

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 28 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JOHN PETE ESSLEY, TAMARA )  
LOMBARD RHYAN, and TISA )  
WILHELMSSEN, individually and as )  
representatives of the Estate of PETE )  
LOMBARD ESSLEY, Deceased, )

Plaintiffs, )

v. )

UNITED STATES OF AMERICA, )

Defendant. )

Case No. 96-CV-746-B

ENTERED ON DOCKET

DATE 8-29-97

ORDER

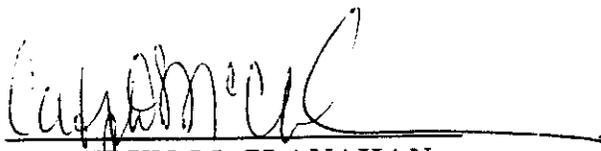
This matter comes on before the court upon the stipulation of all parties and the court, being fully advised in the premises, orders, adjudges and decrees that all claims asserted herein by plaintiffs against the United States of America are hereby dismissed with prejudice.

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

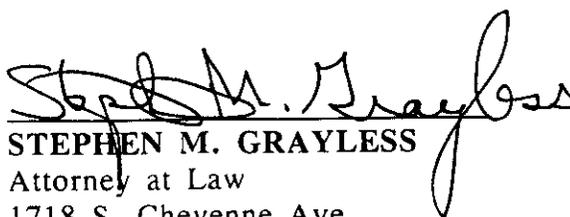
S/ THOMAS R. BRETT

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

APPROVED AS TO CONTENT AND FORM:



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GARLAND L. ROBERTSON,

Plaintiff,

v.

UNITED STATES,

Defendant.

Case No. 96-C-888-B

ORDER

Before the Court are Plaintiff Garland Robertson's ("Robertson") Motion for Summary Judgment (Docket #2), and Defendant United States' Motion for Summary Judgment (Docket #5). On September 27, 1996, Robertson, a former chaplain and lieutenant colonel in the United States Air Force, filed a complaint under the Administrative Procedure Act ("APA"), 5 U.S.C.A. § 701 *et seq.* Robertson alleges that the Air Force's punitive actions against him for questioning the need to use military force in response to Saddam Hussein's military offensive against Kuwait effectively destroy the pluralistic religious witness upon which the constitutionality of the military chaplaincy depends, and thereby promote a "military" religion. Robertson seeks summary judgment that the Air Force's actions against him violate the Free Exercise and Establishment clauses of the First Amendment and Air Force Regulation ("AFR") 265-1. The United States responds and cross moves for summary judgment asserting that Robertson's APA claim is barred by the doctrine of *res judicata*; this Court lacks subject matter jurisdiction over any claim for compensatory damages; and the decision of the

Air Force Board for Correction of Military Record ("AFBCMR") regarding the actions taken against Robertson should be affirmed.

#### A. BACKGROUND

Plaintiff entered the Air Force as a pilot, serving in Vietnam from May 1969 until 1970, and continuing to serve as a pilot until 1975 when he left the Air Force to attend the seminary. In 1982, he returned to the Air Force as a commissioned officer in the service of the chaplaincy. On January 5, 1991, prior to Operation Desert Storm, Plaintiff submitted the following letter to the editor of a local newspaper in Abilene, Texas:

The impression which Vice President Quayle has communicated to the American Soldiers in Saudi Arabia cannot go unchallenged. His comment, "The American people are behind you," must be clarified to indicate that the American people are not united in their decision to support a military offensive against the aggression of Saddam Hussein in Kuwait.

While the human rights violations committed by the Iraqis against the people of Kuwait are atrocious, unfortunately these violations are not exceptions to human rights abuses elsewhere in the world. Our presence in the Persian Gulf region has to do with economic issues primarily.

I have written 25 members of the Armed Services committees in Washington, and their responses reveal a substantial number of Americans, including government officials of distinction, oppose the U. S. - led forceful expulsion of the Iraqis from Kuwait. Other options are available which many believe are more sensitive to the best interest of the world community.

If President Bush remains adamant about using force to drive Iraq from Kuwait, the American soldiers will respond with the full measure of their capabilities - they are servants committed to defend the national interests of the people to whom they have entrusted their lives. The need to use military force in this circumstance, however, is an open issue - one which the citizens of this country will not allow to be decided in the vacuum of sectarian perception.

*Government's Exhibit A.*<sup>1</sup> Robertson signed the letter as "Garland L. Robertson, Chaplain, Dyess Air Force Base." *Id.*

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<sup>1</sup>All exhibits identified as "Government Exhibits" are exhibits attached to the government's motion for summary judgment in Case No. 95-C-1135-B.

On January 8, 1991, Colonel Michael A. Lock ("Lock"), Commander of the 96th Combat Support Group reprimanded Robertson for the letter stating in part "I have no objection to your expressing your political opinions in letters to congressmen or in a letter to the editor. However, when you add your military title and unit of assignment to a published letter you are violating AFR 110-2, which is titled "Political Activities of Members of the Air Force." *Government's Exhibit B.* Lock noted that commenting on Operation Desert Shield is a political activity and questioning the President's use of force flouts military authority. *Id.* Robertson responded to the letter of reprimand by distinguishing his letter as one written by a military pastor and borne from ethical and moral, not political, concerns. He explained that he perceived his responsibility as military chaplain to assist soldiers in clarifying and evaluating the issue of whether the Iraqi conflict was a "just war":

The situation in the Middle East is indeed difficult, complex, and dangerous. Iraq's aggression should not be tolerated. War, however, is an ancient, uncivilized way to resolve conflict. Whether persons are violated by jagged spears or 20MM cannons, war is barbaric and unable to produce equitable solutions for differences. Yet war may be the only alternative for safeguarding human life and checking an otherwise irreducible aggressor. In the Persian Gulf region, war is not the only alternative for reducing Iraq. Therefore this war is immoral - it is not a just war. My duty requires that I make a moral judgment. No one is bound by my conclusion. How you decide is not my responsibility, nor will it embarrass me. I will affirm your decision.

*Government's Exhibit C.*

On January 8, 1991, Colonel Michael A. Lock ("Lock"), Commander of the 96th Combat Support Group reprimanded Robertson for the letter stating in part "I have no objection to your expressing your political opinions in letters to congressmen or in a letter to the editor. However, when you add your military title and unit of assignment to a published letter you are violating AFR 110-2, which is titled "Political Activities of Members of the Air Force." *Government's Exhibit B.* Lock noted that commenting on Operation Desert Shield is a political activity and questioning the President's use of force flouts military authority. *Id.* Robertson responded to the letter of reprimand by distinguishing his letter as one written by a military pastor and borne from ethical and moral, not political, concerns. He explained that he perceived his responsibility as military chaplain to assist soldiers in clarifying and evaluating the issue of whether the Iraqi conflict was a "just war":

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*Government's Exhibit C.*

In May 1991 Robertson received the first of a series of unfavorable Officer Performance Reports ("OPR"), for the period April 1, 1990 until March 31, 1991, in which he was rated as "Does Not Meet Standards" in the area of "Leadership Skills, " by the Installation Staff Chaplain, Lieutenant Colonel Robert S. Leeds ("Leeds"). *Government's Exhibit D.* As the Additional Rater in the OPR, Lock remarked that Robertson's "scheduled TDY to support Desert Storm

casualties was withdrawn because of questionable capabilities,” and recommended that Robertson be removed from the Air Force chaplaincy as “he is not earning his pay.” *Id.* Robertson filed an application to the AFBCMR to declare the OPR void, which the AFBCMR denied. In reference to the letter, the AFBCMR wrote

We do not disagree that [Robertson] has an absolute right to express his own personal views; his error, however, occurred when he indicated his base and official title and targeted a statement by the Vice President. In so doing, he removed himself from the realm of a concerned citizen and represented himself as an Air Force officer expressing a partisan viewpoint. While the applicant justifies his actions as pastoral in nature, as a military -- and the key word is “military” -- chaplain, he is, in fact, bound by the same rules of conduct as other individuals in the Armed Forces.

*Government Exhibit O.*

On May 19, 1991, in a sermon to his congregation on “The Divine Wisdom Within You”, Robertson referenced the actions taken against him:

My senior commanders as well as my immediate supervisor are of the opinion that my contribution to the well-being of this community is less than expected. They believe my presence is a negative influence; they believe my function as a chaplain has been disruptive, a service which has neither been appreciated nor desired. My career will be adjusted according to their evaluations. The issue has moved beyond the boundaries of Dyess AFB. Efforts to reassign me have been complicated because senior leaders on other bases refuse to accept me as a part of their staffs. Some of you also know of consequences which are the result of personal commitment to the wisdom communicated by the divine spirit.

*Government's Exhibit E.* On May 20, 1991, Leeds responded to Robertson’s sermon with a Letter of Counseling noting that “[u]sing the worship service to present your personal position on staff and chaplaincy matters represents poor judgment on your part and will not be tolerated in the future.” *Id.*

In December of 1991, Chaplain Colonel James T. Elwell, who had replaced Leeds as Installation Staff Chaplain, ordered Robertson to undergo a commander directed psychological

evaluation by Captain Marlin K. Moore ("Moore"), Chief Psychological Services at Dyess AFB. Moore issued his report on February 6, 1992 on his psychological evaluation of Robertson. Moore's diagnosis identified an occupation problem and concluded that Robertson's psychiatric profile was S-1 and fully qualified for world wide duty. Moore determined that Robertson's "problems appear to have begun when he arrived at Dyess" and noted specific conflicts with Leeds and Elwell, including their disapproval over Robertson's letter to the editor. In summary, Moore noted that Robertson "appears to be psychologically intact with no evidence of significant past or present pathology," but that

[h]is superior intellect and his self-assurance create problems for him in his job because he often convinces himself that he knows of a better way to do the task at hand. When Ch. Robertson believes he is correct in his beliefs about important matters he will tend to stand his ground even if this requires him to "fall on his sword." While others might interpret this as his being stubborn, I believe his behaviors more closely resemble those of the Old Testament prophets. Unfortunately, then, like now, prophets are often not highly esteemed, especially when their views do not fit into the mainstream of an authoritarian environment such as the military.

*Government's Exhibit F.* In conclusion, Moore recommended that Robertson be removed from the Dyess Chapel staff, placed in a line position and retained in the Air Force until eligible for retirement; however, "[i]f such a job is not available or if the commander believes it is in the best interest of the Air Force for Ch. Robertson to separate, I recommend he be allowed to apply for one of the exit bonus programs rather than face separation under AFR 36-2." *Id.*

On February 7, 1992, Robertson filed a Charge of Institutional Discrimination with the Air Force complaining that Air Force policies and procedures deprived him of the right to the free exercise of religion in his duties as a chaplain. *Plaintiff's Exhibit to 96-C-888-B Summary Judgment Motion.* Robertson stated that the Air Force took the following actions as a result of

the letter: (1) he was removed from the base chapel's preaching schedule for the duration of Operation Desert Storm; (2) his scheduled temporary duty "TDY" to staff a contingency hospital in support of Operation Desert Storm was canceled; (3) in March 1991, he was assigned to Castle AFB in California, but in April the base leadership refused to accept him as part of its staff; and (4) in April 1991 he was assigned to Keesler AFB in Mississippi where he was again refused a position. *Plaintiff's Exhibit to 96-C-888-B Summary Judgment Motion.*

In a Summary Report of Inquiry, the Air Force concluded that the "actions taken against Chaplain Robertson for his numerous breaches in conduct and substandard performance were both measured and fair," and not the result of wrongful discrimination. *Plaintiff's Exhibit to 96-C-888-B Summary Judgment Motion.* In so concluding, the Air Force found that (1) Robertson's "removal from the preaching schedule appears to have been largely a management decision to avoid further indiscretions and conflict between the chaplain and parishioners"; (2) Robertson's release from TDY in January 1991 "was a direct result of the reprimand he received for the previously addressed violation of AFR 110-2 [the letter to the editor]," and "[i]n light of the nature of Chaplain Robertson's breach of conduct, and his expressed view on the use of US military force in the Persian Gulf, it would have been inappropriate to assign him to a contingency hospital to minister to service members who were injured as result of armed conflict in the Gulf"; and (3) although Robertson was considered and rejected for several assignments, "[t]he fact that Chaplain Robertson, through his own actions, has rendered himself unacceptable to other potential Air Force units does not constitute wrongful discrimination." *Id.*

In April 1992, Robertson received his second unfavorable OPR for the period of April 1, 1991 through March 31, 1992 which again cited his leadership as below standard. *Government's*

*Exhibit G.* While Elwell acknowledged Robertson's organization and timely accomplishment of assigned tasks, he remarked that Robertson was not a team player and his "attitude toward authority and the Air Force system has been one marked by indifference to rebellion; at times, just short of insubordination." *Id.*

Robertson took issue with the OPR in his responding comments which include *inter alia* the following: "because of statements I had made on behalf of the Christian churches in America regarding moral objections to initiating a war against Iraq in response to the Aug 90 crisis in the Middle East," and "reference in a sermon to some of the consequences I had experienced because of my effort to apply the knowledge of faith to life," he was suspended and then removed from the preaching schedule, and ordered to undergo a psychiatric evaluation. Characterizing these responses as an effort on the part of the Air Force to promote "prevailing preferences," Robertson concludes,

I am an ordained minister of the Christian faith tradition. As such I am compelled to represent my interpretation of the spirit and the teaching of this standard, both in what I say and in what I do, whether the opinion is popular or not. I will not compromise the knowledge of faith I have acquired in the progress of my experience and training. I will not appear to support a pattern of community structure which does not respect individual religious liberty. If this orientation does not meet AF standards for a chaplain leader, then what does? The answer to this question will say much about the role a chaplain is expected to fulfill in the military establishment. Servants of a democratic god may be an accurate description of the kind of ministers the AF promotes.

*Id.*

The Wing Commander, Colonel Johnny Griffin, "carefully considered Ch Robertson's comments to the OPR," and acknowledged that Robertson's "job performance [showed] a degree of technical proficiency," but concurred with Elwell's assessment that Robertson's "lack of teamwork and mission support has been unacceptable." *Id.*

On July 10, 1992, Brigadier General Jerrold P. Allen ("Allen") issued a Letter of Reprimand to Robertson for disrespect and insubordination toward Elwell. Allen reprimanded Robertson for seeking someone to replace him for an assigned chapel duty and for calling Elwell's insistence on Robertson's compliance with the order "childish." Allen admonished Robertson that "[y]our actions are but another incident in a pattern of inappropriate and petty behavior towards Colonel Elwell, fellow officers, and this Wing. Your disrespect has been detrimental to the chapel staff's morale and this organization." *Government's Exhibit H.*

On July 13, 1992, Robertson responded by explaining that there had been a misunderstanding, that he did not intend to offend Elwell, and assuring that he "will be extremely careful in the future not only to avoid giving Ch Elwell the impression that I disrespect his supervisory authority over me but also to guard my actions that they might not be interpreted as being inappropriate towards fellow officers and the Wing." *Id.*

During that same month, Elwell ordered Robertson to undergo another directed psychiatric evaluation due to the "continuing concern with Chaplain Robertson's job performance and personality issues that have resulted in cumulatively adverse effects on the Chapel mission, morale, and section team work," and his belief that the "problems and patterns of behavior reflected in previous reports seem to have intensified." *Government Exhibit I.* Robertson was interviewed and evaluated by Richard D. Zenn ("Zenn"), Chief, Psychiatric Services. In his September 2, 1992 report, Zenn noted that although "there may not have been enough evidence to make the diagnosis at Dr. Moore's initial evaluation," Zenn concluded that the "most accurate psychiatric diagnosis of Chaplain Robertson is a Personality Disorder Not Otherwise Specified with narcissistic, obsessive-compulsive traits, and passive-aggressive traits." Finding that

Robertson was fully qualified for worldwide duty with no duty restrictions, Zenn concurred with Moore's original suggestion that Robertson be assigned to a line position until eligible for retirement. If Robertson's personality style then continued to be a problem, Zenn suggested that a decision would have to be made as to whether to separate Robertson under AFR 36-2. *Id.*

In April 1993, Elwell again evaluated Robertson's leadership skills as below standard, for the period of April 1, 1992 through March 31, 1993, noting that Robertson's "[l]ong-term continuance of job and staff relationship difficulties has led to repeated written evaluations by mental health that identify an underlying personality disorder that hinders his duty performance." *Government Exhibit J.* In response, Robertson objected that Elwell's actions against him and those of the leaders of the Chaplain Service were intended to "isolate one who will not promote a nationalistic spirit," and in so doing, "the Chaplain Service has betrayed the confidence of the American Christian churches, and the AF has betrayed the trust of a nation who has pledged to protect the free exercise of religion for all persons -- especially those having minority opinions." *Id.* Brigadier General Allen acting as both additional rater and reviewer concurred with Elwell's assessment of Robertson's leadership and concluded that Robertson's "performance makes him a liability to the chaplaincy and the base mission." *Id.*

On March 23, 1993, at the time of this evaluation, Elwell and Major Joseph L. Heiman (Heiman), the Staff Judge Advocate, informed Robertson that Brig. Gen. Allen was considering an AFR 36-2 separation action against Robertson, unless Robertson put in his paperwork for retirement by mid-April 1993. *Plaintiff's Exhibit to 96-C-888-B Summary Judgment Motion.* Heiman told Robertson that should an AFR 36-2 proceeding be initiated, Robertson could lose all retirement benefits, even if the appeal took him beyond his 20 year retirement date of February 1,

1994. *Id.*

At some point between this March 23rd meeting and April 22, 1993, Robertson declined to separate voluntarily. On April 2, 1993, Elwell made a written request for a third mental evaluation of Robertson in which he concluded that a "36-2 action is in order." *Plaintiff's Exhibit 11 to 95-C-1135-B Summary Judgment Motion, p. 154.* Moore conducted the third mental evaluation. *Government Exhibit K.* When Moore contacted Robertson concerning the evaluation, Robertson declined to meet with him but provided him with written rebuttals and other documents for Moore's review. Based on these documents, the two prior mental evaluations, documents of administrative actions, memos for record and the last three OPRs, Dr. Moore changed his original diagnosis and adopted Dr. Zenn's diagnosis of Personality Disorder not otherwise specified with Narcissistic, Passive-Aggressive, and Obsessive-compulsive traits. Although now finding that Robertson's personality disorder was "so severe as to interfere with the normal and customary completion of his duties," and thus warranted discharge pursuant to AFR 36-2, Moore recommended that Robertson be placed in a position outside the Chapel until he is eligible for early retirement because of his faithful service during the bulk of his career. *Id.*

On May 27, 1993, Elwell removed Robertson from all chapel duties and functions at Dyess and reassigned him to the Resource Division of the USAF Chaplain Service Institute to perform independent study and projects under the supervision of Lieutenant Colonel William K. Stothart ("Stothart"). *Government Exhibit L.*

On June 1, 1993, Robertson requested voluntary retirement effective a year later on June 1, 1994. *Administrative Record ("AR") at 46.*<sup>2</sup> Although the record is unclear as to why, his

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<sup>2</sup>All citations to the Administrative Record are to the record in 96-C-888-B.

request for voluntary retirement was not acted upon.

On June 16, 1993, Robertson acknowledged receipt of a Letter of Notification that a Board of Inquiry ("BOI") had convened to determine whether Robertson should be discharged pursuant to AFR 36-2. *AR at 47*. In his indorsement, Robertson stated that he had not applied for voluntary retirement since his initial request for retirement, effective June 1, 1994, was not acted upon by the commander. *Id.* Nor had he tendered his resignation. *Id.*

On August 25, 1993, Lewis G. Burnett, Director of Military Chaplaincy, Home Mission Board, Southern Baptist Convention - Robertson's endorsing agency - wrote a letter to the Air Force "Reviewing Authorities" to affirm the denomination's endorsement of Robertson. After extolling Robertson's accomplishments, military record and character, Burnett concluded with the following remarks:

Garland had an exemplary record until he arrived at Dyess. For four years installation chaplains have attempted to "fix the problem" namely Garland Robertson. It is interesting that in nine years he went from being a first lieutenant to being a lieutenant colonel. It seems to me that the "system" in all of its dealings with Garland, have attempted to force him to comply with what they believed were their standards, rather than exerting effort to understand that this talented, gifted, and committed chaplain wants to accomplish the same goals they do. However, his emphasis is upon people first and then the mission. People accomplish missions.

I believe that every institution that seeks to be consistently efficient and productive must have some kind of built-in mechanism of accountability. It is my conviction that Garland Robertson was acting as a "prophet" to encourage the system toward accountability of consistency.

During two on-site visits to Dyess in 1992 and 93 office calls were made by me with three different commanders regarding Garland Robertson. These commanders addressed the possibility of our removing Chaplain Robertson's endorsement. . . .

It is my opinion that Garland Robertson is in good standing with his endorsing agency and though Garland pursues his ministry differently than I would, he is supported by this office in his calling as a military chaplain.

