeowners Policy states that proof of mailing shall be sufficient proof of notice of cancellation. Id. The Van Horns do not contend the Homeowners Policy is ambiguous, unclear, or inconsistent.

The Court is of the opinion the terms of the Homeowners Policy, in particular the cancellation terms, are unambiguous, clear, and consistent. The clear, unequivocal language of the Homeowners Policy allows proof of mailing a notice of cancellation to the insured's address to suffice as proof of notice of cancellation. Id. The Court finds nothing unreasonable or unjust about the cancellation provision. The undisputed testimony of Tim Elliott shows State Farm mailed the Cancellation Notice to the Van Horns in compliance with the cancellation terms of the Homeowners Policy. Id.

Oklahoma Law

Under Oklahoma law, actual receipt of a policy cancellation notice is not a prerequisite to cancellation when the insurer actually mails the cancellation notice in strict accordance with policy provisions. See Richardson v. Brown, 443 F.2d 926, 928 (10th Cir. 1971); Gilmore v. Grand Prix of Tulsa Corp., 383 P.2d 231 (Okla. 1963); State Farm Mutual Automobile Insurance Co. v. Chaney, 272 F.2d 20 (10th Cir. 1959); Midwestern Insurance Co. v. Cathey, 262 P.2d 434 (Okla. 1953). Here, as a term of the Homeowners Policy, the Van Horns assumed the risk of receipt of the Cancellation Notice when properly mailed to the address given in the Declarations page. See Richardson, 443 F.2d at 927; Cathey, 262 P.2d at 436; Uncontroverted Material fact No. 11. Under the Homeowner Policy, it would "place an unreasonable and unfair burden on [State Farm] to say that notice of the cancellation must be actually delivered to the assured. To make such a requirement would be placing additional words in the policy far beyond the actual terms of the policy agreed to by the parties." Cathey, 262 P.2d at 436. State Farm has met its obligation under the Homeowners

Policy, and such obligation does not contravene Oklahoma law.

The Van Horns do not dispute State Farm mailed the Notice of Cancellation in accordance with the provisions of the Homeowners Policy, rather, they contend Oklahoma law mandates actual receipt of a cancellation notice before an insurance policy may be canceled. For support, the Van Horns rely heavily on Great American Indemnity Co. v. Deatherage, 52 P.2d 827 (Okla. 1935) and Farmers Insurance Exchange v. Taylor, 193 F.2d 756 (10th Cir. 1952). The Court is unpersuaded by the Van Horn's legal authority.

In Deatherage and Taylor the issue was whether or not the insurance company ever mailed a notice of cancellation to its insured. That is not disputed, nor the issue, here. The dictum in Deatherage relied on by the Van Horns which, arguably, stands for the proposition actual notice is required prior to cancellation of an insurance policy has been described as misleading. See Chaney, 272 F.2d at 22; Cathey, 262 P.2d at 436. Deatherage and Taylor discuss the presumptions created when evidence of non-receipt of the notice of cancellation is introduced against evidence of the customary and routine procedure of the company, as opposed to direct evidence of mailing the actual notice. See Deatherage 52 P.2d at 831; Taylor, 193 F.2d at 759-60. Under such circumstances, evidence the notice was not received creates a presumption the notice was not mailed. The presumption creates a fact question as to whether the insured received the notice which must be determined by the trier of fact. Taylor, 193 F.2d at 759. Here, no such presumption arises as there is undisputed evidence that State Farm mailed the Notice of Cancellation to the Van Horns in accordance with the policy provisions. In sum, Deatherage and Taylor are inapplicable.

Defendants' belatedly argue the Homeowners Policy is an adhesion contract, i.e. a "take it or leave it" contract drafted by the party with superior bargaining power. In support of their correct

assertion an insurance contract can be a contract of adhesion, the Van Horn's cite Max True Plastering v. U.S. Fid. & Guar., 912 P.2d 861 (Okla. 1996). However, Max True deals with the "reasonable expectation" doctrine and whether it applies to insurance contracts under Oklahoma law. "Under the doctrine, if the insurer or its agent creates a reasonable expectation of coverage in the insured which is not supported by policy language, the expectation will prevail over the language of the policy." Max True, 912 P.2d at 864. Any argument derivative of the fact an insurance contract can be an adhesion contract or that State Farm created any reasonable expectations beyond the terms of the Homeowners Policy must fail in light of a total lack of factual allegations and Uncontroverted Material Fact No. 5 which reads:

5. At his deposition, defendant David Van Horn testified he has been an attorney for approximately twenty-seven and one-half (27½) years, and while an attorney he has not signed a contract, to which he has been a party, without first reading it and understanding its contents, except for the Payment Plan Application.