*Plaintiff's Exhibit 10 to 95-C-1135-B Summary Judgment Motion.*

The BOI heard testimony and received evidence during Robertson's AFR 36-2 proceeding which took place from September 16-17, 1993. *AR at 1, 4-8; Plaintiff's Exhibits 11 and 12 to 95-C-1135-B Summary Judgment Motion.* After hearing testimony for two days, the BOI determined that Robertson should not be retained, and recommended to the Secretary of the Air Force that he be removed from active duty and awarded an honorable discharge. *Plaintiff's Exhibit 12 to 95-C-1135-B Summary Judgment Motion.*

On July 6-7, 1994, Robertson sought an independent opinion of his psychological condition from Major Paul Pyles ("Pyles"), a Board Certified Psychiatrist with the Air Force. Pyles interviewed, tested and evaluated Robertson over two days and also reviewed his medical record, prior mental evaluations, information provided by Elwell and the BOI transcript. Dr. Pyles opined that although he observed in Robertson "narcissitic [sic], obsessive-compulsive and avoidant/schizoid" traits, "the duration and time course are insufficient to warrant a diagnosis of a 'personality disorder.'" *AR 17-21.*

On October 14, 1994, the Secretary of the Air Force ordered that Robertson be removed from active duty as soon as possible under 10 U.S.C. §1184 and further ordered that he be retired as soon as possible under 10 U.S.C. §1186. *Plaintiff's Exhibit 13 to 95-C-1135 Summary Judgment Motion; AR at 49.* On October 17, 1994, the Air Force relieved Robertson from active duty, effective October 31, 1994, and made his retirement effective November 1, 1994. *AR at 52.* This order, however, was rescinded on October 31, 1994 and a new order entered relieving Robertson from active duty, effective November 30, 1994 and making his retirement effective December 1, 1994. *AR at 53-55.* According to the Certificate of Release or Discharge from Active Duty, Robertson was separated from the service based on his "voluntary retirement -

sufficient service for retirement.” *AR at 55.*

On December 16, 1994, Robertson filed an application for correction of military records with the AFBCMR, requesting the removal of the OPRs for reporting periods ending 31 March 1991, 31 March 1992, 31 March 1993, and 31 March 1994, and the rescission of the Secretary of the Air Force Order of October 14, 1994 that Robertson be retired. In support of his application, Robertson submitted partial testimony from the BOI proceedings, copies of his psychological evaluations and a letter from Janet Walker (“Walker”), the Choir Director at Dyess Protestant Chapel from July 1991 until July 1992. *AR 57.*

In her letter, Walker praised Robertson’s contribution to the Dyess Protestant chapel, noting that he was “ a significant minister to a part of the chapel family that the other chaplains did not seem to reach,” and that “he had a very positive effect on them and his presence and concern was very important to them.” *AR 27.* Walker states that Robertson acted professionally and with dignity and “never said a negative word about Chaplain Elwell” to her or in her presence. Walker also writes that Elwell told her that he had to get Robertson out of the service before Robertson was eligible for retirement. *AR 27.*

In addition, the Air Force submitted the following advisory opinions to the AFBCMR:

(1) CMSgt. Clarence Lee Jr., Chief Evaluation Procedures Section, Evaluation Programs Branch, Randolph AFB, Texas, reviewed the contested OPRs, advised that the OPRs were processed in accordance with AFR 36-10, and recommended disapproval of Robertson’s request to remove them. *AR 41.*

(2) Major Marianne Sterling (“Sterling”), Chief, Appeals and Special Selection Board Branch, Directorate of Personnel Program Management, also reviewed the contested OPRs and

recommended that Robertson's appeal be denied. Sterling noted that Robertson had failed to provide any support from the evaluators of the reports and only provided the letter from Walker and five pages from a 203-page transcript of the BOI hearing, neither of which substantiated any error in the OPRs. Sterling commented that the contested OPRs involved three different raters, three different additional rates, and three different reviewers and thus, "[w]e are not convinced nine senior officers were 'out to get' the applicant." *AR 42-43*.

(3) Mary Dauphine ("Dauphine"), Program and Procedures Branch, Directorate of Personnel Program Management, reviewed Robertson's "retirement process" and recommended denial of his request to rescind the Secretary of the Air Force's Order for Robertson's involuntary release from active duty as there was "no evidence of error, injustice, or impropriety." Dauphine explained that Robertson submitted a request to retire on June 1, 1993, effective June 1, 1994, prior to the initiation of the AFR 36-2 action and as a result of the action, the Secretary of the Air Force authorized Robertson's retirement pursuant to 10 U.S.C. §1186.

On November 15, 1994, Robertson filed a claim with the Air Force under the Federal Tort Claims Act ("FTCA") seeking damages for the Air Force's fraudulent representations that Robertson had a personality disorder, that he was insubordinate and his work was substandard, which resulted in his premature separation from the service. *Plaintiff's Exhibit to Complaint in 95-C-1135-B*. The Air Force denied the claim on July 13, 1995. *Id.* Robertson then filed his first complaint against the United States before this Court in Case No. 95-C-1135-B on November 14, 1995 asserting claims under the FTCA and the Administrative Procedures Act ("APA"). On March 25, 1996, the Court granted the government's motion to dismiss, finding lack of subject matter jurisdiction over Robertson's FTCA claim based on the *Feres* doctrine, and failure to state

a claim under the APA based on the doctrine of nonjusticiability, citing *Lindenau v. Alexander*, 663 F.2d 68 (10th Cir. 1981).

On August 23, 1995, the AFBCMR handed down its decision denying Robertson's application for correction of medical records. *AR 57*. The AFBCMR found that Robertson had failed to show that the contested OPRs or the retirement process were unjust or in error:

Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. We have thoroughly reviewed the applicant's contentions and his submission in judging the merits of the case. However, we do not find the documentation sufficiently persuasive so as to override the rationale expressed by the Offices of the Air Staff. The applicant believes that the contested OPRs were written as a reprisal for a letter written to the editor of a local newspaper. His commander, who administered the January 1991 Letter of Reprimand, stated he had no objection to the applicant expressing his political opinions in letters to congressmen or in a letter to the editor; however, when the applicant used his military title and unit of assignment, he violated AFR 110-2 which prohibits Air Force members on active duty from engaging in political activities. The applicant has not shown that the commander's action was inappropriate. We note the statement from the Protestant Chapel employee; however, this statement does not substantiate that the contested OPRs were erroneous. Applicant does not submit supporting documentation from any of the rating chain members who were different individuals on all four OPRs in questions over a four-year period. We also note that the applicant submitted a request to retire in June 1993 but the request was not acted on because of a pending AFR 36-2 action. His retirement was subsequently approved by the Secretary of the Air Force and we find no evidence of error regarding the retirement process. Therefore, we agree with the recommendation of the Air Staff and do not believe the applicant has been the victim of an error or injustice. In the absence of evidence to the contrary, we find no compelling basis to recommend granting the relief sought in this application.

*AR 60.*

On September 27, 1996, Robertson filed the instant suit alleging that the actions taken by the Air Force which led to Robertson's dismissal from active duty were unconstitutional and violated AFR 265-1. Robertson seeks reinstatement in the military chaplaincy with "the

commission to conduct a comprehensive study under the supervision of Air University, Maxwell AFB, Alabama, for the purpose of identifying and interpreting the dynamics involved in serving as both a religious minister and a military officer on active duty.” *Plaintiff’s Supplemental Brief in 96-C-888-B, p. 6.*

## **B. ANALYSIS**

### **1. The Administrative Procedures Act**

It is helpful to begin with what the claim in this case is not: it is not a constitutional attack on the validity of any Air Force regulation, specifically AFR-110, and it is not a claim for contract damages under the Tucker Act, 28 U.S.C. §1346. The claim in this case is one of review under the Administrative Procedures Act (APA), 5 U.S.C.A. § 701 *et seq.*, which states in pertinent part:

[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States...

5 U.S.C. § 702. Specifically, Robertson seeks judicial review of the AFBCMR’s denial of his application to remove the unfavorable OPRs and to rescind the Secretary’s order for his retirement from active duty, which Robertson alleges resulted from the Air Force’s violation of the First Amendment and AFR 265-1. Robertson also alleges that the Air Force did not comply with prescribed procedures in his retirement process. The relief Robertson seeks is equitable -

removal of the unfavorable OPRs from his military record and reinstatement.<sup>3</sup> The court thus has jurisdiction under the APA.

As this case is before the Court for judicial review of a final agency action, the procedural vehicle of summary judgment is inappropriate. It is not the Court's role to determine whether there are factual questions which require trial, but rather whether the AFBCMR's final decision should be affirmed or set aside. 5 U.S.C. §706. Accordingly, the Court views the cross motions for summary judgment as appellate briefs in support of and in opposition to the appeal of the AFBCMR's decision, and by agreement of the parties, considers the entire record presented in this case and in Case No. 95-C-1135-B in its review.<sup>4</sup> *Olenhouse v. Commodity Credit Corp.* 42 F.3d 1560, 1565 (10th Cir. 1994)(“When acting as a court of appeal, it is improper for the district court to use methods and procedures designed for trial”).

## 2. Justiciability (The *Mindes* Test)

Although the Court applied the *Mindes* test in dismissing Robertson's first APA complaint in Case No. 95-C-1135-B, the Court finds the analysis troubling and chooses not to rely upon it

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<sup>3</sup>Although Robertson seeks back pay and other benefits incident to his reinstatement, the Court does not find that the “prime objective” or “essential purpose” of his claim is to recover money - which would vest exclusive jurisdiction with the Court of Federal Claims under The Tucker Act, 28 U.S.C. §§1346, 1491. *Burkins v. United States*, 112 F.3d 444, 449 (10th Cir.1997). Rather, Robertson's “primary objective [is] to have the court declare the nature of the prospective relationship between [himself] and the [Air Force].” *Id.* at 450. As the claim is not one pursuant to The Tucker Act, the Court determines that it has subject matter jurisdiction.

<sup>4</sup>Along that line and in response to the government's *res judicata* defense, the Court finds that its Order dismissing Robertson's APA claim in Case No. 95-C-1135-B does not preclude his APA claim in this case. In that Order, the Court dismissed Robertson's APA claim with prejudice for failure to state a claim, concluding under *Lindenau v. Alexander*, 663 F.2d 68 (10th Cir. 1981), that Robertson's APA claim was not justiciable. However, *Lindenau* expressly requires that intra-service remedies be exhausted and at the time of the Court's Order, the AFBCMR had not rendered its decision on Robertson's application. The Court concludes, therefore, that the dismissal of Robertson's APA claim should have been without prejudice to refiling when a final agency decision was reached. Thus, the doctrine of claim preclusion does not bar Robertson's APA claim in this case.

in the Court's review of Robertson's APA claim in this case.

In *Lindenau v. Alexander*, 663 F.2d 68 (10th Cir. 1981), the Tenth Circuit adopted a test proposed by the Fifth Circuit in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir.1971). The test is two-pronged. The first prong prohibits judicial review unless the plaintiff has exhausted "available intra service corrective measures" and alleges either a deprivation of constitutional right or a violation by the military of a statute or military regulation. *Mindes*, 453 F.2d at 201. If the first prong is met, then the court must balance the following factors: (1) "the nature and strength of the plaintiff's challenge to the military determination"; (2) the "potential injury to the plaintiff if review is refused"; (3) the "type and degree of anticipated interference with the military function"; and (4) the "extent to which the exercise of military expertise or discretion is involved." *Id.* at 201-02. Only if the factors balance in favor of plaintiff does the court determine the merits of the claim.

The test is thus one of reviewability or justiciability. However, unlike traditional justiciability doctrine by which the court determines if the claim is justiciable based on political question, and if found to be justiciable, then proceeds to the merits, the *Mindes* test actually balances the merits of the case to determine if the case is justiciable. The purpose of injecting this test into the review process was characterized by the *Mindes* court as a "judicial policy akin to comity," that recognized a judicial "unwillingness to secondguess judgments requiring military expertise and ... a reluctance to substitute court orders for discretionary military decisions." *Mindes*, 453 F.2d at 199. In other words, the test mixes the deferential standard of review applied to the military disputes with the concept of justiciability. *Dillard v. Brown*, 652 F.2d 316, 323 (3d Cir.1981) ("The difficulty which we perceive with the *Mindes* analysis is that it

intertwines the concept of justiciability with the standards to be applied to the merits of the case.”); *Knutson v. Wisconsin Air National Guard*, 995 F.2d 765, 768 (7th Cir.1993); *Kreis v. Secretary of the Air Force*, 866 F.2d 1508, 1512 (D.C.Cir.1989).

In applying the *Mindes* test to this case, the Court noted several problems. First, the test requires the exhaustion of administrative remedies. It was this requirement which mandated the Court’s reassessment of the dismissal of the prior action as a dismissal without prejudice rather than with prejudice, as the AFBCMR had not yet ruled on Robertson’s intra-service appeal. However, since *Mindes* and *Lindenau*, the Supreme Court in *Darby v. Cisneros*, 509 U.S. 137 (1993), has held that federal courts do not have authority to require plaintiffs to exhaust administrative remedies before seeking review under the APA where neither statute nor agency rule specifically requires exhaustion as a prerequisite to judicial review. Lower courts have since applied *Darby* to military appeals under the APA and concluded that there is no statute or regulation requiring exhaustion of intra-service remedies. *Dowds v. Clinton*, 18 F.3d 953 (D.C.Cir.1994) and *Perez v. United States*, 850 F.Supp. 1354 (N.D.Ill. 1994).<sup>5</sup> The Court knows of no statute or regulation requiring exhaustion in this case and does not interpret 10 U.S.C. §1552 which establishes military boards of review as “specifically mandat[ing] exhaustion

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<sup>5</sup> The *Perez* court rejected the government’s attempt to distinguish *Darby* on the grounds that the Supreme Court “was not confronted with prior precedent recognizing the military’s special status as an agency apart with its own ‘comprehensive internal system of justice to regulate military life.’” *Perez*, 850 F.Supp. at 1360.

While cognizant of the special nature of the armed services and the potential dangers of unwarranted judicial interference with military activity, this court declines the government’s invitation to carve out a special military exception to the Supreme Court’s decision in *Darby*. In this regard, it is important to remember that *Darby* does not preclude agencies or Congress from making administrative exhaustion a prerequisite to federal jurisdiction. Rather, it simply demands that such prerequisites be made explicit by Congress (through statutes) or agencies (through rules), rather than by judges. Until such action is taken, military personnel like *Perez* will be entitled to seek direct judicial review of final military decisions, such as the discharge at issue here, without first exhausting all available administrative remedies.

*Id.* at 1360-61.

as a prerequisite to judicial review.” The Court thus questions the viability of the *Mindes* test in light of *Darby*.

Even if the Court were to overlook the exhaustion requirement in the *Mindes* test, the Court is bothered by its confusing mix of political question doctrine and deferential standard of review. Application of the *Mindes* test can result in a court’s refusal to conduct any review although the case would not be precluded from review under traditional political question doctrine. Further, the Court finds no basis in Supreme Court precedent for excepting the military from all judicial review under the APA.<sup>6</sup> This is particularly true for claims of constitutional violation, which are expressly included in the APA’s scope of review. See 5 U.S.C. §706(2)(B). What the Court does find in Supreme Court precedent involving constitutional challenges of military actions is the application of a standard of review which is decidedly deferential. However, no matter how deferential, there is judicial review.

For these reasons, the Court declines application of the *Mindes* test and addresses the merits in light of the applicable standard of review set forth below.

### **3. Standard of Review**

Having determined that the Air Force’s actions are subject to review, the Court determines the appropriate standard of review. Judicial review of formal agency action under the APA is governed by 5 U.S.C. §706 which states six separate grounds for reversal:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency

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<sup>6</sup>To the contrary, in *Chappell v. Wallace*, 462 U.S. 296, 303 (1983), the Supreme Court specifically noted that decisions by the military boards of correction pursuant to 10 U.S.C. §1552 “are subject to judicial review and can be set aside if they are arbitrary, capricious or not based on substantial evidence.”

action. The reviewing court shall -

\* \* \* \*

(2) hold unlawful and set aside agency action, findings, and conclusions found to be -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

*See also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 n.30 (1971); *Olenhouse*, 42 F.3d at 1573-76.

As noted above, Robertson requests this Court to set aside the decision of the AFBCMR on two bases: (1) the actions of the Air Force were "contrary to [his] constitutional right[s]" under the First Amendment (and as recognized by AFR 265-1); and (2) the Air Force did not comply with prescribed procedures in his retirement process. The first basis requires the application of the deferential standard of review set forth below. The second mandates reversal if the decision of the AFBCMR was "arbitrary, capricious, in bad faith, unsupported by substantial evidence or contrary to law, regulation or published procedure." *Wyatt v. United States*, 23 Cl.Ct. 314, 318-19 (1991); *Chappell*, 462 U.S. at 303; *Dodson v. United States*, 988 F.2d 1199, 1204-05 (Fed.Cir.1993); *Kreis v. Secretary of the Air Force*, 866 F.2d 1508, 1514-15 (D.C.Cir.1989); *Olenhouse*, 42 F.3d at 1573-76 (general discussion of the scope of review of

agency action).

**a. Deference to Military in Constitutional Challenges of Military Actions**

The Supreme Court has long recognized the need for deference when facing constitutional challenges to military decisions. Because the Constitution expressly assigns the responsibility of military affairs to the Legislative and Executive branches, the Supreme Court has consistently shown great restraint in second-guessing their supervision. “[J]udicial deference to [a] congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.” *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981). On a more practical level, the Judicial branch acknowledges its lack of expertise in military matters:

it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.

*Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953)

(“judges are not given the task of running the Army. . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters”). Further restraining judicial review is an appreciation of the necessity of conformity, discipline and obedience to an effective national defense. *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (“The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection”). The deference shown the legislative and executive branches over military affairs is

thus mirrored by that shown to the decision-making authority of military personnel who “have been charged by the Executive and Legislative Branches with carrying out our Nation’s military policy.” *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986).

Accordingly, the Supreme Court has adapted its review of the individual constitutional rights of service members to reflect the “communal” exigencies of military life. While members of this “specialized” community retain their individual constitutional rights, those rights are mere shadows of their civilian counterparts. For example, the Supreme Court has upheld military regulations which denied - a Jewish clinical psychologist at an Air Force base mental health clinic his free exercise right to wear a yarmulke, *Goldman*, 475 U.S. at 509-10 (“[t]he First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations”); service members their free speech right to circulate petitions on bases without prior military approval, *Brown v. Glines*, 444 U.S. 348, 358 n.14 (1980)(“Loyalty, morale, and discipline are essential attributes of all military service. Combat service obviously requires them”); and service members their First Amendment right to the distribution of political materials on base, *Greer v. Spock*, 424 U.S. 828, 837 (1976) (recognizing “the special constitutional function of the military in our national life”).

Given that the Supreme Court did review the above constitutional challenges to the military, it is clear that “deference does not mean abdication,” *Rostker*, 453 U.S. at 70, and further persuades the Court that it is required to review Robertson’s constitutional challenge under the APA. This review, however, is conducted with the traditional deference applied to military disputes.

#### 4. Constitutional Challenge under the Religion Clauses

Robertson asks the Court to hold unlawful and set aside Air Force actions which he asserts were taken in violation of his constitutional rights under the First Amendment and in excess of the Air Force's authority under AFR 265-1.<sup>7</sup>

It is Robertson's contention that the reason for his unfavorable OPRs and premature retirement from the Air Force originated in his "moral judgment" that American troops should not engage in a military action against Iraq, which was published in a letter to the editor of a local newspaper in Abilene, Texas on January 5, 1991, when American troops had been mobilized to Saudi Arabia in Operation Desert Shield. Robertson argues that the First Amendment and AFR 265-1 not only grant him the right but mandate his duty to determine whether the Iraqi conflict was a "just war" so that he may assist soldiers in clarifying and evaluating the moral issue for themselves. His letter, he explains, was one written by a military pastor, borne of moral, not political concerns. And thus, he was freely exercising his religious rights in expressing those moral concerns. The Air Force's response, according to Robertson, was to punish and ostracize him, remove him from his preaching duties, intimidate and harass him by ordering him to undergo three mental examinations which incorrectly diagnosed him as having a personality disorder, and finally bringing an AFR 36-2 separation proceeding against him which resulted in his forced retirement from service. In so doing, the Air Force acted outside the scope of their authority and violated AFR 265-1 and the Establishment and Free Exercise Clauses of the First Amendment.

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<sup>7</sup> AFR 265A(1), entitled Chaplain Service Mission states the following:

The mission of the Air Force Chaplain Service is to provide opportunities for the free exercise of religion in the Air Force community through worship, rites, religious education, visitation, pastoral counseling, and a responsiveness to individual religious needs.

The record reflects that the Air Force considered Robertson's letter to the editor to be a violation of AFR 110-2, which restricts the political activities of members of the Air Force. Specifically, AFR 110-2 allows a member of the Air Force to "express his or her personal opinion on political candidates and issues, but not as a representative of the Armed Forces." It is the Air Force's position that Robertson crossed the line of permitted behavior under AFR 110-2 when he identified his military title and unit of assignment in his subscription to a letter which commented on Operation Desert Shield, a political activity,<sup>8</sup> and flouted military authority by questioning the President's use of force in Kuwait.

We do not disagree that [Robertson] has an absolute right to express his own personal views; his error, however, occurred when he indicated his base and official title and targeted a statement by the Vice President. In so doing, he removed himself from the realm of a concerned citizen and represented himself as an Air Force officer expressing a partisan viewpoint. While the applicant justifies his actions as pastoral in nature, as a military -- and the key word is "military" -- chaplain, he is, in fact, bound by the same rules of conduct as other individuals in the Armed Forces.

*AFBCMR's April 19, 1993 Ruling, Government Exhibit O.*

This initial conflict set the stage for the following events:

A few months after the letter, the Air Force issues an OPR critical of Robertson's leadership skills. Robertson responds by sharing with his congregation in a sermon on "personal commitment to the wisdom communicated by the divine spirit" that his career will be adjusted

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<sup>8</sup> Although the Air Force has a legitimate concern that its members not publicly oppose specific military action as representatives of the Air Force, the guidelines to AFR 110-2 do not make such proscription crystal clear. In Enclosure 2 to AFR 110-2, entitled "Political Activities: Supplemental Guidelines," the following is identified as an example of the type of political activity permitted: "Write a letter to the editor of a newspaper expressing the member's personal views concerning public issues, if those views do not attempt to promote a partisan political cause." A "partisan political activity" is defined in the regulation as an "activity supporting or relating to candidates representing, or issues specifically identified with, national or State political parties and associated or ancillary organizations." The use of force to drive Iraq from Kuwait, although a political issue, was not a partisan political issue, particularly in January 1991 when both the Republican and Democratic Parties were divided on the issue.

according to the evaluations of his senior commanders who have criticized that personal commitment. The sermon is followed by a Letter of Counseling from the Air Force, Robertson's removal from the preaching schedule, the refusal of other Air Force bases to accept Robertson as part of their staff and a commander-directed psychological evaluation. In response, Robertson files a Charge of Institutional Discrimination. And the Air Force issues another unfavorable OPR, noting that Robertson's "attitude toward authority and the Air Force system has been one marked by indifference to rebellion; at times, just short of insubordination." Robertson responds by affirming that he is not one of the "[s]ervants of a democratic god," "the kind of ministers the AF promotes." A year and a half to two years after the letter to the editor, Brigadier General Allen issues a Letter of Reprimand to Robertson for disrespect and insubordination toward his commanding officer, Senior Chaplain Elwell; Elwell orders that Robertson undergo another psychiatric evaluation which results in a diagnosis of personality disorder; and another unfavorable OPR issues. Robertson objects that the leaders of the Chaplain Service are isolating him for refusing "to promote a nationalistic spirit." Brigadier General Allen threatens an AFR 36-2 separation action unless Robertson voluntarily retires by a certain date. Robertson refuses. Elwell requests a third mental evaluation and removes Robertson from all chapel duties. Robertson requests voluntary retirement. An AFR 36-2 proceeding is convened; the BOI recommends that Robertson be removed from active duty; and the Secretary of the Air Force orders Robertson to retire. Robertson files an appeal to the AFBCMR, which is denied.

Robertson's appeal to this Court raises two underlying constitutional questions: (1) whether the Air Force violated Robertson's rights under the First Amendment by treating his published "moral judgment" that the Persian Gulf war was not a "just" war as a political issue and

reprimanding him accordingly; and (2) whether the Air Force's actions against Robertson as an Air Force chaplain violate the Establishment and Free Exercise Clauses by effectively promoting a "military religion" through its chaplaincy program.

The Court is guided in its analysis of the first question by the United States Supreme Court's decision in *Gillette v. United States*, 401 U.S. 437 (1971). In *Gillette*, petitioners were conscientious objectors to the war against Vietnam who challenged the constitutionality of §6(j) of the Military Selective Service Act of 1967, 50 U.S.C. §456(j), as violative of the Free Exercise and Establishment clauses of the First Amendment. Section 6(j) provided that no person shall be subject to "service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." Petitioners asserted that in limiting recognition of conscientious objectors to those who opposed war as such, and excluding those who opposed a particular war, Congress impermissibly discriminated among types of religious belief and affiliation, thereby rendering §6(j) fatally underinclusive:

This happens, say petitioners, because some religious faiths themselves distinguish between personal participation in "just" and in "unjust" wars, commending the former and forbidding the latter, and therefore adherents of some religious faiths--and individuals whose personal beliefs of a religious nature include the distinction--cannot object to all wars consistently with what is regarded as the true imperative of conscience.

*Id.* at 452.

As noted by Justice Douglas in his dissent in *Gillette*, one of the petitioners, Louis Negre ("Negre"), was a devout Catholic who opposed the war in Vietnam. According to Catholic doctrine, "a person has a moral duty to take part in wars declared by his government so long as they comply with the tests of his church for just wars. Conversely, a Catholic has a moral duty not to participate in unjust wars." *Id.* at 469 (Douglas, J. dissenting, citing Pope John XXIII in

Part II of *Pacem in Terris* 46, 51 (Paulist Press 1963)). The determination of whether a particular war is a “just” war is a personal decision which a Catholic must make as a matter of conscience after studying the facts. *Id.* at 471. Negre made this determination, and yet because he did not oppose all wars, his application for discharge as a conscientious objector was denied pursuant to §6(j). *Id.* at 474.

Rejecting petitioners’ argument that §6(j) is a law respecting the establishment of religion by discriminating against conscientious objectors like Negre, the Supreme Court held that §6(j) did not violate the Establishment Clause because there were “valid neutral reasons” for limiting the exemption to objectors of all wars; *e.g.*, the government’s need for manpower and interest in maintaining a fair induction system. *Id.* at 454. In so holding, the Court recognized that including conscientious objectors to a particular war “would involve a real danger of erratic or even discriminatory decisionmaking in administrative practice.” *Id.* at 455. Such would result because “[a]ll the factors that might go into nonconscientious dissent from policy, also might appear as the concrete basis of an objection that has roots as well in conscience and religion.” *Id.* Thus, “opposition to a particular war may more likely be political and nonconscientious, than otherwise.” *Id.*

Ours is a Nation of enormous heterogeneity in respect of political views, moral codes, and religious persuasions. It does not bespeak an establishing of religion for Congress to forgo the enterprise of distinguishing those whose dissent has some conscientious basis from those who simply dissent.

*Id.* at 457.

The Court also held that §6(j) did not violate the Free Exercise Clause. Acknowledging “a general harmony of purpose” between the religion clauses, the Court noted that the Free Exercise Clause, however, has a reach of its own although the neutral governmental interests

which defeated petitioners' Establishment Clause challenge are also "of a kind and weight sufficient" to meet the requirements of the Free Exercise Clause. *Id.* at 461. Recognizing that the Free Exercise Clause bars "governmental regulation of religious beliefs as such," *Sherbert v. Verner*, 374 U.S. 398, 402 (1963), as well as interference with the dissemination of religious ideas, *Fowler v. Rhode Island*, 345 U.S. 67, 73 (1953), the Court scrutinized the government's "neutral" interests to determine if the conscription laws violated the free exercise clause.

The conscription laws, applied to such persons as to others, are not designed to interfere with any religious ritual or practice, and do not work a penalty against any theological position. The incidental burdens felt by persons in petitioners' position are strictly justified by substantial governmental interests that relate directly to the very impacts questioned. And more broadly, of course, there is the Government's interest in procuring the manpower necessary for military purposes, pursuant to the constitutional grant of power to Congress to raise and support armies. Art.I, s8.

*Id.* at 462.

Like Negre, Robertson sincerely believes that the war he opposed was "unjust" and he was compelled by conscientious, religious conviction to object. However, the sincerity and conviction of his moral judgment as an individual and military officer does not mandate accommodation by the Air Force. As Robertson himself has insisted, it is not the role of the Air Force to make moral judgments. Its role is to fight for and defend nationalistic interests. *Rostker*, 453 U.S. at 70 ("it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise"). When or if that role is moral is not, under the Constitution, for the Air Force to decide. It may be, as quoted by Justice Douglas in his dissent in *Gillette*, that

modern wars can never fulfill those conditions which . . . govern - theoretically - a just and lawful war. Moreover, no conceivable cause could ever be sufficient justification for the evils, the slaughter, the destruction, the moral and religious upheavals which war today entails. In practice, then, a declaration of war will never be justifiable.

*Id.* at 472-73 (quoting Cardinal Ottaviani in *The Future of Offensive War*, 30 *Blackfriars*, 415, 419 (1949)). But that determination is obviously not one for the Air Force, but one to be made by each individual, as well as a democratic nation made up of individuals of various ethnic, cultural and religious origin.

As an Air Force officer, Robertson was bound by the same rules of conduct as other members of the Air Force. These rules include AFR 110-2 which prohibits all members of the Air Force from expressing their personal opinions on political issues as representatives of the Air Force. The Air Force paradigmatically viewed Robertson's "moral" objection as political, its effect to undermine the authority, discipline and unity of the force at a time of conflict. Within this military "neutral" context, the Air Force issued unfavorable reviews of Robertson's "military" leadership skills and eventually forced his early retirement from the service. Given his public opposition to the Persian Gulf War and defiant insistence that his "political" view be condoned, the Air Force concluded Robertson was no longer the kind of officer the Air Force desired to keep in its ranks. In so responding, the Air Force was enforcing interests the Supreme Court has deemed neutral, legitimate and of sufficient weight and significance to defeat challenge under the religion clauses. As noted in *Goldman*, 475 U.S. at 507,

The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.

Accordingly, the Court finds no constitutional violation pertaining to the Air Force's censure of Robertson's public criticism of the Persian Gulf War, given that the letter was written in his

representative capacity as a member of the Air Force.<sup>9</sup>

Nor does the fact that Robertson was a chaplain at the time of the challenged actions alter this finding. Robertson is not the first and likely will not be the last to complain that the military chaplaincy program promotes a "military religion." *See, e.g., United States v. Gray*, 41 C.M.R. 756, 758 (1968) (marine violated Uniform Code of Military Justice when he issued antiwar statement to press during war in Vietnam stating among other things that "[i]n general, church services served well for war propaganda... I... have never met a chaplain against the war"); *see also Smith v. United States*, 502 F.2d 512 (5th Cir. 1974)(upholding discharge of VA hospital chaplain who insisted on wearing a peace pin while treating emotionally disturbed veterans); *Baz v. Walters*, 782 F.2d 701, 709 (7th Cir.1986)(rejecting VA hospital chaplain's charge that the VA promoted an "institutional theology" in its hospital chaplaincy program); *Carter v. Broadlawns Medical Center*, 857 F.2d 448 (8th Cir.1988)(same). Inherent in the relationship between the military services and their chaplaincy programs is an institutional duality which pulls at opposing constitutional constraints.

A military chaplain is a member of two institutions: the military and a religious denomination. The government's involvement with military chaplaincy begins with dictating who

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<sup>9</sup>Although not raised by Robertson, the Court also concludes that the Air Force did not violate his right to free speech. The Supreme Court has upheld the constitutionality of military regulations requiring members of the Air Force to seek approval from the base commander before circulating petitions on Air Force bases, *Brown v. Glines*, 444 U.S. 348 (1980), and requiring civilians to seek permission from the base commander before distributing political material on Army bases, *Greer v. Spock*, 424 U.S. 828 (1976). Although the plaintiffs in these cases argued that the regulations were unconstitutional prior restraints on speech, the Supreme Court held that the regulations protected a substantial government interest - a military commander's duty "to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command." *Spock*, 424 U.S. at 840. In so holding, the Supreme Court noted that members of the military are not entitled to the same free speech protections granted civilians because their rights "must yield somewhat 'to meet certain overriding demands of discipline and duty.'" *Glines*, 444 U.S. at 354. Given the breadth of these decisions and the extreme deference shown the military, the Court does not see how reprimanding Robertson, who was speaking as a representative of the Air Force, for publicly objecting to military action in the Persian Gulf during a time of military readiness violates his right to free speech.

may become a chaplain. Pursuant to 10 U.S.C. §532, the Department of Defense (“DOD”) promulgates criteria for denominations who endorse chaplains and the applicants they endorse. See 32 C.F.R. §65.4(b). Religious faith groups that wish to become endorsing agencies must be approved by the DOD. 32 C.F.R. §65.5 (b). Among the criteria for acceptance as an ecclesiastical endorsing agency is the agency’s commitment to “[a]bide by the applicable DOD regulations and policies. 32 C.F.R. §65.5(b)(1)(v). The DOD also has the power to revoke its recognition of an endorsing agency that fails to abide by its applicable regulations and policies. 32 C.F.R. §65.5(b)(2). In addition to the requirements set forth by the DOD, chaplains must also meet the requirements for appointment as an officer and chaplain established by the particular military branch. 32 C.F.R. §65.5(d).

Once appointed, chaplains are uniformed, commissioned officers. 10 U.S.C. §8067(h) (“Chaplain functions in the Air Force shall be performed by commissioned officers of the Air Force who are qualified under regulations prescribed by the Secretary and who are designated as chaplains.”). They have rank, without command. 10 U.S.C. §8581. As commissioned officers, military chaplains are subject to the chain of command and under the authority of their superiors. Chaplains are rated and promoted by the same evaluation procedures used for all other military officers. They are obliged to follow the orders of their commanding officers, are subject to the Uniform Code of Military Justice, 10 U.S.C. §802; statutes pertaining to the removal of officers for substandard performance, 10 U.S.C. §1181 *et seq.*; and all pertinent military rules and regulations.

This institutional duality of the military chaplaincy directly implicates the Establishment Clause principles of “nonentanglement” and “neutrality.” *Marsh v. Chambers*, 463 U.S. 783,

801-03 (1983) (Brennan dissenting)(separation and neutrality required by Establishment Clause); *Walz*, 397 U.S. at 676 and 695 (tax exemption reflects government neutrality and avoids excessive entanglement with religion); *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). The test for nonentanglement for programs, such as the military chaplaincy, which require an administrative relationship between governmental and religious entities, is that the programs must preserve “the autonomy and freedom of religious bodies while avoiding any semblance of established religion.” *Walz*, 397 U.S. at 672. Similarly, the principle of “[g]overnment neutrality in matters of religion” prevents government from advancing or inhibiting religion. *Gillette*, 401 U.S. at 449; *Walz*, 397 U.S. at 694; *Larson v. Valente*, 456 U.S. 228, 246-47 (1982). Without these safeguards, the institutional duality of the military chaplaincy engenders the risk of politicizing religion. *Walz*, 397 U.S. at 695; *Larson*, 456 U.S. at 253.

Serious questions of “excessive entanglement” and lack of “neutrality” are raised in the military administration of the chaplain programs. From the program’s inception, governmental neutrality is questionable: the DOD’s determination of criteria for the selection of endorsing agencies and their representatives may effect nonneutral religious endorsement and favor “military friendly” agencies for participation in the chaplaincy program. Being military officers, wearing military uniforms, participating in patriotic military ceremonies certainly “militarize” the chaplaincy. Similarly, the authority of commanding officers to review, evaluate, promote and recommend removal of chaplains provides encouragement and motive to espouse a religious ministry in line with military purpose. “Promotion of a chaplain within the military ranks is based solely on his military performance and not on his effectiveness as a cleric.” *Katcoff v. Marsh*, 755

F.2d 223, 226 (2d Cir.1985)(emphasis added).<sup>10</sup> The excessiveness of such entanglement is no more apparent than in a situation such as the one Robertson presents where the Air Force requires a chaplain's early retirement (or discharges a chaplain) based on military criteria, although the chaplain's endorsing agency has not withdrawn its endorsement of the chaplain as its representative. This unilateral decision on the part of the Air Force hardly preserves "the autonomy and freedom" of the endorsing agency. *Walz*, 397 U.S. at 672.

One commentator observes that "[t]hroughout most of American history, the ideological relationship between organized religion and the military has been a harmonious one"; the traditional American belief inherited from the colonists was that "service to God equals service to country."<sup>11</sup> Consequently, the constitutionality of the military chaplaincy was rarely questioned. This perception, however, changed during the war in Vietnam.

Scholars generally agree that the Vietnam experience sparked a general reappraisal of America's moral and religious traditions regarding the activities of the secular government. American society began to question whether America's participation in the war was justified, and serious doubt was expressed whether organized religion had any business legitimizing the unpopular and unjust war. Chaplains, sometimes referred to as "greased cogs in a machine for killing" because of their role in the military, came under particularly harsh criticism. The chaplain's role as a military officer was considered by many churchmen to be incompatible with the clergy role, necessitating elimination of the chaplaincy.

The voices of criticism have quieted in recent years, but the experience raises serious doubts whether the churches can ever again ally themselves so comfortably with the ideology of the military. The chaplain's resulting predicament is vividly described in a recent study of the chaplaincy: "The day will come, I feel, when the contrast . . . between the American military ethic and the American civilian ethic will be nowhere greater than in the field of religion. And

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<sup>10</sup> Although the *Katcoff* court cites this as evidence of the military's "nonentanglement" with religion, such overlooks its likely influence on a chaplain's incentive to comply with military views.

<sup>11</sup> William T. Cavanaugh, Jr., Note, *The United States Military Chaplaincy Program; Another Seam in the Fabric of Our Society*, 59 Notre Dame L.Rev. 181, 195-199 (1983).

the chaplain will be left, straddling the gap that has become a chasm!"<sup>12</sup>

Wars, particularly unpopular wars, widen that gap. Robertson was not alone in his objection to the Persian Gulf War. Neither was he alone in the conflict between his roles as chaplain and military officer during that war. As noted by a scholar who researched the religious practices of the armed forces during the Persian Gulf war,

[f]rom the earliest months of American military deployment in the Persian Gulf, various regulations, directives, orders and advisories sought to limit religious practices and expressions. Military chaplains, for example, were ordered to remove insignia showing their religion, and told to call themselves "morale officers." Also, chaplains were prohibited from being interviewed by the media, which in turn was forbidden to film any religious worship services. This was even on bases far away from Saudi citizens or military personnel, and caused a major negative response among the hundreds of chaplains deployed in the Gulf.

Kenneth Lasson, *Religious Liberty in the Military: The First Amendment under "Friendly Fire"*, 9 J.L. & Religion 471 (1992).<sup>13</sup>

Ironically, it is the right of a "lonely soldier stationed at some faraway outpost" to the free exercise of his/her religion which has been traditionally cited as the primary justification for a military chaplaincy. *Abington School Dist. v. Schempp*, 374 U.S. 203, 309 (1963)(Stewart, J., dissenting)("Spending federal funds to employ chaplains for the armed forces might be said to

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<sup>12</sup>Id. (citations omitted)(quoting C. ABERCROMBIE, *THE MILITARY CHAPLAIN* 137 (1977)). For other articles discussing the constitutionality of the military chaplaincy, see Julie B. Kaplan, *Military Mirrors on the Wall: Nonestablishment and the Military Chaplaincy*, 95 Yale L.J. 1210 (May 1986); Michael F. Noone, *Rendering unto Caesar: Legal Responses to Religious Nonconformity in the Armed Forces*, 18 St. Mary's L.J. 1233 (1987); Kenneth Lasson, *Religious Liberty in the Military: The First Amendment under "Friendly Fire"*, 9 J.L. & Religion 471 (1992).

<sup>13</sup>Lasson later notes that these proscriptions were generally ignored: [d]espite the regulations promulgated from above - from the State Department, the Secretary of Defense, and others in positions of influence - military personnel from all the services freely engaged in religious practices. Directives were widely disregarded. Chaplains refused to call themselves "morale officers." Services were held for all denominations, on all holidays. Kosher food, while difficult to obtain on military bases . . . was available in Riyadh - as was a Torah scroll flown in on a military transport from Frankfurt, West Germany.

violate the Establishment Clause. Yet a lonely soldier stationed at some far-away outpost could surely complain that a government which did not provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion.”); *id.* at 297-98 (Brennan, J. concurring)(“Since government has deprived such persons of the opportunity to practice their faith at places of their choice . . . government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires such persons to be.”). Indeed, the military chaplaincy has often been cited as the model of permissible government accommodation of religion. *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984) (public funding of military chaplains cited in support of public funding of creche); *Marsh*, 463 U.S. at 812 (Brennan, J., dissenting)(restating support for military chaplaincy, but denying support for legislative chaplaincy); *Engel v. Vitale*, 370 U.S. 421, 449 n.4 (1962) (Stewart, J. dissenting) (public funding of military chaplaincy to support prayer in public school); *Abington* 374 U.S. at 309(Stewart, J., dissenting)(same). Thus, although in dicta, several justices of the Supreme Court have recognized that the “presumed” violation of the Establishment Clause created by a military chaplaincy is justified as a necessary accommodation of the rights of military personnel to the free exercise of religion. Whether this model of “accommodation” will continue to stand the test of time and war remains to be seen.

The accommodation of the free exercise rights of members of the military was the primary justification given by the Second Circuit in *Katcoff v. Marsh*, 755 F.2d 223, 234-35 (2d Cir. 1985) for upholding the constitutionality of the military chaplaincy. In determining whether the military chaplaincy programs violated the Establishment Clause, the *Katcoff* court first looked to the tripartite test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1991): (1) whether the

chaplaincy had a secular legislative purpose (“secular purpose”); (2) whether its principal effect was one that neither advances nor inhibits religion (“neutrality”); and (3) whether it did not foster excessive government entanglement with religion (“nonentanglement”). Although acknowledging that the military chaplaincy would fail the *Lemon* test if viewed in isolation, the circuit court nonetheless concluded that it passed constitutional muster when viewed in light of its historical background, the War Power Clause and judicial deference to the military’s exercise of its discretion, and the Free Exercise Clause. *Id.* at 232-235.