The Court can draw no other conclusion but that David Van Horn read the Homeowners Policy and understood its terms as the insured party thereto.

Conclusion

Under the terms of the Homeowners Policy and Oklahoma law, State Farm has met its burden of showing an absence of disputed material fact and are thus entitled to judgment as a matter of law. The Court hereby **GRANTS** State Farm's Motion for Summary Judgment. Defendants' Motion for Summary Judgment is **DENIED**.

Plaintiff's Motion in Limine is **MOOT**.

Costs of this action shall be awarded in favor of Plaintiff State Farm if properly applied for pursuant to N.D.LR 54.2. Each party shall pay their own attorney fees.

IT IS SO ORDERED this 6th day of June, 1997.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCS
6-11-97

UNITED STATES OF AMERICA,

Plaintiff

v.

JOHNA D. REYNOLDS,

Defendant.

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Civil Action No. 97CV0245K ✓

FILED

JUN 11 1997

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DEFAULT JUDGMENT

Phil Lombardi, Clerk
U.S. DISTRICT COURT

This matter comes on for consideration this 10 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, Johna D. Reynolds, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Johna D. Reynolds, 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.

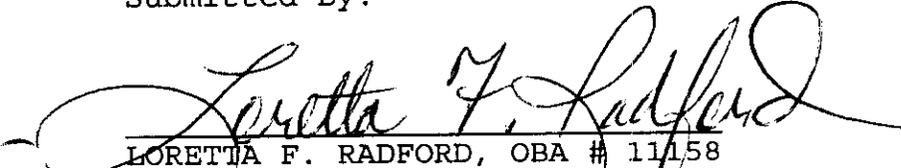
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Johna D. Reynolds, for the principal amount of \$5,617.36 and \$2,973.09, plus accrued interest of \$2,250.55 and \$1,212.74, plus interest thereafter at the rate of 7.51 percent per annum and 8 percent per

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

LFR/jmo

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

ENTERED ON DOCKET
6-11-97

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 ✓

F I L E D

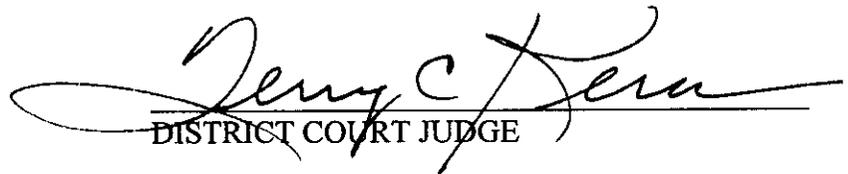
JUN 11 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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. Plaintiff is responsible for his attorneys' fees, and Defendants are responsible for their attorneys' fees.


DISTRICT COURT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 10 1997

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

JACK R. MAY,
SS# 511-60-9250

Plaintiff,

v.

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

Defendant.

No. 96-C-571-C

ENTERED ON DOCKET

DATE JUN 11 1997

REPORT & RECOMMENDATION^{2/}

Currently before the Court is Defendant's Motion to Dismiss the Plaintiff's complaint based on a lack of jurisdiction. Defendant's Motion was heard by this Court on June 9, 1997. Plaintiff appeared by and through attorney Thomas H. Wagenblast, and Defendant appeared by and through attorney Cathryn McClanahan.

Having heard the argument of counsel, and having reviewed the briefs, the pleadings, and the case file, the United States Magistrate Judge recommends that Defendant's Motion to Dismiss be **GRANTED**.

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

^{2/} By minute order dated February 26, 1996, this case was referred to the United States Magistrate Judge for all further proceedings in accordance with his jurisdiction.

FACTUAL & PROCEDURAL BACKGROUND

Plaintiff filed an initial application for social security benefits on September 19, 1991. [R. at 99-102]. Plaintiff's application was initially denied, and Plaintiff, following a request for reconsideration, was granted a hearing before an Administrative Law Judge ("ALJ"). [R. at 103-05, 59]. Plaintiff's hearing before ALJ Stephen C. Calvarese was held September 17, 1992. On March 16, 1993, the ALJ issued a decision denying benefits to Plaintiff. [R. at 258-269]. Plaintiff appealed the ALJ's decision to the Appeals Council. [R. at 270]. On August 6, 1993, the Appeals Council denied Plaintiff's request. [R. at 272]. The notice by the Appeals Council to Plaintiff stated that Plaintiff had sixty days to file a civil action in the district court. [R. at 273]. Plaintiff was last insured for the purpose of social security disability benefits on September 30, 1992. [R. at 43].