In so holding, the court rejected an “absolutist” application of the *Lemon* test, finding that no single test provides the flexibility necessary for Establishment Clause inquiries:<sup>14</sup>

“The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. . . . Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.”

*Id.* at 233-34 (quoting *Walz*, 397 U.S. at 669). This is particularly so given that the “different character of the military community and of the military mission” impacts the protections granted by the First Amendment. *Id.* at 234 (quoting *Parker v. Levy*, 417 U.S. 733, 758 (1974)).

The line where military control requires that enjoyment of civilian rights be regulated or restricted may sometimes be difficult to define. But caution dictates that when a matter provided for by Congress in the exercise of its war power and

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<sup>14</sup> Support for the *Lemon* test has suffered significant erosion over time. For example, in a recent decision striking a New York statute which created a special school district for the Satmar Hasidim as violative of the Establishment Clause, several justices complained that the *Lemon* test lacks necessary flexibility and should be dramatically changed or discarded. *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 750-51 (1994) (Scalia, J. with Rehnquist, J. and Thomas, J. dissenting) (arguing to replace *Lemon* with a test embodying as its foremost principle “fidelity to the longstanding traditions of our people”); *id.* at 720-21 (O’Connor concurring) (calls for abandoning *Lemon* test as too rigid and unitary). Although the *Lemon* test is still applied by lower courts, like the analysis in *Katcoff*, it is often “softened” by the circumstances presenting the Establishment Clause challenge.

implemented by the Army appears reasonably relevant and necessary to furtherance of our national defense it should be treated as presumptively valid and any doubt as to its constitutionality should be resolved as a matter of judicial comity in favor of deference to the military's exercise of its discretion.

*Id.* (citing *Rostker*, 453 U.S. at 64-68 (1981)). Further, the Establishment Clause must be interpreted so as to accommodate the free exercise of religion when possible. In the case of the military chaplaincy program, both clauses obligate Congress "to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them." *Id.* at 234. Based on this analysis, the Second Circuit concluded that "the chaplaincy program is relevant to and reasonably necessary for the Army's conduct of our national defense," and thus does not violate the Establishment Clause. *Id.* at 235.

The Court recognizes the seriousness and complexity of the issues raised by Robertson and appreciates the sincerity and conviction of his beliefs. However, the Court is persuaded by the reasoning set forth in *Katcoff* which soundly relies upon an established history of judicial recognition of the constitutionality of the military chaplaincy, and judicial deference to Congress and the Executive branch over military affairs. Notably, Robertson himself does not urge that the chaplaincy is unconstitutional; rather he seeks reinstatement in the Air Force chaplaincy and a commission to study "the dynamics involved in serving as both a religious minister and a military officer on active duty." While the Court may commend Robertson's individual pursuit of this study, the Court knows of no authority under the APA (or any other statutory or common law) to order the Air Force to grant such a commission. To the contrary, to do so would constitute

unwarranted judicial intervention in military affairs.<sup>15</sup> *Orloff*, 345 U.S. at 93-94. As to Robertson's request under the APA to set aside the decision of the AFBCMR denying reinstatement and expungement of the subject OPRs, the Court concludes that the conflict between the Air Force and Robertson as an Air Force chaplain does not establish a constitutional violation of the religion clauses.

#### 5. Administrative Review of Retirement Process

The AFBCMR's finding of no error in Robertson's retirement process can be set aside only if it is arbitrary, capricious, or not based on substantial evidence. *Chappell*, 462 U.S. at 303. "The function of this court is not to reweigh the evidence presented to the [AFBCMR]. Rather, the court is charged with determining 'whether the conclusion being reviewed is supported by substantial evidence.'" *Robbins v. United States*, 29 Fed.Cl. 717, 725 (1993).

Robertson's objection to the retirement process is contradictory. He first argues that his request to retire lapsed when no action was taken by his commander within seven days.<sup>16</sup> He then argues that the Air Force caused him and his family unnecessary and unreasonable hardship by not acting on his request to retire until the AFR 36-2 proceedings were concluded. Robertson requested retirement on June 1, 1993. Robertson was notified of the AFR 36-2 action against him

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<sup>15</sup> Although judicial deference to the military generally determines the merits of claims involving intra-service military disputes before the court for review, courts have held that such deference sometimes determines whether the claim is "justiciable" based on the relief sought. *Watson v. Arkansas National Guard*, 886 F.2d 1004 (8th Cir. 1989)(injunctive relief of reinstatement in Arkansas National Guard nonjusticiable); *Kreis v. Secretary of the Air Force*, 866 F.2d 1508, 1511 (D.C. Cir. 1989)(request for "retroactive promotion falls squarely within the realm of nonjusticiable military personnel decisions"). These courts distinguish these nonjusticiable remedies with "more modest request[s]" for corrective action found in the "normal review" of agency actions. *Kreis*, 866 F.2d at 1512. Clearly, under this analysis, Robertson's request that the Court order his reinstatement with a commission to study the problems of a military chaplaincy would so invade military personnel decision making as to render his claim for relief nonjusticiable.

<sup>16</sup> Robertson claims that this seven-day approval period is stated on the retirement form. However, it does not appear in the retirement form, AF Form 1160, in the record. *Ex. to Government's Reply in Case No. 96-C-888-B*.

on June 15, 1993. If he were correct that the request lapsed due to inaction on June 8, 1993, seven days later, there was no request for the Air Force to act on after that date.

The government contends that Robertson's request to retire did not lapse because it was not acted upon within seven days, but rather it was suspended during the AFR 36-2 proceeding. The only seven-day time period in AFR 35-7, Service Retirements, is one that is inapplicable to Robertson's situation as it refers only to the time a retirement eligible service member, upon being ordered to a new assignment, may opt to retire rather than take the new assignment. It is undisputed that Robertson never withdrew his request to retire. Thus, the request was still active when the Secretary elected to approve it pursuant to 10 U.S.C. §1186, as a result of the AFR 36-2 action.

The AFBCMR reviewed Robertson's objection to the retirement process and concluded the following:

We also note that the applicant submitted a request to retire in June 1993 but the request was not acted on because of a pending AFR 36-2 action. His retirement was subsequently approved by the Secretary of the Air Force and we find no evidence of error regarding the retirement process.

*AR 60.* Based on the record before it, the Court cannot conclude that this finding is arbitrary, capricious or not based on substantial evidence.

### C. CONCLUSION

Having found no underlying constitutional violation of Robertson's rights under the First Amendment, and thus AFR 265-1, and no error in the AFBCMR's finding regarding Robertson's retirement process, the Court affirms the decision of the AFBCMR.

IT IS SO ORDERED, this 28<sup>th</sup> day of August, 1997.

A handwritten signature in black ink, appearing to read "Thomas R. Brett". The signature is written in a cursive style with a long, sweeping underline that extends to the left.

THOMAS R. BRET  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 8-28-97

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

**FILED**

AUG 27 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MAX RISHELL, Curator of the person and estate )  
of KATHLEEN LACEY, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
CHARLES WELLSHEAR, M.D., )  
 )  
Defendant. )

Case No. 94-CV-636-H

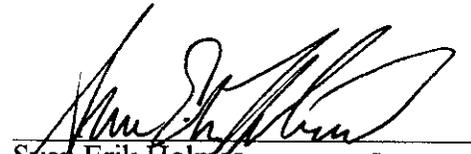
**JUDGMENT**

This matter came before the Court for a trial by jury on August 18-22, 1997. The jury returned its verdict finding Defendant not liable on August 22, 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 26<sup>TH</sup> day of August, 1997.

  
Sven Erik Holmes  
United States District Judge

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275-7

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

ENTERED ON DOCKET

DATE 8-28-97

DALE JEAN TERWILLIGER, )  
on behalf of herself and all other )  
employees of HOME OF HOME, )  
INC. similarly situated, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
HOME OF HOPE, INC., )  
 )  
Defendant. )

**FILED**

AUG 27 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 96CV1042H

**JOINT STIPULATION FOR DISMISSAL WITHOUT PREJUDICE**

COME NOW Plaintiffs and Defendant, each and all, and, pursuant to Fed. R. Civ. Proc. 41(a)(1), hereby stipulate to the voluntary dismissal of the above-referenced action by Plaintiffs:

1. John Ball;
2. Cathryn Ball;
3. Beverly Forrester;
4. Betty Hamilton;
5. Brenda Mason; and
6. Richard Stepp,

without prejudice.

DATED this 27<sup>th</sup> day of August, 1997.

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

ENTERED ON DOCKET

DATE 8-28-97

**FILED**  
AUG 27 1997  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

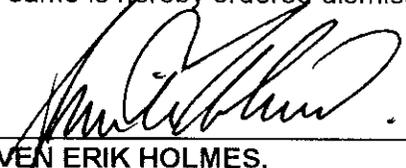
VIRGINIA KAY HAYS, et al.  
Plaintiffs. )  
)  
)  
vs. )  
)  
)  
JACKSON NATIONAL LIFE INSURANCE )  
COMPANY, a Michigan corporation, )  
Defendant. )

Case No. 94-860-H

**ORDER OF DISMISSAL**

NOW on this 26<sup>TH</sup> day of August, 1997, the Plaintiffs having filed their Motion to Dismiss With Prejudice, the Court finds that said Motion should be sustained.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above captioned and numbered cause be and the same is hereby ordered dismissed.

  
SVEN ERIK HOLMES,  
United States District Judge

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

ENTERED ON DOCKET

DATE

8-28-97

IMOGENE H. HARRIS,

Plaintiff,

v.

Case No. 96-C-230-H

THE CITY OF TULSA, OKLAHOMA,  
a municipal corporation; TULSA  
AIRPORT AUTHORITY, a charter  
agency of the CITY OF TULSA; and  
TULSA AIRPORTS IMPROVEMENT  
TRUST, a public trust,

Defendants.

**FILED**

AUG 27 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

This matter came on before the Court this 26<sup>TH</sup> day of August, 1997, upon the Stipulation of Dismissal With Prejudice, filed jointly by Plaintiff and Defendant Tulsa Airport Improvements Trust ("TAIT") and for good cause shown, it is therefore

ORDERED, ADJUDGED AND DECREED, that Plaintiff's causes of action against Defendants TAIT are hereby dismissed with prejudice with each party to bear its own costs and attorneys' fees.

  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
DATE AUG 28 1997

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 MIGUEL A. FIGUEREDO, )  
 )  
 Defendant, )  
 )  
 and )  
 )  
 ST. FRANCIS HOSPITAL, )  
 )  
 Garnishee. )

CIVIL ACTION NO. 97CV-201BU ✓

**FILED**  
AUG 27 1997 *RL*  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER DIRECTING DISBURSAL OF GARNISHMENT MONIES

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

1. Pursuant to the Writ of Continuing Garnishment entered on June 25, 1997, the Garnishee, St, Francis Hospital, has made garnishment payments into the Court's registry deposit fund.
2. An Agreed Garnishee Order was issued July 25, 1997, 1997, ordering the Garnishee, St. Francis Hospital, to pay \$60 per pay period of Miguel Figueredo's income to plaintiff and continue said payment until the debt to the plaintiff is paid in full or until the garnishee, St. Francis Hospital, no longer has custody, possession or control of any property belonging to the debtor, Miguel A. Figueredo, or until further Order of the Court. Payment is to be made to the U.S. Department of Justice and submitted to the U. S. Attorney's Office.

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✓  
⑧

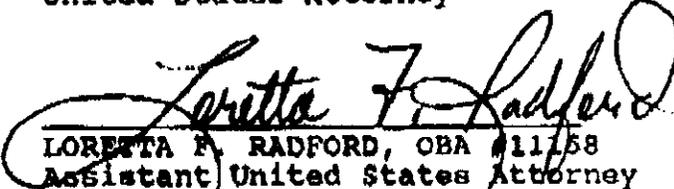
IT IS THEREFORE ORDERED that the United States Court Clerk is to disburse all monies paid into the Court's registry deposit fund as a result of the United States' garnishment on Miguel A. Figueredo.

  
United States District Judge

Submitted by:

UNITED STATES OF AMERICA

Stephen C. Lewis  
United States Attorney

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

LFR/llf

ENTERED ON DOCKET  
DATE 8-27-97

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

DAVID RAY KLUTTS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 McCURTAIN COUNTY SHERIFF and )  
 EMPLOYEES, OKLAHOMA )  
 DEPARTMENT OF CORRECTIONS )  
 and EMPLOYEES, )  
 )  
 Defendants. )

AUG 27 1997  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
No. 97-CV-131-K

**F I L E D**  
AUG 27 1997  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

The Court has for consideration the Report and Recommendation (the "Report") of the U.S. Magistrate Judge filed on June 6, 1997, in this civil rights action brought pursuant to 42 U.S.C. § 1983. The Magistrate Judge recommends that Plaintiff's case be dismissed without prejudice for failure to prosecute.<sup>1</sup> None of the parties has filed an objection to the Report.

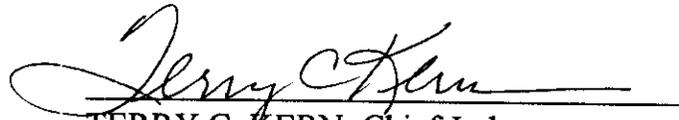
Having reviewed the Report and the facts of this case, pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court concludes that the Report should be adopted and affirmed.

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<sup>1</sup>Plaintiff has failed to keep the Court apprised of his address. Therefore, he has not received Court Orders and instructions necessary to prosecute his case.

**IT IS THEREFORE ORDERED** that the Report and Recommendation of the Magistrate Judge (Docket #5) is adopted and affirmed. Plaintiff's complaint is dismissed without prejudice for failure to prosecute. Any pending motion is denied as moot.

SO ORDERED THIS 25 day of August, 1997.

  
TERRY C. KERN, Chief Judge  
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET  
DATE 8-27-97

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DANA ELAINE HARRIS-BAKER, )  
 )  
 Defendant. )

No. 96-C-1112-K

**FILED**

AUG 27 1997

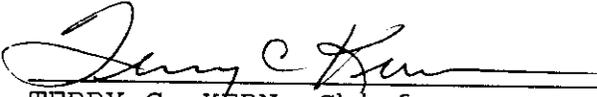
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

On July 22, 1997, Magistrate Judge Joyner entered his Report and Recommendation regarding defendant's motion to vacate default judgment. The Magistrate Judge recommended that the motion be denied. No objection has been filed to the Report and Recommendation and the ten-day time limit of Rule 72(b) F.R.Cv.P. has passed. The Court has also independently reviewed the Report and Recommendation and sees no reason to modify it, except to note that the government's response makes clear that an "infancy" defense to the educational loan debt is unavailable to defendant.

Therefore, it is the Order of the Court that the motion of the defendant to vacate default judgment is denied. The Report and Recommendation of the Magistrate Judge (#11) is affirmed.

ORDERED this 25 day of August, 1997.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

12-

ENTERED ON DOCKET

DATE 8-27-97

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

RICHARD POUNDS, et al. )  
 )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 OTTAWA DISTRICT COURT, et al. )  
 )  
 )  
 Defendant. )

No. 96-C-895-K

**F I L E D**

AUG 27 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

Before the Court is the objection of the plaintiffs to the Report and Recommendation of the United States Magistrate Judge. The Magistrate Judge recommended that the motion of the federal defendants<sup>1</sup> to consolidate actions and to dismiss be granted.

Plaintiffs bring this action pro se seeking a writ of habeas corpus and damages in the amount of \$1,000,000 for the alleged illegal removal of three minor Indian children from their home and denial of visitation with the family. Plaintiff Mary McRae is apparently the children's grandmother and plaintiff Richard Pounds is married to Mary McRae and therefore the children's step-grandfather. The mother of the minor children, an Eastern Shawnee Indian, is not a party to the case.

Attachments to plaintiffs' complaint and defendants' motion to consolidate actions and to dismiss show that, in January of 1996, the children's mother applied to the Eastern Shawnee tribe to take

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<sup>1</sup>The "federal" defendants include the United States Department of the Interior, the Bureau of Indian Affairs, and Judge Burris of the C.F.R. Court. Other private individuals are also named as defendants.

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custody of her children and signed a voluntary grant of her custodial rights. Richard James, prosecuting attorney for the Court of Indian Offenses, filed an Application for Emergency Custody to bring the matter before the Court of Indian Offenses, Juvenile Division, on January 11, 1996. The court granted custody to the tribe, and the children were placed in the foster care of Mary McRae temporarily, subject to the tribe's supervision. When Mary McRae did not cooperate with the tribe in its efforts to supervise the situation, an application for an order authorizing the apprehension of the juveniles was granted. On January 23, 1996, Richard James filed a Petition for Adjudication as Children in Need of Care. The court issued an Order of Adjudication as Children in Need of Care on March 14, 1996, which decreed that the custody of the children be continued with the Eastern Shawnee nation and their placement determined by the Indian Child Welfare Department. They were removed from the care of Richard Pounds and Mary McRae and this lawsuit resulted.

Plaintiffs seek to regain custody of their Native American grandchildren, custody having been taken away by decision of the CFR court.<sup>2</sup> The Magistrate Judge correctly ruled it is established that federal habeas relief is not available to test the validity of

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<sup>2</sup>The Secretary of the Interior has established the Courts of Indian Offenses to provide for law enforcement on Indian reservations with no courts of their own, and these courts are referred to as "CFR courts." Tillett v. Lujan, 931 F.2d 636, 638 (10th Cir.1991). The Eastern Shawnee Tribe does not have a tribal court, so the C.F.R. court has jurisdiction over Eastern Shawnee child welfare matters under 25 C.F.R. §11.900-912 and proceedings in which a minor is alleged to be a minor-in-need-of-care under 25 C.F.R. §11.905(b).

a child custody decree of an Indian tribal court. Weatherwax on Behalf of Carlson v. Fairbanks, 619 F.Supp. 294, 296 (D.Mont.1985); Sandman v. Dakota, 816 F.Supp. 448, 451 (W.D.Mich.1992), aff'd mem., 7 F.3d 234 (6th Cir.1993); LeBeau v. Dakota, 815 F.Supp. 1074, 1076 (W.D.Mich.1993). This Court lacks jurisdiction over the habeas aspect of the lawsuit.

As to the somewhat murky claim for damages because of "defendants' negligence", the Magistrate Judge also correctly ruled that the federal defendants had not been properly served and that plaintiffs have failed to exhaust their remedies under the Federal Tort Claims Act, the only means by which a negligence claim could be pressed against the United States. Dismissal is appropriate as to the federal defendants. The Report and Recommendation appears to contemplate dismissal of all defendants. However, only the federal defendants, represented by the United States Attorney for the Northern District of Oklahoma, filed a motion to dismiss.<sup>3</sup> The non-federal defendants are represented by different counsel and have not requested dismissal. The Court declines to dismiss them on its own motion.

Also before the Court is the Magistrate Judge's Report and Recommendation (#45), which recommended dismissal of Judge Sam C. Fullerton of Ottawa County, on grounds of judicial immunity. Although Judge Fullerton is not named as a defendant, plaintiffs named the Ottawa District Court as a defendant, apparently on the grounds that the state court refused to intervene in the C.F.R.

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<sup>3</sup>An exception is Judge Fullerton, as discussed below.

court. This Court concludes that the recommendation of the Magistrate Judge was correct. No money damages or habeas relief is available against the Ottawa District Court for actions taken in Judge Fullerton's judicial capacity, such as the actions involved here.

Finally, the Court notes that plaintiffs, without leave of court, filed a pleading entitled "petition in federal court--for writ of habeas corpus". There is no provision for filing a second petition for writ of habeas corpus under the identical case number. If plaintiffs intend to file a separate habeas corpus petition, they may do so, and seek a new case number from the Court Clerk's office. If they intended to amend their present petition, they must file a motion seeking leave to amend. As of now, the new pleading is stricken and will not be considered.

It is the Order of the Court that the objection (#50) of plaintiffs to the Report and Recommendation of the Magistrate Judge is hereby denied. The motion of the Ottawa District Court to dismiss (#13) is hereby GRANTED.

It is the further Order of the Court that the objection (#67) of the plaintiffs to the Report and Recommendation of the Magistrate Judge is hereby denied. The motion of the federal defendants to dismiss (#39) is hereby GRANTED. Defendants Department of Interior, Bureau of Indian Affairs, Code of Federal Regulations Court (Miami Agency), and Lynn Burris are dismissed. To the extent that motion requested consolidation with 96-C-913-K,

it is denied, because 96-C-913 has been dismissed in a companion order.

It is the further Order of the Court that plaintiffs' second petition for writ (#64) is hereby stricken. All other pending motions are hereby denied. This action is referred to the United States Magistrate Judge for status conference, with a view to resolving whether plaintiffs state a claim against the remaining defendants, and whether discovery is necessary.

ORDERED THIS 25 DAY OF AUGUST, 1997

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 8-27-97

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

MARY V. POUNDS, et al. )  
)  
)  
Plaintiffs, )  
)  
vs. )  
)  
EASTERN SHAWNEE TRIBE, et al. )  
)  
)  
Defendants. )

No. 96-C-913-K ✓

**F I L E D**

AUG 27 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

The Court hereby considers its jurisdiction of this action pursuant to Rule 12(h)(3) F.R.Cv.P. The pro se plaintiffs commenced this action, and a companion action, 96-C-895-K, apparently seeking resolution of child custody issues between themselves and an Indian tribal court.

The Magistrate Judge noted in his order entered April 16, 1997 that "[t]he parties agree and stipulate to consolidation of this case with 96-C-895-K as the cases concern a common nucleus of operative facts." Accordingly, the Court will consider the same jurisdictional defect raised by motion in the companion case and which is also addressed in a separate order entered in that case.

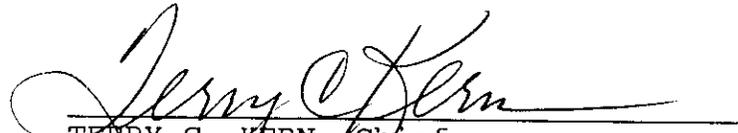
Plaintiffs commenced this action by filing a "petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 by a person in state custody." Named as defendants are the Eastern Shawnee Tribe and the Code of Federal Regulations Court. Plaintiffs seek to regain custody of their Native American grandchildren, custody

having been taken away by decision of the CFR court.<sup>1</sup>

It is established that federal habeas relief is not available to test the validity of a child custody decree of an Indian tribal court. Weatherwax on Behalf of Carlson v. Fairbanks, 619 F.Supp. 294, 296 (D.Mont.1985); Sandman v. Dakota, 816 F.Supp. 448, 451 (W.D.Mich.1992), aff'd mem., 7 F.3d 234 (6th Cir.1993); LeBeau v. Dakota, 815 F.Supp. 1074, 1076 (W.D.Mich.1993). This Court lacks jurisdiction.

It is the Order of the Court that, pursuant to Rule 12(h)(3) F.R.Cv.P., this action is hereby DISMISSED.

ORDERED THIS 25 DAY OF AUGUST, 1997

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

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<sup>1</sup>The Secretary of the Interior has established the Courts of Indian Offenses to provide for law enforcement on Indian reservations with no courts of their own, and these courts are referred to as "CFR courts." Tillett v. Lujan, 931 F.2d 636, 638 (10th Cir.1991). The Eastern Shawnee Tribe does not have a tribal court, so the C.F.R. court has jurisdiction over Eastern Shawnee child welfare matters under 25 C.F.R. §11.900-912 and proceedings in which a minor is alleged to be a minor-in-need-of-care under 25 C.F.R. §11.905(b).

ENTERED ON DOCKET  
DATE 8-27-97

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

METROPOLITAN LIFE INSURANCE, )  
COMPANY, )

Plaintiff, )

vs. )

No. 96-C-751-K

ONETHA SCOTT, GODFREY GOFF, )  
SR., MATTHEW S. HENTON, a minor, )  
and BRANDON G. HENTON, a minor, )  
and GEOFFREY R. HENTON, father )  
and next friend of MATTHEW S. )  
HENTON AND BRANDON G. HENTON, )

Defendants. )

**F I L E D**

AUG 27 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**JUDGMENT**

This matter came before the Court for consideration of the Defendants' 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 August 27, 1997, the Court finds summary judgment is appropriate in favor of Defendants Onetha Scott and Godfrey Goff, Sr.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Defendants Onetha Scott and Godfrey Goff, Sr. and against the Defendants Brandon Henton, Matthew Henton, and Geoffrey Henton.

ORDERED this 25 day of August, 1997.

  
TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE

67

ENTERED ON DOCKET

DATE 8-27-97

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

METROPOLITAN LIFE INSURANCE, )  
COMPANY, )

Plaintiff, )

vs. )

No. 96-C-751-K

ONETHA SCOTT, GODFREY GOFF, )  
SR., MATTHEW S. HENTON, a minor, )  
and BRANDON G. HENTON, a minor, )  
and GEOFFREY R. HENTON, father )  
and next friend of MATTHEW S. )

HENTON AND BRANDON G. HENTON, )

Defendants. )

**F I L E D**

AUG 27 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

Before this Court are the Defendants' cross motions for Summary Judgment.

This is an action for declaratory relief arising from the death of Godfrey E. Goff, Jr., a retired employee of the federal government. Mr. Goff was covered for life insurance benefits under the Federal Employees Group Life Insurance ("FEGLI") policy. Upon Mr. Goff's death on May 14, 1995, a beneficiary designation was submitted to the Plaintiff, purporting to name Matthew and Brandon Henton as the intended beneficiaries to the life insurance proceeds. A claim for the death benefits was sent on August 28, 1995 by Geoffrey Henton on behalf of Matthew and Brandon Henton.

Subsequent to the receipt of the Hentons' claim, Plaintiff received notice that Mr. Goff's mother and father, Onetha Scott and Godfrey Goff, Sr., each claimed a statutory share of the proceeds of the life insurance benefits.

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Pursuant to the Federal Employees Group Life Insurance Act of 1954 ("FEGLIA"), 5 U.S.C. § 8705, the amount of a group life insurance policy in force on an employee at the date of his death should be paid, on the establishment of a valid claim, to the person or persons surviving at the date of his death in the following order of preference:

First, to the beneficiary or beneficiaries designated by the employee in a signed and witnessed writing;

Second, if there is not designated beneficiary, to the widow or widower of the employee;

Third, if none of the above, to the child or children of the employee and descendants of deceased children by representation;

Fourth, if none of the above, to the parents of the employee or the survivor of them

Fifth, if none of the above, to the duly appointed executor or administrator of the estate of the employee;

Sixth, if none of the above, to the other next of kin of the employee entitled under the law of the domicile of the employee at the date of his death . . .

Each of the Defendants have submitted a claim for the proceeds of the insurance policy, and the claim of the Henton Defendants is adverse to those of Defendants Scott and Goff. The Hentons assert a right to the proceeds on the ground that they were the intended beneficiaries of the policy pursuant to a beneficiary designation form submitted to Plaintiff. Defendants Goff and Scott assert that the beneficiary designation form is invalid because it was not signed and dated by the deceased, and thus, pursuant to the FEGLIA statute, they are the preferred beneficiaries. It is uncontested that the deceased had no spouse or children, or other named beneficiaries.

Under the FEGLIA, as well as the FEGLI Policy at issue, the designation of beneficiary must be in writing, and must be signed by the insured and witnessed. It is undisputed that the beneficiary

designation form naming the Hentons as intended beneficiaries, although in writing and witnessed, does not contain the deceased's signature, nor is it dated; however, according to the Hentons, Godfrey Goff, Jr. printed his name on the form, and checked a box on the form indicating that the form had been signed by him and witnessed. The Henton's claim that this should suffice as a signature for purposes of both the statutory and policy requirements, and that they thus should be entitled to first preference according to the statute.

Because of the claims of the Defendants are adverse, the Plaintiff has brought this cause of action seeking to resolve the issue of each Defendant's entitlement to the proceeds of the life insurance policy.<sup>1</sup>

#### Summary Judgment Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P.* 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. *Mares v. ConAgra Poultry Co., Inc.*, 971 F.2d 492, 494 (10th Cir. 1992). Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. *Thomas v. Internat'l Business*

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<sup>1</sup> The Plaintiff deposited the controverted amount with the Court, and has since been dismissed as a party.

*Machines*, 48 F.3d 478, 485 (10th Cir. 1995).

### Discussion

The legal question that must first be resolved is whether or not the deceased's failure to attach a signature and date to the beneficiary designation form renders such form invalid. More precisely, the Court must determine the legal definition of the word "signed" as used in the FEGLIA and its regulations, as well as in the FEGLI policy itself.<sup>2</sup>

Section 8705(a) of Title 5 of the United States Code provides, in pertinent part, as follows:

The amount of group life insurance in force on an employee at the date of his death shall be paid, on the establishment of a valid claim, to the person or persons surviving at the date of his death . . . [f]irst, to the beneficiary or beneficiaries designated by the employee in a *signed* and witnessed writing received before death in the employing office. . . . For this purpose, a designation, change or cancellation of beneficiary in a will or other document not so executed and filed has no force or effect.

5 U.S.C. § 8705(a) (1982) (emphasis added). The regulations promulgated under section 8705 that were effective when Goff died provide, in pertinent part, as follows:

(a) A designation of beneficiary shall be in writing, *signed*, and witnessed and received in the employing office . . . before the death of the insured.

(b) A change or cancellation of beneficiary in a last will or testament, or in any other document not witnessed and filed as required by this part, shall not have any force or effect.

5 C.F.R. § 870.901(a)-901(b) (1987) (emphasis added).

After a thorough search of applicable case law, the Court has determined that there are only

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<sup>2</sup> In light of the fact that neither Defendant Scott nor Defendant Goff, Sr. has presented any evidence that the beneficiary designation form was fraudulently submitted by the Henton Defendants, the Court notes that this case should have been equitably and informally settled by the parties in light of the apparently obvious intent of the deceased to have his insurance proceeds distributed to the Hentons.

two cases which are directly on point: *Thomas v. Metropolitan Life Ins. Co.*, 921 F. Supp. 810 (D.D.C. 1996) *aff'd* 111 F.3d 963 (D.C. Cir. 1997), and *Metropolitan Life Ins. Co. v. Nellis*, No. 4:94 CV 2571 (N.D. Ohio July 17, 1995). Although dealing with the same legal issue, the facts of both *Thomas* and *Nellis* are distinguishable from those in this case in that the insured in both cases “properly” filled out and executed several designation of beneficiary forms prior to their submission of designation forms with the “signature of insured” and “date of execution” boxes left blank, thus precluding an argument in those cases that the insured intended to “sign” the designation form by printing his name and marking “X” in the box labeled “I have signed this form in the presence of the two witnesses who have signed below.”

In support of their claim, the Hentons have submitted the affidavit of Melissa Hardy, a witness to the designation of beneficiary form. In her affidavit, Ms. Hardy asserts that it was clearly the intention of the deceased to leave his insurance proceeds to his nephews. Ms. Hardy further states that

Godfrey E. Goff, Jr., finished filling out his designation of beneficiary form, and signed the same in my presence. Upon the completion of the form by Godfrey E. Goff, Jr., he asked me to sign the form as a witness and indicated to me that he had signed the form and it was complete.

Ms. Hardy's affidavit also claims that Mr. Goff submitted the beneficiary designation for filing, and that at the time he submitted it, he believed it was signed and complete.

In response, Defendants Onetha Scott and Godfrey Goff, Sr. submitted the deposition testimony of Melissa Hardy in which Ms. Hardy admits that she didn't have personal knowledge regarding whether the deceased actually submitted the beneficiary designation form for filing or not. *Hardy Affidavit p.54, ln 19 - p. 56, ln. 5.* Additionally, Ms. Hardy stated in her deposition that she

just "assumed" that the deceased would sign and date the form. *Hardy Affidavit at 24, lns. 3-9.* Ms. Hardy further testified that she could not remember if the designation of beneficiary form had an "X" in the box at the time she witnessed it or not. *Hardy Affidavit at 26, lns. 9-10.* Ms. Hardy also conceded that she did not have a conversation with the deceased regarding whether or not the document was complete, but testified that it was her belief that he thought it was complete. *Hardy Affidavit p.55, lns. 23-25 - p. 56, lns.1-5.*

According to the evidence gleaned from Ms. Hardy's deposition, the deceased was an attorney with the National Labor Relations Board. He was responsible for investigating and trying unfair labor practice cases, and signed formal court documents as well as other significant documents with a cursive signature. The Court has not been presented with any evidence that indicates that the deceased submitted the beneficiary designation form, or that he thought it was complete if he did, in fact, submit the document. Although the testimony of Melissa Hardy is compelling as to the obvious intent of the deceased to leave his insurance benefits to his nephews, there is insufficient evidence from which a trier of fact could find that the deceased actually executed or submitted the designation of beneficiary form.

For the foregoing reasons, Defendants Onetha Scott and Godfrey Goff, Sr.'s Motion for Summary Judgment is GRANTED, and Defendants Brandon Henton, Matthew Henton, and Geoffrey Henton's Motion for Summary Judgment is DENIED.

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

  
TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET  
DATE 8-27-97

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

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

No. 97-CV-66-K

**F I L E D**

AUG 27 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

The Court has for consideration the Report and Recommendation (the "Report") of the U.S. Magistrate Judge filed on June 6, 1997, in this civil rights action. The Magistrate Judge recommends that Plaintiff's case be dismissed without prejudice for failure to prosecute.<sup>1</sup> None of the parties has filed an objection to the Report.

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

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<sup>1</sup>Plaintiff failed to submit his civil rights complaint on the appropriate form by the May 30, 1997, deadline imposed by the Court's Order of April 29, 1997. Plaintiff was advised that failure to comply with the Order within the time specified may result in the dismissal of this action.

**IT IS THEREFORE ORDERED** that the Report and Recommendation of the Magistrate Judge (Docket #7) is **adopted and affirmed**. Plaintiff's action is **dismissed without prejudice** for failure to prosecute. Any pending motion is **denied as moot**.

SO ORDERED THIS 25 day of August, 1997.

  
TERRY C. KERN, Chief Judge  
UNITED STATES DISTRICT COURT

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

**FILED**

AUG 26 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CARDTOONS, L.C., )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MAJOR LEAGUE BASEBALL )  
 PLAYERS ASSOCIATION, )  
 )  
 )  
 Defendant. )

No. 93-C-576-E ✓

ENTERED ON DOCKET

DATE AUG 27 1997

ORDER

This Court granted judgment on the merits in favor of plaintiff, Cardtoons, L.C. (Cardtoons), and the defendant, Major League Baseball Players Association (MLBPA) appealed. Cardtoons prevailed on appeal, and the Court of Appeals held that Cardtoons "shall recover its reasonable attorney's fees both on appeal and at the trial level. In determining the amount of fees to be awarded to Cardtoons, the Court, upon consideration of the evidence presented at the hearing on attorney fees dated February 11, 1997, the briefs submitted, and arguments of counsel, enters the following findings of fact and conclusions of law.

Findings of Fact and Conclusions of Law

1. By way of background, the Court notes that this is an action brought by Cardtoons against MLBPA in which Cardtoons sought a declaratory judgement that its product, a parody baseball trading card, did not violate MLBPA's right of publicity or MLBPA's rights under Chapter 22, Title 15 of the United States Code. Cardtoons also alleged that MLBPA was liable for tortious interference with

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Cardtoons' contractual relationship with its printer and requested an injunction against further interference by MLBPA. MLBPA filed a counterclaim against Cardtoons in which it sought a declaratory judgment that the trading card did violate MLBPA's right of publicity under Okla.Stat.tit.12, §1449(A), an injunction against Cardtoons, and monetary damages. It was on the first claim, that the parody card did not violate MLBPA's right of publicity, that Cardtoons prevailed at the trial level and on appeal.

2. Pursuant to the Court of Appeals' ruling that plaintiff is entitled to fees at the trial level and on appeal, plaintiff requests fees in the "Lodestar" amount of \$130,951.25 plus an "enhancement" of one third, or \$43,650.42, for a total of \$174,601.67. In addition, plaintiff seeks to recover costs in the amount of \$28,361.47, the bulk of which can be attributed to expenses for use of computer aided research.

3. Under well-settled law in this Circuit, the appropriate starting point for determining a reasonable fee is the number of hours reasonably expended multiplied by a reasonable hourly rate. Ramos v. Lamm, 713 F.2d 546, 552 (10th Cir. 1983). Cardtoons requests an award for 1167.55 hours at hourly rates ranging from \$90 to \$175 for attorneys from Tilly & Ward, and at hourly rates of \$185 and \$250 for two attorneys from the Chicago law firm of Welsh & Katz. The current rate charged by Mr. Tilly is \$175 an hour for himself and \$125 for associates.

4. The Court finds that fees allowable for Welsh & Katz should be calculated at prevailing hourly rates in the Tulsa, Oklahoma area. Specifically there are no factors here which would

warrant paying an additional fee for out-of-state attorneys, and there is no evidence that attorneys with expertise in the areas at issue in this case are not available in Tulsa, Oklahoma. Ramos, 713 F.2d, at 555.

5. The Court accepts the testimony of James Tilly and Mark Kachigan that prevailing hourly rates for this area range from \$100 to \$175 per hour. Thus, the rates charged by Tilly & Ward are reasonable under these circumstances. Further, under Ramos, the rates used in the fee award should be the rates "in effect at the time the fee is being established by the court, rather than those in effect at the time the services were performed." Id., at 555.

6. The next step is to determine whether the hours requested to be compensated are hours "reasonably expended" for the litigation. Ramos, 713 F.2d, at 552. MLBPA submitted into evidence "Exhibit B" which summarizes \$9,937.50 of time entries which MLBPA contends are not compensable. According to MLBPA, these time entries deal with claims other than the one on which plaintiff prevailed, i.e. tortious interference, printers' liability and appellate jurisdiction.

7. The Court finds however, from a review of the testimony and the hours spent, that the fees were either reasonable and necessary to the litigation of the right of publicity claim ( as in the case of time spent on the appellate jurisdiction issue), or have already been reduced from Cardtoons' request in its Supplemental Application. There should be no reduction based on MLBPA's "Exhibit B."

8. MLBPA also objects to the time spent by Cardtoons in

preparing its three fee applications. Counsel for Cardtoons spent 125.5 hours preparing its original application for attorney fees and reply to MLBPA's objections, 53.75 hours preparing its application for attorney's fees and reply to MLBPA's objections in the Tenth Circuit, and 67 hours preparing its supplemental application for attorney's fees filed on December 26, 1996, and preparing for the hearing. In addition, Cardtoon's expert, Mr. Kachigan spent 10.3 hours preparing for the hearing.

9. The Court accepts the testimony of Mr. Tilly and Mr. Kachigan that Cardtoons was required to address issues not normally presented in fee applications, but nonetheless finds the fees for preparing the fee applications not to be reasonable. The Court notes that, other than to add additional hours spent on the case, the fee application in the Tenth Circuit and the supplemental fee application should not have differed significantly from the original application. In reviewing the hours spent, and the tasks completed for the fee applications, the Court finds a reasonable amount of time would be one-half of that spent, or 128 hours.

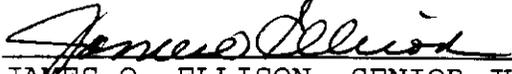
10. Next, the Court must consider whether an enhancement of fees is appropriate. An enhancement is considered if the success achieved was exceptional. Hensley v. Eckerhart, 103 S.Ct. 1933 (1982). In this case, the result achieved was certainly excellent. Nonetheless, based on the number of hours spent, the lack of any "undesirability" in taking the case, and the fact that some compensation has been received during the pendency of this matter, the Court finds that an enhancement is not appropriate under these facts. Ramos, 713 F.2d at 558.

11. The last issue relates to the appropriateness of a recovery on expenses in the amount of \$28,361.47, of which \$25,628.31 consists of computer assisted legal research. MLBPA argues that computer assisted legal research is not a cost that can be recovered under the Oklahoma costs statute, 12 O.S. §942. While this may be true it does not prevent an award as attorney fees. See, e.g., Whalen v. Unit Rig. Inc., 974 F.2d 1248, 1254 (10th Cir. 1992).

12. Although the Court finds that reimbursement for computer aided legal research is appropriate under the law, the Court is concerned about the reasonableness of the amount requested. The legal issues in this case were, although novel, quite limited in scope, and the research performed for trial court briefing should have sufficed, to a large degree, on appeal. With these concerns in mind, the Court finds that Cardtoons should be reimbursed for half of its computer aided legal research expenses, or \$12,814.15. Plaintiff should also be reimbursed for the additional \$2,733.16, to which MLBPA does not object.

13. The Lodestar amount, derived from multiplying the hours requested by plaintiff's counsel's current rates is \$175,742.50. This amount is appropriately reduced by \$20,430 for hours spent on the attorney fee application and the amount necessary to reduce the rate of the Chicago counsel. The Lodestar amount therefore is \$155,312 plus expenses in the amount of \$15,547.31, for a total fee award of \$170,859.31.