Plaintiff filed a second application for social security benefits on February 15, 1994. [R. at 274]. The Social Security Administration denied his second application. [R. at 281]. Plaintiff requested and was granted a hearing before the ALJ. The hearing before the ALJ was held April 11, 1995. [R. at 13]. On May 15, 1995, the ALJ issued a (1) "Notice of Dismissal," denying Plaintiff's application to reopen his first application for benefits (and therefore denying benefits based on Social Security Disability ("SDI")), and (2) a "Notice of Decision -- Partially Favorable," which awarded Supplemental Security Income ("SSI") benefits to Plaintiff. [R. at 41, 45].

In the Notice of Dismissal, the ALJ noted that a prior decision of the Social Security Administration may be reopened within four years of the decision if "good cause" is shown.

The regulations provide that good cause will be found where (1) new and material evidence is furnished; (2) there is a clerical error in the computation or recomputation of benefits; or (3) there is error on the face of the evidence on which such determination or decision was based.

[R. at 43]. The ALJ additionally noted that none of these three conditions had been met by Plaintiff. [R. at 44]. The ALJ concluded that "in view of the above, the final decision made on the claimant's application filed September 19, 1991, may not be reopened." [R. at 44]. The ALJ additionally observed that under the Social Security Regulations, an ALJ "may dismiss a claimant's request for hearing when the doctrine of res judicata applies." [R. at 44]. In this case, the ALJ applied res judicata because the Plaintiff had a previous determination by the Social Security Administration that he was not disabled; the prior determination could not be reopened; and therefore the prior decision was final. [R. at 44].

Plaintiff met the insured status requirements for social security disability only until September 30, 1992. Plaintiff filed his second application for social security benefits on February 15, 1994. Because Plaintiff no longer met the insured status requirements to qualify for SDI, absent a decision to reopen Plaintiff's first application for disability benefits, Plaintiff could receive only SSI benefits. The ALJ declined to reopen Plaintiff's prior application, and observed that the beginning date for consideration of Plaintiff's alleged disability for the purpose of awarding SSI was the

date of his second application for social security benefits -- February 15, 1994. [R. at 48]. The ALJ found that Plaintiff was disabled as of this date, and granted SSI benefits. [R. at 49-50].

DEFENDANT'S MOTION TO DISMISS

Defendant asserts that Plaintiff's complaint should be dismissed because this Court lacks jurisdiction to review the decision of the ALJ not to open the prior determination of the Social Security Administration that Plaintiff was not disabled. Plaintiff relies primarily on Califano v. Sanders, 430 U.S. 99 (1977).

In Sanders, the Supreme Court held that § 205(g) of the Social Security Act does not "authorize judicial review of alleged abuses of agency discretion in refusing to reopen claims for social security benefits." Id. at 108. The Court noted that, generally, judicial review is limited to a "final decision of the Secretary made after a hearing." Id. The Court concluded that absent the assertion of a constitutional question, the federal courts lack jurisdiction to review the discretionary decision of the Commissioner to decline to reopen a prior decision denying benefits. Id. at 108-09. See also Abbruzzese v. Railroad Retirement Board, 63 F.3d 972, 974 (10th Cir. 1995) ("[A]bsent the presence of a constitutional question raised by the refusal to reopen, we are without subject matter jurisdiction to review a decision by the Board not to reopen a case."); Dozier v. Bowen, 891 F.2d 769 (10th Cir. 1989). Consequently, absent the existence of a constitutional issue, this Court lacks jurisdiction to review the Commissioner's decision.

Plaintiff acknowledged at the June 9, 1997 hearing, and in his brief, that absent a constitutional issue, the District Courts lack jurisdiction to hear Plaintiff's appeal. Plaintiff asserted in his brief that Plaintiff was denied "due process" because a "failure to permit a hearing on Plaintiff's current application for Social Security Disability is denial of due process." Plaintiff's Brief at 5. However, at the June 9, 1997 hearing, Plaintiff acknowledged that he had been given the opportunity at the hearing before the ALJ on his second application for benefits, to present argument to support his request to reopen the prior ALJ's decision, but had declined to do so. Therefore, assuming due process requires the Commission to give Plaintiff a hearing prior to deciding not to reopen a prior application, Plaintiff was not denied due process because he was given such an opportunity at his hearing.

Plaintiff also asserts, as a "constitutional" argument, that the ALJ issued a decision denying benefits which covered fourteen days for which the ALJ lacked evidence. The ALJ's first decision denying benefits was issued March 16, 1993. This decision was affirmed by the Appeals Council on August 6, 1993, and was not further appealed by the Plaintiff. It is therefore a final decision.

Plaintiff notes he was last insured for the purpose of social security disability on September 30, 1992, but that the hearing before the ALJ was on September 17, 1992, and therefore the hearing did not include evidence for fourteen days during which Plaintiff still met the insured status requirements. Plaintiff therefore concludes that the ALJ's March 30, 1993 decision improperly includes a period of fourteen days

within the decision, finding that Plaintiff was not disabled although no evidence was presented to the ALJ for that period of time.

As noted above, this Court lacks jurisdiction absent Plaintiff establishing that the decision by the ALJ not to reopen violates some constitutional right. Plaintiff does not argue or explain why the ALJ's or the Commission's asserted failure to consider evidence from this fourteen day period denies Plaintiff a constitutional right. Regardless, in Plaintiff's first application, Plaintiff appealed the decision of the ALJ to the Appeals Council. The Appeals Council did not issue its decision until August 6, 1993. Plaintiff had every opportunity to present any new evidence of a disability to the Appeals Council prior to its decision "affirming" the ALJ, or to the ALJ, prior to the ALJ's decision denying benefits. See O'Dell v. Shalala, 44 F.3d 855 (10th Cir. 1994); 20 C.F.R. § 404.976 ("The Appeals Council will consider all the evidence in the administrative law judge hearing record as well as any new and material evidence submitted to it which relates to the period on or before the date of the administrative law judge hearing decision.") Plaintiff acknowledges that he did not present any new evidence to either the ALJ or the Appeals Council. Plaintiff's allegations do not rise to the level of a constitutional violation contemplated by Califano.

Plaintiff additionally asserts that the ALJ in some manner waived res judicata.^{3/} Plaintiff relies on Taylor v. Heckler, 738 F.2d 1112 (10th Cir. 1984), to support his

^{3/} In their discussion of res judicata principles, both Plaintiff and Defendant appear to confuse claim and issue preclusion. Issue preclusion only bars relitigation of the precise issue determined in the prior action. Claim preclusion bars relitigation of the claim raised in the prior action and any issues which could or should have been raised. See, e.g., Fox v. Maulding, 112 F.3d 453 (10th Cir. 1997).

argument on waiver. Taylor found that although the ALJ in the hearing at the Commission had not expressly found that a prior decision denying benefits should be reopened, that due to the ALJ's consideration of evidence and his treatment of the case, the ALJ had implicitly found that the prior decision should be reopened. The Tenth Circuit concluded that the ALJ's actions constituted a "de facto reopening" of the application, and that the District Court therefore erred in denying judicial review based on principles of res judicata. Id. at 114-15. This factual scenario is obviously not the situation presently before the Court. In this case, the ALJ expressly found that the prior decision should not be reopened, and because it was not reopened, the prior decision constituted a final decision on the merits and therefore principles of res judicata (claim preclusion) could be applied. Such an application is a proper and appropriate use of the principles of res judicata.

Plaintiff has not presented a sufficient constitutional basis to justify the invocation of jurisdiction in this Court. Consequently, the Magistrate Judge recommends that the District Court grant Defendant's Motion to Dismiss.

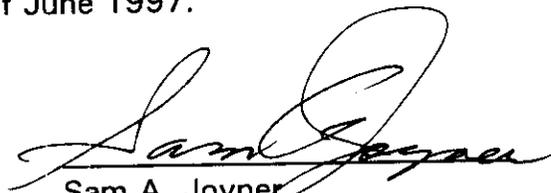
RECOMMENDATION

Based on the legal and factual issues in this case, the United States Magistrate Judge recommends that the District Court **GRANT** the Motion of the Commissioner, and **DISMISS** Plaintiff's complaint.

Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days of service of this notice. Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's legal

and factual findings. See, e.g., Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 10th day of June 1997.


Sam A. Joyner
United States Magistrate Judge

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

JEANNIE JAMES,

Plaintiff,

vs.