ORDERED this 26<sup>th</sup> day of August, 1997.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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✓

IN THE UNITED STATES DISTRICT COURT FOR THE **FILED**

NORTHERN DISTRICT OF OKLAHOMA

AUG 27 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

COBBLESTONE APARTMENTS )  
LIMITED PARTNERSHIP, ET AL., )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
SHELL OIL COMPANY, ET AL., )  
 )  
Defendants. )

Case No. 97-C-182-BU ✓

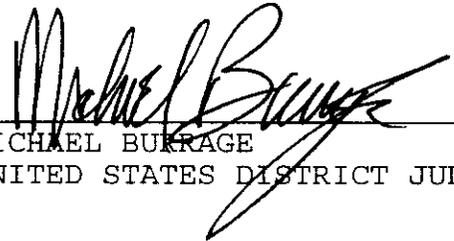
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DATE AUG 27 1997

ADMINISTRATIVE CLOSING ORDER

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

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

Entered this 27<sup>th</sup> day of August, 1997.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

①

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

COMMERCE INSURANCE AGENCY, INC., )  
an Oklahoma corporation, )  
 )  
Plaintiff, )  
 )  
and )  
 )  
ROBERT G. ROGERS, )  
 )  
Intervenor, )  
 )  
v. )  
 )  
BILL McBRIDE, an individual, MJB )  
TRUCKING; and MAC-PAC, INC., )  
 )  
Defendants, )  
 )  
and )  
 )  
UNITED STATES OF AMERICA, )  
 )  
Intervenor. )

**FILED**

AUG 22 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 96-C-188-E

**ENTERED ON DOCKET**

**DATE AUG 26 1997**

**J U D G M E N T**

In accord with the Order filed this date granting the Motion for Summary Judgment of the Intervenor, United States of America, and denying the Motion for Summary Judgment of the Plaintiff Commerce Insurance Agency and Intervenor Robert G. Rogers, the Court hereby enters Judgment in favor of the United States of America and against Commerce Insurance Agency and Robert G. Rogers in the amount of \$8,304.66, plus interest accrued thereon, currently held in escrow with the Peoples Bank of Checotah.

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IT IS SO ORDERED THIS 22<sup>d</sup> DAY OF AUGUST, 1997.

A handwritten signature in cursive script, appearing to read "James O. Ellison", written over a horizontal line.

JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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

COMMERCE INSURANCE AGENCY, INC., )  
an Oklahoma corporation, )

Plaintiff, )

and )

ROBERT G. ROGERS, )

Intervenor, )

v. )

BILL McBRIDE, an individual, MJB )  
TRUCKING; and MAC-PAC, INC., )

Defendants, )

and )

UNITED STATES OF AMERICA, )

Intervenor. )

**FILED**

AUG 22 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 96-C-188-E

**ENTERED ON DOCKET**

DATE AUG 26 1997

**ORDER**

Now before the Court is the Motion for Summary Judgment (Docket #11) of the Intervenor, United States of America, and the Motion for Summary Judgment (Docket #12) of Plaintiff and Intervenor Commerce Insurance Agency (Commerce) and Robert G. Rogers (Rogers).

This matter began as a Motion for Interpleader in state court when Commerce received a judgment against defendant Bill McBride in the amount of \$8,304.66. McBride filed the Motion for Interpleader in light of an IRS lien against Commerce in

the amount of \$21,019.90. The IRS removed this matter to Federal Court, and Rogers then moved to intervene, claiming to also have liens against Commerce which would give him a right to the funds in question. McBride, after depositing the money at the Peoples Bank of Checotah, has been dismissed. Thus, the only remaining dispute is between IRS and Rogers, in that Commerce makes no direct claim to the money.

The key facts in this case are the dates on which Rogers' and the IRS' interests in the funds arose. Rogers claims an interest by virtue of financing statements filed against plaintiff dated May 12, 1992, May 26, 1992, and June 4, 1992. The IRS claims an interest based on three different Tax Assessments: \$56.35 assessed on June 17, 1991; \$14,085.72 assessed on December 28, 1992, and \$5,326.11 assessed on December 28, 1992. The IRS also filed a Notice of Federal Tax Lien on March 23, 1993. Neither party disputes that Rogers' financing statements were filed prior to the Notice of Federal Tax Lien giving those financing statements priority under ordinary circumstances.

The dispute arises from the fact that Rogers assigned his security interest to the Billie F. Stewart Trust on February 15, 1993, and that assignment was recorded in Tulsa County and Oklahoma County on February 16, 1993 and March 5, 1993, respectively. The IRS, relying on National Bank of Commerce of Tulsa v. ABC Const. Co., 442 P.2d 269 (Okla. 1966), claims that the assignment divested Rogers of any interest he may have had. Rogers asserts that by giving an assignment to the Billie F. Stewart Trust, he merely "subordinated his lien to the interests of Stewart," and

that Stewart released the Assignment on September 16, 1996, thus "re-establishing" Rogers' priority.

The assignments were memorialized with a "Statement of Assignment of Financing Statement," which provides in pertinent part:

This statement of assignment is presented to a filing officer for filing pursuant to the provisions of Article 9 of the Oklahoma Uniform Commercial Code. . . . The secured party certifies that he has assigned to the assignee above named the rights of secured party indicated in the financing statement bearing the above file number concerning the following described collateral: [description changes for each financing statement involved].

The assignments were purportedly released by a document entitled "Release of Lien," which provides:

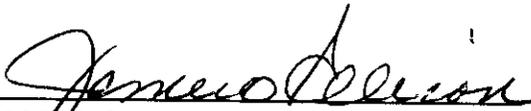
The Billie F. Stewart Revocable Trust does hereby certify that a certain Assignment of Financing Statement filed on or about February 16, 1993, is fully Satisfied, Released, and Discharged and the Clerk of said County is hereby authorized and directed to Discharge the same upon the record thereof. This Release does not affect the Financing Statement No. 923931 filed by Robert G. Rogers.

The determinative issue is the effect of the assignment. Unfortunately, the language in the Statement of Assignment of Financing Statement provides little guidance as to its effect, other than to direct one to Article 9 of the Oklahoma Uniform Commercial Code. Part (3) of Okla. Stat.tit. 12A, §9-405, which governs the assignment of security interests, however, provides that, "[a]fter the disclosure or filing of an assignment under this section, the assignee is the secured party of record." This language does not support Rogers' assertion, made without authority, that he merely "subordinated his interest" to that of the assignee. Obviously, under

this language, Rogers' lost his interest, and the "Release of Lien" is of no force and effect.

Since Rogers' no longer has a security interest to assert, it is the IRS' interest that prevails in this matter. The Motion for Summary Judgment of the IRS (Docket #11) is granted and the Motion for Summary Judgment of Rogers' (Docket #12) is denied.

Dated this 22<sup>d</sup> day of August 1997.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

JOHN PETE ESSLEY, TAMARA )  
LOMBARD RHYAN, and TISA )  
WILHELMSSEN, individually and as )  
representatives of the Estate of PETE )  
LOMBARD ESSLEY, Deceased, )

Plaintiffs, )

v. )

UNITED STATES OF AMERICA, )

Defendant. )

**F I L E D**

AUG 25 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 96-CV-746-B ✓

ENTERED ON DOCKET

DATE AUG 26 1997

STIPULATION OF DISMISSAL

The plaintiffs, by their attorney of record, Stephen M. Grayless, and the defendant, United States of America, acting on behalf of the United States Department of Health and Human Services, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn McClanahan, Assistant United States Attorney, having fully settled all claims asserted by the plaintiffs in this litigation, hereby stipulate to, and request entry by the Court of, the order submitted herewith dismissing all such claims with prejudice.

Dated this 22 day of August, 1997.

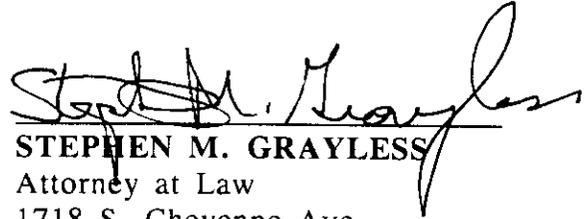
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QH

Essley v. United States  
Case No. 96-CV-746-B  
Stipulation of Dismissal



**CATHRYN McCLANAHAN**  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
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Attorney for the Defendant



**STEPHEN M. GRAYLESS**  
Attorney at Law  
1718 S. Cheyenne Ave.  
Tulsa, OK 74119  
(918) 587-3366  
Attorney for Plaintiffs

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

**FILED**

AUG 14 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

RICHARD C. LETT,

Plaintiff,

vs.

SITTON MOTOR LINES, INC.,

Defendant.

No. 97-C-481-B ✓

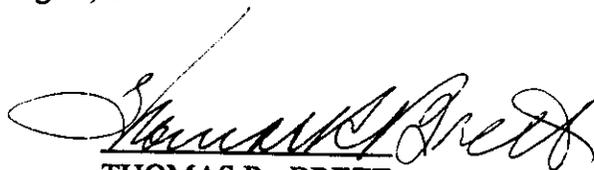
ENTERED ON DOCKET

DATE AUG 26 1997

**ORDER OF REMAND**

This matter came before the Court for Case Management Conference on the 14th day of August, 1997, with counsel for Plaintiff and Defendant of record appearing. Plaintiff's counsel reported to the Court that he makes no claim on behalf of Plaintiff for compensatory, consequential or punitive damages for in excess of \$75,000, exclusive of interest and costs, and concedes that the jurisdictional amount is lacking. The Court thus lacks subject matter jurisdiction and the case is hereby remanded to the District Court in and for Tulsa County.

ORDERED this 14<sup>th</sup> day of August, 1997.



THOMAS R. BRETT  
UNITED STATES DISTRICT COURT



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

FILED

AUG 22 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

OMA J. COPELAND and CALVIN )  
COPELAND, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 AMERICAN TELEPHONE AND )  
 TELEGRAPH, et al., )  
 )  
 Defendants. )

Case No. CIV-96-988-E

ENTERED ON DOCKET  
DATE AUG 26 1997

ORDER OF DISMISSAL WITHOUT PREJUDICE

This matter is before the Court for consideration of Plaintiffs' Motion For Dismissal Without Prejudice and Brief in Support.

The Court having examined the respective briefs filed herein, and for good cause shown, finds that Plaintiffs' Motion is well taken and should be granted.

IT IS HEREBY ORDERED that this cause be dismissed without prejudice to refiling against the defendants American Telephone and Telegraph and International Business Machines.

ORDERED this 22<sup>d</sup> day of August, 1997

UNITED STATES DISTRICT JUDGE

*Handwritten initials*

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

AUG 22 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JOANN WIGGINTON, )  
SSN: 448-58-3809 )

Plaintiff, )

v. )

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

Defendant. )

No. 95-C-870-E

**ENTERED ON DOCKET**

DATE AUG 26 1997

**ORDER**

Now before the Court is the Application for Attorney Fees (Docket # 20) of the Plaintiff JoAnn Wigginton.

Wigginton, who prevailed on her appeal of the Commissioner's denial of benefits, seeks attorney fees under the Equal Access to Justice Act, 28 U.S.C. §2412, which provides in pertinent part:

a court shall award to a prevailing party other than the United States, fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States in any court having jurisdiction over that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

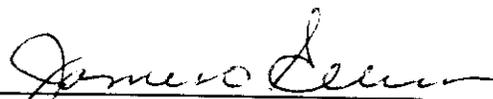
28 U.S.C. §2412(d)(1)(A).

In this case, the only dispute with regard to Wigginton's application is whether the ALJ was substantially justified in his position in denying benefits. The standard of substantial justification means "justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 565 (1988). The standard is satisfied

if there is a genuine dispute, but the Court in Pierce, also noted that it means more than "merely undeserving of sanctions for frivolousness." Id. at p. 566. The Commissioner argues that there was substantial justification because one counselor found Wigginton employable on January 13, 1992. The Commissioner asserts that the treating physician rule "is not absolute" and that evidence supports the position taken by the ALJ. The Court finds, however, that the violation of the treating physician rule, Byron v. Heckler, 742 F.d. 1232 (10th Cir. 1984) was clear, and that the position of the United States here was not substantially justified.

Because the Commissioner raises no other objection to plaintiff's request, the Motion (Docket #20) is GRANTED and attorney fees and costs are granted in the amount of \$4,272.25.

Dated this 21<sup>st</sup> day of August 1997.

  
James O. Ellison, Senior Judge  
United States District Court

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

**F I L E D**

AUG 22 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

GLORIA SCHAFFER-BOWMAN, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 HOUSING AUTHORITY OF THE CITY OF )  
 TULSA, )  
 )  
 Defendant. )

Case No. 96-C-282-E

**ENTERED ON DOCKET**

**DATE** 8-26-97

ORDER

Now before the Court is the Motion to Dismiss (Docket # 12) of the Defendant, Housing Authority of the City of Tulsa (THA).

THA claims that plaintiff Gloria Schaffer-Bowman's Complaint should be dismissed, pursuant to Fed.R. Civ.P. 12(b)(1) and 12 (h)(3) for lack of subject matter jurisdiction. THA claims that the "litany of allegations" in Schaffer-Bowman's request fail to state a claim involving a federal question, and therefore this court has no jurisdiction.

It is clear, however, from subsequent pleadings, at least, that Schaffer-Bowman intended to file a Qui Tam action under the False Claims Act, 31 U.S.C. §3729 et seq. The question is whether Schaffer-Bowman sufficiently pled such a claim. After closely examining plaintiff's pro se, five page hand-written pleading entitled "Partial Complaint; Request for Court Appointed Attorney; and Request for Emergency Injunctive Relief and Restraining Order," the Court concludes that she has not. The gravamen of plaintiff's complaint is that THA is interfering with the business of the Hewgley Terrace Residents' Association, of which plaintiff is a member. In conjunction with her Complaint, plaintiff asserts that her own, and other tenants' life and property have been repeatedly

threatened and vandalized. The only allegation that appears to be relevant to the False Claims Act appears on page four where plaintiff claims that “[p]laintiff believes THA has violated HUD regulations, and has committed fraud against the United States Government and Plaintiff. . . .” This fraud claim, however, must fail because this general allegation is insufficient to satisfy the requisites of Fed.R.Civ.P. 9 which requires that claims of fraud be pled with particularity. See, e.g., U.S. Ex Rel. Mikes v. Straus, 853 F.Supp. 115, 118 (S.D.N.Y. 1994).

Defendant’s Motion to Dismiss (Docket # 12) is granted.

IT IS SO ORDERED THIS 21<sup>st</sup> DAY OF ~~FEBRUARY~~<sup>AUGUST</sup>, 1997.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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

**F I L E D**

AUG 26 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

WILLIAM D. CARPENTER, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 STANLEY GLANZ, et al., )  
 )  
 Defendants. )

Case No. 96-C-57-K

ENTERED ON DOCKET

DATE 8-26-97

**REPORT AND RECOMMENDATION**  
**AND ORDER OF U.S. MAGISTRATE JUDGE**

This report and recommendation and order pertains to Plaintiff's Motion for Summary Judgment Pursuant to Rule 56(a) Fed. R. Civ. Proc. (Docket #107), Defendants' Response to Plaintiff's Motion for Summary Judgment and Defendant's Counter-Motion for Summary Judgment (Docket #114), Plaintiff's Motion for Order of Judgment Pursuant to Rule 54(c) of the Federal Rules of Civil Procedure (Docket #115), Plaintiff's Motion for Declaratory Judgment Pursuant to 28 U.S.C. §§ 2201, 2202 (Docket #125), Plaintiff's Motion for Order Allowing Additional Interrogatories (Docket #126), Plaintiff's Third Motion for Order to Compel Discovery (Docket #138), Plaintiff's Fourth Motion for Order to Compel Discovery (Docket #143), Plaintiff's Motion for Order of Judgment Pursuant to Rule 54(b) Fed. Rules of Civil Procedure (Docket #144), and Plaintiff's Motion to Reurge Motion for Summary Judgment Pursuant to Rule 56(a) Fed. R. Civ. Proc. (Docket #147).

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## REPORT AND RECOMMENDATION

Plaintiff claims that he is entitled to summary judgment as to the remaining issue in this case, which is whether excessive force was used in the spraying of pepper gas in his face on September 12, 1995. He notes that the incident reports completed by defendant Ralph E. Duncan ("Duncan") stated that he and another inmate Ottie C. Webb IV ("Webb") were merely standing with their arms crossed looking at him when he entered their cell and "assaulted them with his chemical agent weapon" on that date. He points out that the justification given for the "assault" was banging noises coming from that section of the jail which were disturbing court proceedings on the floor below and he was not observed making any noises or doing any threatening act. He states that he is therefore entitled to summary judgment as to his claim that defendants used excessive force in violation of his constitutional rights.

The defendants respond that the reports show that the use of the pepper spray was a de minimis use of force for a justifiable end, which was to put a stop to conduct that was disrupting court on the floor below and did not constitute cruel and unusual punishment.

Summary judgment is appropriate if the moving party can demonstrate that there is no genuine issue as to any material fact, and entitlement to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P.<sup>1</sup>

The court has reviewed the reports which are included in the pleadings and finds that there is an issue of fact as to the reason for the use of the pepper spray.

---

<sup>1</sup>The court applies the well-established framework for analysis of summary judgment motions. "[T]he plain language of Rule 56(c) [Fed.R.Civ.P.] 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." Celotex Corp v. Catrett, 477 U.S. 317, 322 (1986). If there is a complete failure of proof concerning an essential element of the non-movant's case, there can be no genuine issue of material fact because all other facts are necessarily rendered immaterial. Id. at 323.

A party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must affirmatively prove specific facts showing that there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The Court stated that "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Id. at 252.

The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts". Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585 (1986).

The record must be construed liberally in favor of the party opposing the summary judgment, but "conclusory allegations by the party opposing ... are not sufficient to establish an issue of fact and defeat the motion." McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988). The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384 (10th Cir. 1988).

Duncan claims in several documents that plaintiff and the other inmates in his cell had towels over their faces and were banging on the wall and using obscene language directed towards Duncan prior to the time he entered the cell. He told them to get on their bunks, but they cursed at him and refused to do so, so he entered the cell and sprayed them. Plaintiff's Motion for Summary Judgment Pursuant to Rule 56(a) Fed. R. Civ. Proc. (Docket #107), Defendant's Counter-Motion for Summary Judgment (Docket #114), Plaintiff's Motion for Order of Judgment Pursuant to Rule 54(c) of the Federal Rules of Civil Procedure (Docket #115), Plaintiff's Motion for Order of Judgment Pursuant to Rule 54(b) Fed. Rules of Civil Procedure (Docket #144), and Plaintiff's Motion to Reurge Motion for Summary Judgment Pursuant to Rule 56(a) Fed. R. Civ. Proc. (Docket #147) should therefore be denied.

Order

Plaintiff's Motion for Declaratory Judgment Pursuant to 28 U.S.C. §§ 2201, 2202 (Docket #125) is denied. Plaintiff asks the court for a declaratory judgment that "O.C. Spray is a chemical agent weapon." This is not a proper matter for the court to consider pursuant to 28 U.S.C. §§ 2201 and 2202. Under these statutes, a court may declare the rights and other legal relations of any interested party seeking the declaration. The issue raised by plaintiff has nothing to do with the rights or legal relations of the parties to this lawsuit.

Plaintiff's Motion for Order Allowing Additional Interrogatories (Docket #126) is denied. Plaintiff asks to be allowed to submit twenty additional interrogatories to Duncan and thirty additional interrogatories of defendant Stanley Glanz because they

have not answered previous interrogatories truthfully. Plaintiff has had an opportunity to serve interrogatories to allow him to conduct discovery in this case and has not shown that submission of additional interrogatories will serve any purpose to further the search for truth.

Plaintiff's Third Motion for Order to Compel Discovery (Docket #138) and Plaintiff's Fourth Motion for Order to Compel Discovery (Docket #143) are granted in part. Defendant Stanley Glanz is ordered to respond to Questions No. 1 and 2 of Plaintiff's Request for Production of Documents and Information Pertaining to Discovery within 15 days of the date of this order or notify plaintiff by that date that no such records exist. The deposition of Andre Green sought by plaintiff in his motion has been taken. Plaintiff is not entitled to a fee for motions he has filed relating to this issue.

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



JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

s:\r&r\carpenter.2rr

ENTERED ON DOCKET

DATE 8-26-97

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

CHERRY COMMUNICATIONS, INC., )  
an Illinois corporation, )

Plaintiff, )

vs. )

WORLDCOM, INC., a Georgia corporation, )  
WORLDCOM NETWORK SERVICES, )  
INC., a Delaware corporation; and )  
DIGITAL COMMUNICATIONS OF )  
AMERICA, INC., an Oklahoma corporation )

Defendants, )

vs. )

THE MANAGEMENT NETWORK GROUP, )  
INC., a Kansas corporation; and MICKEY )  
WOO, an individual, )

Third-Party Defendants. )

**FILED**

AUG 26 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 96-C-1102 K

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Cherry Communications, Inc. ("Cherry"), defendants, WorldCom, Inc. ("WCI"), WorldCom Network Services, Inc. ("WNS"), and Digital Communications of America, Inc. ("DCA"), and third-party defendant, The Management Network Group, Inc. ("TMNG"), pursuant to Fed. R. Civ. P. 41(C), hereby stipulate to the dismissal, with prejudice, of all third-party counter-claims asserted in this action by TMNG.

Respectfully submitted:

**JENNER & BLOCK**

By:   
One of its attorneys

Anton R. Valukas  
Charles B. Sklarsky  
Russ M. Strobel  
One IBM Plaza  
Chicago, IL 60611  
(312) 222-9350

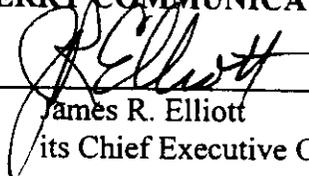
and

**GABLE GOTWALS MOCK SCHWABE**

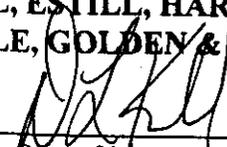
James M. Sturdivant  
Oliver S. Howard  
Amelia A. Fogleman  
2000 Boatmen's Bank  
15 West Sixth Street  
Tulsa, Oklahoma 74119-5447  
(918) 582-9201

**ATTORNEYS FOR PLAINTIFF  
CHERRY COMMUNICATIONS, INC.**

**CHERRY COMMUNICATIONS, INC.**

By:   
James R. Elliott  
its Chief Executive Officer

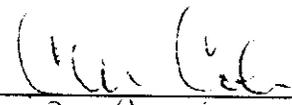
**HALL, ESTILL, HARDWICK,  
GABLE, GOLDEN & NELSON, P.C.**

By:   
One of its attorneys

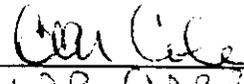
Donald L. Kahl  
Claire V. Eagan  
Mark Banner  
T. Lane Wilson  
HALL, ESTILL, HARDWICK,  
GABLE, GOLDEN & NELSON, P.C.  
320 S. Boston Avenue, Suite 400  
Tulsa, OK 74103-3708  
(918) 594-0400

**ATTORNEYS FOR DEFENDANTS  
WORLDCOM, INC., WORLDCOM  
NETWORK SERVICES, INC., AND  
DIGITAL COMMUNICATIONS OF  
AMERICA, INC.**

**WORLDCOM, INC.**

By:   
Its: VP (MARKET SALES)

**WORLDCOM NETWORK SERVICES,  
INC.**

By:   
Its: VP (MARKET SALES)

**DIGITAL COMMUNICATIONS OF  
AMERICA, INC.**

By:   
Its: PRESIDENT



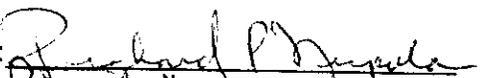
**SHUGHART, THOMSON & KILROY, P.C.**

By:   
One of its attorneys

Philip W. Bledsoe  
Bradley D. Holstrom  
Heather A. Suve  
120 West 12th Street  
Kansas City, KS 64105  
(816) 421-3355

**ATTORNEYS FOR THIRD-PARTY  
DEFENDANTS THE MANAGEMENT  
NETWORK GROUP, INC. AND  
MICKY WOO**

**THE MANAGEMENT NETWORK  
GROUP, INC.**

By:   
Its: President & CEO

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

**FILED**  
AUG 22 1997  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

RONALD EDWARD BROWN, )  
)  
Plaintiff. )  
)  
vs. )  
)  
DICK CONNER CORRECTIONAL )  
CENTER; RON CHAMPION, )  
Warden, )  
)  
Defendant. )

No. 96-CV-968-H

ENTERED ON DOCKET  
DATE 8-25-97

**ORDER**

Plaintiff, a state prisoner, filed a *pro se* Motion for Temporary Restraining Order on October 22, 1996, alleging the Defendant and other prison officials refused to provide him with one "Halal food box" per week used in the practice of his Muslim religion. By Order of this Court, dated November 13, 1996, Plaintiff's motion was denied without prejudice for failure to comply with the requirements of Rule 65(a) and (b). *See* Fed.R.Civ.P. 65. Furthermore, the Court granted Plaintiff twenty days from the date of the Order to complete and submit a complaint pursuant to 42 U.S.C. § 1983, summons, and Marshal forms, as well as a court-approved motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a), as amended by the Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996). On November 14, 1996, the Clerk notified Plaintiff of the above deficiencies and mailed him the court-approved civil rights complaint, summons, Marshal forms, and motion for leave proceed in forma pauperis with instructions. However, Plaintiff

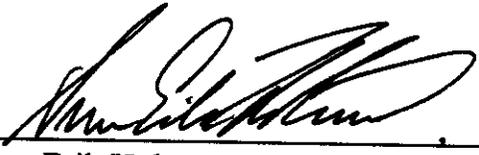
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has failed to respond or otherwise comply with the Court's Order.

**ACCORDINGLY, IT IS HEREBY ORDERED** that Plaintiff's incomplete motion for leave to proceed in forma pauperis (doc. #3) is **denied** and this action is **dismissed without prejudice** for failure to pay the filing fee and to comply with the Federal Rules of Civil Procedure. See N.D. LR 5.1(F); Fed.R.Civ.P. 65; Fed.R.Civ.P. 4(m).

IT IS SO ORDERED.

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

  
\_\_\_\_\_  
Sven Erik Holmes  
United States District Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 22 1997

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

UNITED STATES OF AMERICA,

Plaintiff

v.

TONY L. BEARD,

Defendant.

Civil Action No. 97CV593 H ✓

ENTERED ON DOCKET

DATE 8-25-97

DEFAULT JUDGMENT

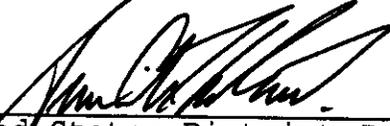
This matter comes on for consideration this 21<sup>st</sup> day of August, 1997, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Tony L. Beard, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Tony L. Beard, acknowledged receipt of Summons and Complaint on June 24, 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.

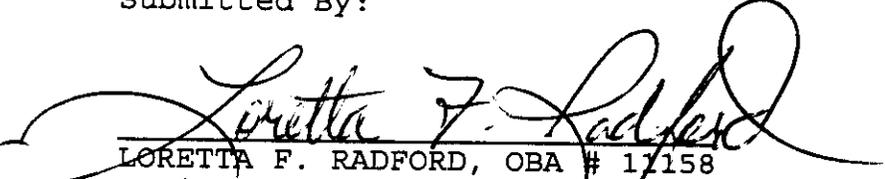
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Tony L. Beard, for the principal amount of \$2,700.21, plus accrued interest of \$1,669.01, plus administrative charges in the amount of \$0.00, plus interest thereafter at the rate of 8 percent per annum until

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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 5.58 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

Jan  
8-15-97

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 22 1997

cl

UNITED STATES OF AMERICA,

Plaintiff

v.

JOHN S. HUFFCUTT,

Defendant.

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

Civil Action No. 97CV458 H ✓

ENTERED ON DOCKET

DATE 8-25-97

DEFAULT JUDGMENT

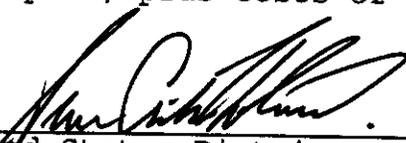
This matter comes on for consideration this 21<sup>st</sup> day of August, 1997, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, John S. Huffcutt, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, John S. Huffcutt, was served with Summons and Complaint on June 12, 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.

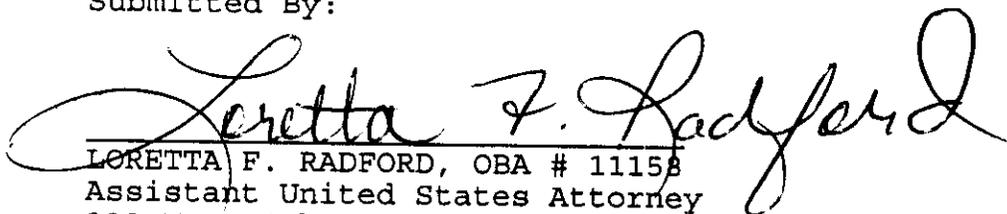
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, John S. Huffcutt, for the principal amount of \$5,348.43, plus accrued interest of \$3,474.15, plus interest thereafter at the rate of 7 percent per annum until judgment, a surcharge of 10% of the amount

6

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 5.58 percent per annum until paid, plus costs of this action.

  
United States District Judge

Submitted By:



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

LFJ/jmo

3

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

INDUSTRIAL POWER BUSINESS SERVICES )  
and VELMA ROSE GAY, trustee, )

Plaintiffs, )

v. )

UNITED STATES of AMERICA, INTERNAL )  
REVENUE SERVICE, REVENUE OFFICER )  
HOMER WALKER, ARKANSAS VALLEY )  
STATE BANK, and BOATMEN'S FIRST )  
NATIONAL BANK, )

Defendants. )

ENTERED ON DOCKET

DATE 8-25-97

Case No. 97-C-483-H

FILED  
AUG 22 1997

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

ORDER

This matter comes before the Court on a motion to dismiss by Defendant Arkansas Valley State Bank. Pursuant to a hearing held on May 21, 1997, and based upon the consent of the parties, Defendant Arkansas Valley State Bank was ordered to remit the balance of certain accounts into the registry of the Court in relation to this matter. (Docket #7.) Upon such remittance, the parties agreed that Defendant Arkansas Valley State Bank would be dismissed from this case. Defendant Arkansas Valley State Bank remitted the balances of these accounts to the Court registry on June 19, 1997 (Docket # 9.) Accordingly, Defendant's motion is granted. Defendant Arkansas Valley State Bank is dismissed from this action.

IT IS SO ORDERED.

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

  
Sven Erik Holmes  
United States District Judge

25

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

The C. PHILIP THOLEN Revocable Trust,  
by C. Philip Tholen, TRUSTEE

Plaintiff,

v.

BURLINGTON RESOURCES COAL  
SEAM GAS ROYALTY TRUST,  
a Delaware Business Trust,  
NATIONSBANK OF TEXAS, N.A.;  
MELLON BANK (D.E.), N.A.;  
BURLINGTON RESOURCES, INC., a  
Delaware corporation, and MERIDIAN  
OIL PRODUCTION INC., a Delaware  
corporation,

Defendants.

FILED

AUG 22 1997

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

1073  
Case No 96-CV-0173-H

ENTERED ON DOCKET

DATE 8-25-97

**DISMISSAL**

This matter comes before the Court on the Motion to Dismiss filed by the Plaintiff in the captioned action. The Court finds that the Motion should be granted.

IT IS THEREFORE ORDERED that this action is hereby dismissed.

It is so ordered this 21<sup>st</sup> day of August, 1997.

  
SVEN ERIK HOLMES

15

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

NORAM GAS TRANSMISSION CO.,  
a Delaware Corporation,

Plaintiff,

v.

ENTERPRISE RESOURCE CORP.,  
an Arkansas Corporation;  
ALAN G. MIKELL; and TIDEMARK  
EXPLORATION, INC., an  
Oklahoma Corporation,

Defendants.

FILED  
AUG 22 1997  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

No. 94-C-773-H

ENTERED ON DOCKET

DATE 8-25-97

**ORDER**

This matter comes before the Court on Defendant Alan G. Mikell's motion for a new trial and motion to amend this Court's Order adopting findings of fact and conclusions of law (Docket # 120), his supplement to the motion for new trial (Docket # 126), and Plaintiff's motion for attorneys fees (Docket # 124).

This breach of contract action was tried to the Court. After considering the evidence presented and the arguments of counsel, the Court found in favor of Plaintiff and adopted findings of fact and conclusions of law (Docket # 118). In his motions, Defendant Alan G. Mikell<sup>1</sup> seeks a new trial and amendment of the Court's findings of fact and conclusions of law, asserting that a number of the Court's findings and conclusions are not supported by the evidence. "In the federal court system, the trial judge has broad discretion in deciding whether to grant a new trial, and the court's ruling on such a motion will not be disturbed on appeal unless there is a gross abuse of discretion." Capstick v. Allstate Ins. Co., 998 F.2d 810, 819 (10th Cir. 1993). After reviewing

<sup>1</sup>Defendant Enterprise Resource Corporation did not file a motion for new trial or a motion to amend the findings and conclusions.

134

Mr. Mikell's arguments, the Court is not persuaded that a new trial is warranted in this case. The evidence presented at trial supports the Court's findings of fact and conclusions of law.

Accordingly, Mr. Mikell's motions (Docket # 120 and Docket # 126) are denied.

In the Order adopting findings of fact and conclusions of law, the Court determined that the settlement agreement at issue here was a contract for the sale of natural gas. Plaintiff now seeks attorneys fees under Okla. Stat. tit. 12, § 936, which awards attorneys fees to the prevailing party in cases involving contracts for the sale of goods. For purposes of section 936, contracts for the sale of natural gas are contracts for the sale of goods. See Arkla Energy Resources v. Roye Realty & Developing, Inc., 9 F.3d 855, 853-54 (10th Cir. 1993) (applying Okla. Stat. tit. 12, § 936 to a case involving a contract for the sale of oil and gas).

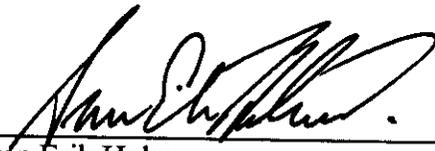
In their response to Plaintiff's motion, Defendants do not object to the amount of attorneys fees requested. Instead, Defendants claim that Plaintiff is not entitled to an award of attorneys fees in part because Plaintiff's request does not allocate the requested fees between Defendants. Defendants do not cite any authority, nor has the Court found any, for the proposition that Plaintiff's failure to establish explicitly what fees it incurred against each Defendant is fatal to Plaintiff's claim for attorneys fees. The Tenth Circuit has never addressed this question, but cases from other circuits indicate that district courts have wide discretion regarding when and how to apportion attorneys fees. See Council for Periodical Distributors Ass'n v. Evans, 827 F.2d 1483, 1487 (11th Cir. 1987) (stating that "[i]n addition to having discretion on when to apportion fees, district courts also have wide discretion on how to divide liability for fees."). Other circuits have also indicated that a court may decline to apportion attorneys fees. Corder v. Gates, 947 F.2d 374, 383 (9th Cir. 1991).

In this case, Plaintiff pursued the same claims for approximately the same amount of damages against both Defendants. Defendants retained the same counsel, and the claims were tried before the Court in one trial. It appears that Plaintiff's attorneys fees would have been

essentially the same had it pursued only one Defendant. In the absence of authority to the contrary, the Court concludes that an award of attorneys fees jointly against both Defendants is reasonable. Accordingly, Plaintiff's motion for attorneys fees is granted, and Plaintiff is awarded attorneys fees in the amount of \$101,828.00, as requested in the motion (Docket # 124).

IT IS SO ORDERED.

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

  
\_\_\_\_\_  
Sven Erik Holmes  
United States District Judge

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

FEDERAL DEPOSIT INSURANCE )  
CORPORATION, )  
Plaintiff, )

vs. )

LOUIS W. GRANT, JR., CHARLES B. )  
GRANT, J. LAWRENCE MILLS, JR., )  
KEITH R. GOLLUST, PAUL E. TIERNEY, )  
JR., EDWARD L. JACOBY, ROD L. )  
REPPE, DONALD BERGMAN, WILLIAM )  
M. BRUMBAUGH, EDWARD H. HAWES, )  
JAMES R. MALONE, ROBERT B. RISS, )  
ROBIN K. BUERGE, W.R. HAGSTROM )  
and DAVID M. MOFFETT, )  
Defendants. )

ENTERED ON DOCKET

DATE 8-25-97

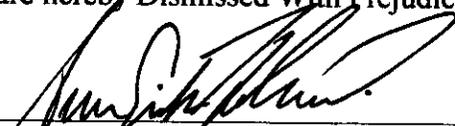
CASE NO. 92-C-1043-H

**FILED**  
AUG 22 1997  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**ORDER DISMISSING WITH PREJUDICE DEFENDANT'S EDWARD H. HAWES,  
JAMES R. MALONE, ROBERT B. RISS, DONALD BERGMAN, WILLIAM M.  
BRUMBAUGH AND ROBIN BUERGE**

Upon Motion of the Federal Deposit Insurance Corporation for and Order Dismissing the defendant's Edward H. Hawes, James R. Malone, Robert B. Riss, Donald Bergman, William M. Brumbaugh and Robin Buerge, the court finds that the FDIC and said defendant's have entered into a Settlement and Release Agreement which provides for the FDIC to Dismiss With Prejudice all claims against said defendant's and,

IT IS THEREFORE ORDERED that the claims by the Federal Deposit Insurance Corporation against the defendant's Edward H. Hawes, James R. Malone, Robert B. Riss, Donald Bergman, William M. Brumbaugh and Robin Buerge are hereby Dismissed With Prejudice.

  
UNITED STATES DISTRICT JUDGE

353

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

**F I L E D**

AUG 25 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ROBERT L. CLEERE,

Plaintiff,

v.

OKLAHOMA TURNPIKE AUTHORITY,

Defendant.

Case No. 96-CV-953-BU

ENTERED ON CLERK'S

DATE AUG 25 1997

JOINT STIPULATION OF DISMISSAL

The plaintiff, Robert L. Cleere, and the defendant, Oklahoma Turnpike Authority, advise the court of a settlement agreement between the parties and pursuant to Rule 41(a)(1)(ii), F.E.D. R. CIV. P., jointly stipulate that the plaintiff's action against the defendant, Oklahoma Turnpike Authority, be dismissed with prejudice, the parties to bear their respective costs, including all attorney's fees and expenses of this litigation.

Dated this 21<sup>st</sup> day of August, 1997.

Malloy & Malloy, Inc.

By: Pat Malloy, Sr.

Pat Malloy, Sr., OBA #5646  
1924 South Utica, Suite 810  
Tulsa, Oklahoma 74104  
(918) 747-3491

Attorneys for Plaintiff,  
Robert L. Cleere

(14)

CD

ROSENSTEIN, FIST & RINGOLD

By:



---

Karen L. Long, OBA #5510  
525 South Main, Suite 700  
Tulsa, Oklahoma 74103  
(918) 585-9211

Attorneys for Defendant,  
Oklahoma Turnpike Authority

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 22 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

LAWRENCE TROMBKA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
CHURCH OF SCIENTOLOGY )  
INTERNATIONAL, a foreign corporation, )  
and CITIZENS COMMISSION ON )  
HUMAN RIGHTS, a foreign corporation, )  
)  
Defendants. )

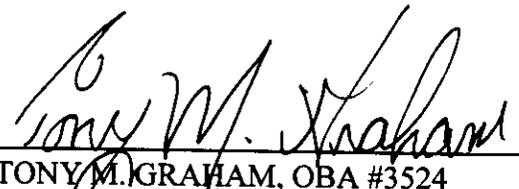
Case No. 97 CV 596 ~~K~~(M)

(Formerly Tulsa County  
Case No. CJ 97-2701)

ENTERED ON DOCKET  
AUG 25 1997  
DATE \_\_\_\_\_

**STIPULATION OF DISMISSAL**

Plaintiff Lawrence Trombka and defendants Church of Scientology International and Citizens Commission on Human Rights, stipulate to the dismissal of this action with prejudice, with each party to bear his or its cost.

  
TONY M. GRAHAM, OBA #3524  
FELDMAN, FRANDEN, WOODARD,  
FARRIS & TAYLOR  
525 South Main, Suite 1400  
Tulsa, Oklahoma 74103-4523  
918-583-7129  
**ATTORNEY FOR PLAINTIFF**

  
Harry A. Woods, Jr., OBA # 9863  
Colin H. Tucker, OBA #16325

-Of the Firm -

CROWE & DUNLEVY, P.C.  
1800 Mid-America Tower  
20 North Broadway  
Oklahoma City, OK 73102  
(405) 235-7754  
(405) 272-5236

- and -

RABINOWITZ, BOUDIN, STANDARD,  
KRINSKY & LIEBERMAN, P.C.  
Eric M. Lieberman  
740 Broadway, 5th Floor  
New York, NY 10003  
(212) 254-1111

ATTORNEYS FOR DEFENDANTS  
CHURCH OF SCIENTOLOGY  
INTERNATIONAL AND CITIZENS  
COMMISSION ON HUMAN RIGHTS

8-22-97

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

CREDIT GENERAL INSURANCE )  
COMPANY, )

Plaintiff, )

v. )

ASBESTOS REMOVAL AND )  
MAINTENANCE, INC., KDS )  
ENVIRONMENTAL SERVICES, )  
INC., )

Defendants. )

Court No: 96-C-393-K

**FILED**

AUG 21 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL

The Plaintiff and Defendants, pursuant to Rule 41(a)(1) F.R.C.P., stipulate to the dismissal of the above-styled and numbered cause of action with prejudice, each party to bear their own costs.



ROBERT A. FRANDEN, OBA #3086

TIMOTHY E. TIPTON, OBA #13391

Feldman, Franden, Woodard,

Farris & Taylor

525 South Main, Suite 1400

Tulsa, OK 74103

ATTORNEYS FOR PLAINTIFF



ANDREW L. RICHARDSON, OBA #16298

Rhodes, Hieronymus, Jones, Tucker

& Gable

P.O. Box 2110

Tulsa, OK 74121-1100

and of counsel:

Gerald O. Schultz (#11,999)

302 Fleming, Suite 5

Garden City, KS 67846

**ATTORNEYS FOR DEFENDANTS**

97-08\CREDIT.DISSMISSAL

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

**FILED**

AUG 21 1997

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

JOSEPH KENNETH RAY, II, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
MCCURTAIN COUNTY JAIL, ET AL., )  
 )  
Defendants. )

Case No. 97-C-130-BU ✓

ENTERED ON DOCKET  
DATE AUG 21 1997

**ORDER**

On July 23, 1997, United States Magistrate Judge Sam A. Joyner entered a Report and Recommendation wherein he recommended that this Court dismiss Petitioner's Petition for a Writ of Habeas Corpus without prejudice. In the Report and Recommendation, Magistrate Judge Joyner advised that any objection to the Report and Recommendation must be filed within ten days of service.