Case No. 96-CV-631C ✓

GRAND LAKE MENTAL HEALTH CENTER, INC.; PAULA VELLA, individually and in her capacity as employee of Grand Lake Mental Health Center, Inc.; SIOUX GRENINGER, individually and in her official capacity as a police officer of the City of Pryor, Oklahoma; RONNIE BATT, individually and in his official capacity as a police officer of the City of Pryor, Oklahoma; TRENT HUMPHREY, individually and in his official capacity as a police officer of the City of Pryor, Oklahoma; CITY OF PRYOR, OKLAHOMA; BAPTIST HEALTHCARE CORPORATION, d/b/a MAYES COUNTY MEDICAL CENTER; DR. CHRISTOPHER DELONG, D.O.; individually and in his capacity as employee of Mayes County Medical Center; DR. K.W. SOUTHERN, D.O., individually and in his capacity as employee of Eastern State Hospital, Vinita, Oklahoma; and DR. JOE FERMO, M.D., individually and in his capacity as employee of Eastern State Hospital, Vinita, Oklahoma; EASTERN STATE HOSPITAL, VINITA, OKLAHOMA; STATE OF OKLAHOMA,

Defendants.

FILED

JUN - 9 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

JUN 11 1997

**JOINT STIPULATION OF DISMISSAL WITH
PREJUDICE AS TO DEFENDANT, RONNIE BATT, ONLY**

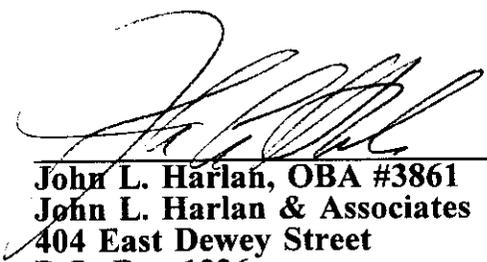
The plaintiff, Jeannie James, and the defendant, Ronnie Batt, individually and in his official capacity as a police officer of the City of Pryor, Oklahoma ("Batt"), pursuant to Rule 41(a)(1)(ii), FED. R. CIV. P., jointly stipulate that the plaintiff's action against Batt,

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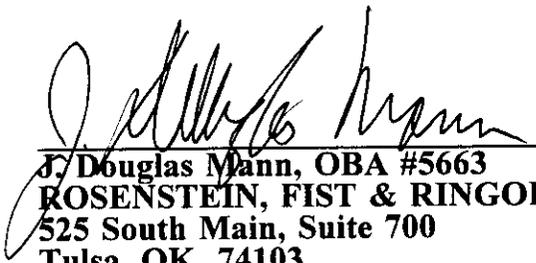
be dismissed **WITH PREJUDICE** as to Batt only, with the plaintiff reserving all claims against all other defendants, and with the plaintiff and Batt to bear their own respective costs, including all attorney's fees and expenses of this litigation.

Dated this 2 day of June, 1997.



John L. Harlan, OBA #3861
John L. Harlan & Associates
404 East Dewey Street
P.O. Box 1326
Sapulpa, OK 74067

Attorneys for Plaintiff, Jeannie James



J. Douglas Mann, OBA #5663
ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 700
Tulsa, OK 74103
(918) 585-9211

Attorneys for Defendant, Ronnie Batt,
individually and in his official capacity
as a police officer with the City of
Pryor, Oklahoma, and referred to
above as "Batt"

ENTERED ON DOCKET

6-11-97

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

WILLIAM HUDSON,)
)
 Plaintiff,)
)
 vs.)
)
 CITY OF TULSA,)
)
 Defendant.)

No. 96CV1097K

FILED

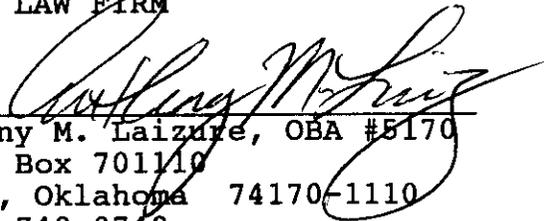
JUN 10 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL

Plaintiff no longer desires to pursue his claim against the City of Tulsa and therefore the parties stipulate to the dismissal of this case without prejudice pursuant to Rule 41 of the Federal Rules of Civil Procedure.

STIPE LAW FIRM

By: 
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(918) 749-0749


Larry Simmons, OBA #10960
City Attorney
200 Civic Center
Tulsa, OK 74103

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ENTERED ON DOCKET
DATE 6-11-97

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 BRADLEY D. PURVIS,)
)
 Defendant.)

JUN 10 1997 *M*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Action No. 97CV0242K ✓

NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Loretta F. Radford, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action.

Dated this 10th day of June, 1997.

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

Loretta F. Radford

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

CERTIFICATE OF SERVICE

This is to certify that on the 10th day of June, 1997, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Bradley Purvis, c/o Johnny P. Akers, 401 S. Dewey, Suite 214, Bartlesville, OK 74005.

Loretta F. Radford
Assistant United States Attorney

CF