Upon review of the file, it appears that no objection has been filed within the time prescribed by Magistrate Judge Joyner. With no objection being filed, the Court finds that the Report and Recommendation should be affirmed.

Accordingly, Magistrate Judge Joyner's Report and Recommendation (Docket Entry #4) is **AFFIRMED**. Petitioner's Petition for a Writ of Habeas Corpus is **DISMISSED WITHOUT PREJUDICE**.

ENTERED this 21<sup>st</sup> day of August, 1997.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

(5)

F I L E C O P Y

rm

United States District Court  
for Northern District of Oklahoma  
August 21, 1997

Everett R Bennett Jr, Esq.  
Frasier Frasier & Hickman  
1700 SW Blvd, #100  
P O Box 799  
Tulsa, OK 74101

ENTERED ON DOCKET

DATE AUG 21 1997

-----  
C I V I L M I N U T E S  
-----

4:93-cv-00972

McDonell v Smith

-----  
DOCKET ENTRY  
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MINUTES: by Judge Michael Burrage . Case called for Pretrial conference on 8/21/97. Deft counsel present. Pltf counsel's office appeared by Telephone. Pltf announced stip/dismissal had been submitted to deft counsel. Court orders case DISMISSED WITHOUT PREJUDICE for plaintiff's failure to appear as ordered by the Court. (cc: all counsel) [EOD: 8/21/97]

Hon. Michael Burrage, Judge

THIS NOTICE SENT TO ALL COUNSEL  
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8-27-97

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

IMOGENE H. HARRIS,

Plaintiff,

v.

THE CITY OF TULSA, OKLAHOMA,  
a municipal corporation; TULSA  
AIRPORT AUTHORITY, a charter  
agency of the CITY OF TULSA; and  
TULSA AIRPORTS IMPROVEMENT  
TRUST, a public trust,

Defendants.

Case No. 96-C-230-H

FILED

AUG 27 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

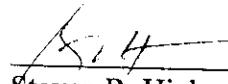
Plaintiff and Defendant Tulsa Airports Improvement Trust ("TAIT"), by and through their respective attorneys, jointly stipulate that all of Plaintiff's claims herein should be dismissed with prejudice with each side to bear its own costs and attorneys' fees.

DATED this 21<sup>st</sup> day of August, 1997.

Respectfully submitted,

FRASIER, FRASIER & HICKMAN

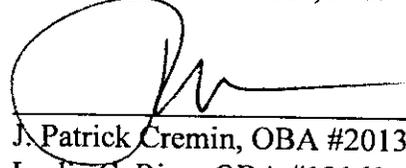
By:

  
Steven R. Hickman, Esq.  
1700 Southwest Boulevard, Suite 100  
P.O. Box 799  
Tulsa, Oklahoma 74101-0799  
(918) 584-4724

ATTORNEYS FOR PLAINTIFF

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

By:



J. Patrick Cremin, OBA #2013

Leslie C. Rinn, OBA #12160

Kelly S. Kibbie, OBA #16333

320 South Boston Avenue, Suite 400

Tulsa, Oklahoma 74103-3708

(918) 594-0400

ATTORNEYS FOR DEFENDANT  
TULSA AIRPORTS IMPROVEMENT TRUST

ENTERED ON DOCKET

8-21-97

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

FILED

AUG 21 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ERVIN SAM, )  
)  
Plaintiff, )  
)  
vs. )  
)  
M.E. BAYLES, E.G. WATKINS, THE )  
CITY OF TULSA, AND OTHER )  
PRESENTLY UNKNOWN OFFICERS AND )  
OFFICIALS, )  
)  
Defendants. )

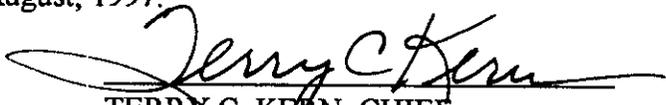
No. 96-C-437-K

JUDGMENT

This matter came before the Court for consideration of the Plaintiff's request for dismissal without prejudice. The issues having been duly considered and a decision having been rendered in accordance with the Order filed on August 21, 1997, the Court finds dismissal with prejudice is appropriate in favor of Defendants M.E. Bayles, E.G. Watkins, the City of Tulsa, and Other Presently Unknown Officers and Officials.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Defendants M.E. Bayles, E.G. Watkins, the City of Tulsa, and Other Presently Unknown Officers and Officials and against the Plaintiff.

ORDERED this 20 day of August, 1997.

  
TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE

REGISTERED ON DOCUMENT  
8-21-97

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

ERVIN SAM, )  
)  
Plaintiff, )  
)  
vs. )  
)  
M.E. BAYLES, E.G. WATKINS, THE )  
CITY OF TULSA, AND OTHER )  
PRESENTLY UNKNOWN OFFICERS AND )  
OFFICIALS, )  
)  
Defendants. )

No. 96-C-437-K ✓

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

ORDER

Before the Court is Plaintiff's Status Report filed pursuant to the Court's Order of May 22, 1997. In that Order, the Court informed Plaintiff that his failure to prosecute his case by July 31, 1997 would result in dismissal of the case with prejudice. The Plaintiff's attorney has given notice that the Plaintiff has failed to appear in Oklahoma for his deposition, or otherwise pursue his claim. However, Plaintiff requests that this Court dismiss the claim without prejudice to its refiling. The Defendants have not responded.

The Plaintiff, Ervin Sam, has filed a complaint against the Defendants seeking relief under 42 U.S.C. § 1983, asserting that he was subjected to excessive use of force and conspiracy. Additionally, Plaintiff has asserted state law claims for false imprisonment, assault and battery, and intentional infliction of emotional distress.

On January 8, 1997, all Defendants moved for dismissal of Plaintiff's claim pursuant to Rule 37 on the ground that Plaintiff had failed to appear to provide deposition testimony. According to

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the record at that time, the Plaintiff had been officially noticed for oral deposition on two separate occasions. Additionally, oral deposition was informally scheduled on at least four occasions. Plaintiff failed to appear at any of these scheduled depositions, and stated that he could not appear because he would be arrested upon his appearance pursuant to eleven outstanding warrants against him. Plaintiff was at that time, and appears to currently be a fugitive in Louisiana. Plaintiff asserted that payment of fines would extinguish the warrants, and that his family was attempting to raise funds to pay those fines so that he could return to Oklahoma and appear for deposition. Plaintiff further requested that the current case be stayed pending resolution of the outstanding warrants. After consideration of the factors announced in *Ehrenhaus v. Reynolds*, 965 F.2d 916 (10th Cir. 1992), the Court considered the record, and denied the Defendant's Motion to Dismiss holding that the Defendants had failed to seek alternate, less severe sanctions for Plaintiff's failure to appear. See *Order of March 6, 1997*. Since that time, the Defendants have sought and obtained court orders compelling Plaintiff to appear for depositions on two separate occasions. Plaintiff, in disregard of those orders, again failed to appear for his deposition. Defendants again sought dismissal of the case on April 17, 1997 pursuant to Rule 37; however, the Plaintiff requested a three month stay which the Court granted.

#### Discussion

A court has the authority pursuant to Rule 37(b)(2) to impose a variety of sanctions for a party's failure to comply with discovery procedures. One of those authorized sanctions is dismissal of the action thereby rendering judgment by default. Rule 37(b)(2)(C). The Court notes that imposition of a default judgment is an extreme sanction, and should only be applied in cases of willful misconduct. *Meade v. Grubbs*, 841 F.2d 1512, 1520 (10th Cir. 1988). Additionally, a lesser sanction

will often prompt an appropriate response, and dismissal, which altogether defeats a litigant's access to court, should be used as "a weapon of last, rather than first, resort." *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920 (10th Cir. 1992) quoting *Meade*, 841 F.2d at 1520 n.6.

The Tenth Circuit in *Ehrenhaus* listed five factors which a court should consider prior to choosing dismissal as a sanction for noncompliance with the discovery process: (1) the degree of actual prejudice to the defendants; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions. *Ehrenhaus*, 965 F.2d at 921. In *Ehrenhaus*, the plaintiff repeatedly refused to testify during deposition citing attorney-client privilege. *Id.* at 918. After a conflict with the plaintiff, the plaintiff's attorney moved to withdraw from representation. *Id.* The judge in the case viewed the plaintiff's alleged conflict with his attorney as a delay tactic, and ordered the parties to hold the deposition in the federal courthouse so that the judge could immediately rule on any further privilege claims and warned the plaintiff's counsel that failure to attend might lead the defendants to file a motion to dismiss for failure to cooperate with discovery. *Ehrenhaus*, 965 F.2d at 919. The plaintiff moved to delay the deposition for five days in order to attend a business meeting out of state, but a magistrate denied the motion and warned the plaintiff that failure to appear would subject him to sanctions. *Id.* Despite two warnings, the plaintiff failed to appear at the deposition, and the judge issued an order to plaintiff to show cause why the court should not dismiss the suit. *Id.* After a good cause hearing was held, the suit was dismissed. *Id.* The Tenth Circuit upheld the dismissal concluding that the judge acted within his discretion. *Id.* at 921.

A careful reading of *Ehrenhaus* indicates that two factors were of particular significance to

the Tenth Circuit in affirming the dismissal: (1) the *Ehrenhaus* plaintiff was given two warnings regarding the possibility of sanctions; and (2) the Defendant acted in disregard of two court orders. These two factors were mentioned three different times in the Court's opinion as evidence of interference with judicial process, culpability of the plaintiff, and notice of the potential for dismissal. *Id.* Additionally, the Tenth Circuit did not find that the delay caused by the plaintiff's non-compliance caused significant prejudice to the defendant, and expressed concern that the district court did not fully consider the fifth factor, efficacy of lesser sanction.

After further consideration of the *Ehrenhaus* factors, the Court has determined that dismissal of the current claim is now warranted. The Court recognizes that the Defendants have sought the assistance of the Court in this matter on two occasions, and the Plaintiff has been adequately notified as to the potential for dismissal of his lawsuit. Additionally, the Court notes that the Defendants have been substantially prejudiced in their ability to defend this claim by Plaintiff's failure to appear for deposition. They have been unable to adhere to the Court's scheduling order and have been severely restricted in their ability to submit dispositive motions in this matter. Likewise, the Defendant's have incurred additional attorneys fees and costs by being forced to appear for new scheduling conferences, by having to file motions to compel Plaintiff's attendance and attending hearings on those motions, and by being forced to file a second motion to dismiss.

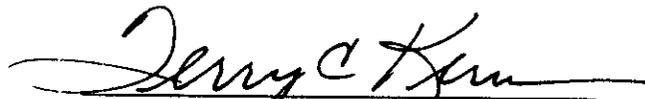
Plaintiff's failure to comply with discovery has also caused substantial interference with the judicial process as the Court has been forced to reschedule the trial of this matter on two occasions. Additionally, the Plaintiff has acted in violation of a two direct court orders to appear, thus flouting the Court's authority. Plaintiff was warned in the Court's stay order that if he had not resolved the outstanding warrant matter and remained a fugitive outside the state of Oklahoma by July 31, 1997,

his claim would be dismissed with prejudice. Despite this warning, Plaintiff has failed to appear, and the Court finds no grounds for further lenience.

Conclusion

For the foregoing reasons, Plaintiff's case is DISMISSED WITH PREJUDICE.

ORDERED this 20 day of August, 1997.

  
TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE

SEARCHED ON 8-21-97

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

METROPOLITAN LIFE INSURANCE, )  
COMPANY, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
ONETHA SCOTT, GODFREY GOFF, )  
SR., MATTHEW S. HENTON, a minor, )  
and BRANDON G. HENTON, a minor, )  
and GEOFFREY R. HENTON, father )  
and next friend of MATTHEW S. )  
HENTON AND BRANDON G. HENTON, )  
 )  
Defendants. )

No. 96-C-751-K

FILED

AUG 21 1997

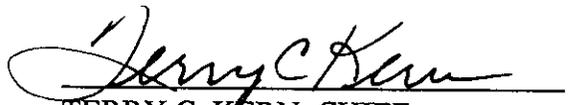
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

Before the Court is the motion of Plaintiff, Metropolitan Life Insurance Company ("Met Life") to sustain interpleader, and motion for dismissal and an award of attorney fees.

Finding no objections, and for good cause shown, Met Life's motion is granted. Met Life is hereby dismissed from this action, and will be awarded the reasonable costs and attorney fees.

IT IS SO ORDERED THIS 20 DAY OF AUGUST, 1997.

  
TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE

65

TEB/jo/8/7/97

ENTERED ON DOCKET

8-21-97

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

AUG 15 1997

PHOENIX ASSURANCE COMPANY )  
OF NEW YORK )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
WEBB BOATS, INC. AND RCB BANK, )  
 )  
Defendants. )

Case No. 96-C-00530-B / Phil Lombardi, Clerk  
U.S. DISTRICT COURT

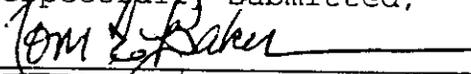
STIPULATION FOR ORDER OF DISMISSAL

COME NOW all parties to this action, through attorneys of record, and hereby stipulate that the Court can and should dismiss with prejudice all claims, counterclaims, and cross-claims filed within this action.

A resolution of all claims was reached after the parties participated in a formal Settlement Conference presided over by Magistrate Wagner.

Each party is to bear its own costs and attorney's fees and execute privately any other closing documents requested by the other.

Respectfully submitted,

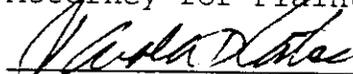


THOMAS E. BAKER

AND

RICHARD M. MOSHER

Attorney for Plaintiff



RONALD D. CATES

Attorney for Defendant

Webb Boats, Inc.



RICHARD D. MOSIER

Attorney for Defendant RCB  
Bank



REGISTERED ON BOOKS  
DATE 8-21-97

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

**FILED**

DOROTHY KEY, )  
SSN: 497-58-4007, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
JOHN CALLAHAN, Acting )  
Commissioner of the Social )  
Security Administration,<sup>1</sup> )  
 )  
Defendant. )

AUG 20 1997

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

Case No. 96-cv-475-K

**REPORT AND RECOMMENDATION**

Plaintiff, Dorothy Key, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.<sup>2</sup> This matter has been referred to the undersigned Magistrate Judge for Report and Recommendation.

The role of the Court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by

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<sup>1</sup> President Clinton appointed John J. Callahan to serve as Acting Commissioner of Social Security, effective March 1, 1997, to succeed Shirley S. Chater. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, John J. Callahan should be substituted, therefore, for Shirley S. Chater, as defendant in this suit. 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).

<sup>2</sup> Plaintiff filed an application for benefits on July 12, 1993 which was denied. No further action was taken on that claim. Plaintiff's March 18, 1994 (protective filing date: February 28, 1994) application for disability benefits was denied May 4, 1994. The denial was affirmed on reconsideration. A hearing before an Administrative Law Judge (ALJ) was held May 1, 1995. By decision dated May 26, 1995, the ALJ entered the findings which are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on April 24, 1996. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Secretary. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). The record of the proceedings has been meticulously reviewed by the Court.

Plaintiff claims inability to work since May 22, 1992 due to degenerative disc disease in the lumbar spine, vitiligo<sup>3</sup>, depression and pain derived from arthritis. [Plf's Brief, p. 2]. In his May 26, 1995 decision, the ALJ concluded that Plaintiff has severe impairments consisting of degenerative disc disease, arthritis, vitiligo and depression, and was unable to perform her past relevant work (PRW) as a cook in a school cafeteria. He determined, however, that she has the residual functional capacity (RFC) to perform the physical exertional and nonexertional requirements of light work except for lifting over 10 pounds frequently or 20 pounds occasionally,

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<sup>3</sup> Vitiligo is defined in *Dorland's Illustrated Medical Dictionary*, 28th Ed., Phil: W.B. Saunders Co., 1994, p. 1835 as: "a usually progressive, chronic pigmentary anomaly of the skin manifested by depigmented white patches that may be surrounded by a hyperpigmented border; it is associated with a dominantly inherited predisposition, and it has been speculated that autoimmune mechanisms are involved in the etiology."

work that requires complex or detailed work tasks, or work that requires overhead reaching with the left shoulder. He found, therefore, that Plaintiff is not disabled as defined by the Social Security Act.

Plaintiff has appealed the determination of the ALJ, alleging that the decision is not supported by substantial evidence; specifically, that the ALJ improperly rejected the reports of Plaintiff's treating physicians and that he failed to properly evaluate Plaintiff's subjective complaints of pain, depression and vitiligo.

#### Medical Evidence

Plaintiff's first complaints of back pain appear in the record in the September 1991 treatment records of Doug Cox, M.D., Plaintiff's general care practitioner. [R. 186]. X-ray of the lumbar spine on September 23, 1991 revealed "minimal anterior wedging of T12 thru L2 vertebrae" and "slight narrowing of the L4-5 disc." [R. 183]. Dr. Cox referred Plaintiff to Milton R. Workman, M.D., an orthopedic surgeon. [R. 184].

Dr. Workman's initial examination of Plaintiff on October 2, 1991, revealed normal range of motion and no abnormalities. [R. 209-210]. His impression was apparent functional low back and left upper extremity pain due to weakness and lack of exercise. He noted that chiropractic treatments were of no benefit. He asked her to stay off work for two weeks and to discontinue all activities that irritated her back. He instructed her in back care and exercises and recommended that she go for walks once a day. [R. 209-210]. At his follow-up examination of Plaintiff two weeks later, Dr. Workman noted that Plaintiff's complaints of pain were more definable. [R. 209].

He prescribed analgesics, muscle relaxants and anti-inflammatory medication. He also prescribed a light weight back support, stating: "If she is going to try and work I think she is going to need that." He wrote that Plaintiff's work on the serving line at the school and the lifting of her son were "implicated." [R. 209]. Plaintiff returned to work "in the middle of the line where she doesn't have to lift the heavy tray", and Dr. Workman noted on October 30, 1991, that the corset seemed to be helping but that her hips still hurt if she stood for a long time at work or sat for a long period of time. He warned her against increasing her activity level until after the tenderness decreased, "probably a minimum of 4 more weeks." [R. 209]. In November, Dr. Workman noted that Plaintiff was continuing to work and to improve but that the pain was about the same except when she wore the brace. [R. 208]. He advised her employer that Plaintiff could lift 5 to 10 pounds infrequently. In December 1991, Dr. Workman noted continued improvement. [R. 208]. Despite complaints of increased pain in the left arm and lower back during examinations in January and February 1992, Dr. Workman encouraged Plaintiff to continue working although, "she should rest when she is at home and not be too aggressive when she is at work." [R. 208]. On March 4, 1992, Dr. Workman stated that Plaintiff was "definitely better" and had worked a whole month without any big problems. [R. 208]. He told her that she "mustn't discontinue her back brace in a hurry especially at work" and that there was a possibility that the symptoms will return. He assured her that he would continue her prescription for Feldene over the next year. [R. 208]. Dr. Workman reported to Hertz Claim Management Corporation on March 20, 1992, that he had prescribed the

dorsolumbar support for Plaintiff to help ease the strain caused by leaning over many hours each day while working on a serving line at school. [R. 207]. He stated that Mrs. Key did improve, that the brace decreased her symptoms and allowed the other modalities of treatment to be more effective. [R. 207].

On March 3, 1992, Plaintiff began seeing Darrel K. Mease, M.D. [R. 310-313]. After checking Plaintiff's medical records, Dr. Mease continued her prescriptions of Feldene and Nsaid. [R. 275, 309]. Dr. Mease treated Plaintiff over the next two and one-half years for various general complaints, including upper respiratory problems, vaginitis, breast pain, chest wall pain, insomnia and back pain. [R. 262-308]. On March 22, 1994, Dr. Mease diagnosed depression and started Plaintiff on Prozac. [R. 265].

In the meantime, Plaintiff had been examined by two different doctors for the Disability Determination Unit, Beau C. Jennings, D.O. and David B. Dean, M.D. Dr. Jennings, who examined Plaintiff on September 9, 1992, found few hypopigmented lesions, all ranges of motion full, no joint swelling, good grip strength, full lumbar spine range of motion and negative straight leg raising. [R. 202-203]. He assessed chronic headaches, chronic lumbar pain and status post thrombophlebitis by history. Dr. Dean, who examined Plaintiff on September 1, 1993, reported mild limitation of range of motion of the lumbosacral spine but no motor, sensory or reflex deficit. He diagnosed vitiligo, osteoarthropathy and chest wall pain syndrome. [R. 254-260].

Dr. Mease referred Plaintiff to Robert McArthur, M.D., who first saw her on October 19, 1993. [R. 321-322]. Plaintiff's complaints at that time were chronic

vaginal infections, blurred vision and headaches, trouble with sun sensitivity with headaches and weakness, extreme fatigue, history of deep venous thrombosis, left shoulder joint pain and fairly severe muscle spasm in her low back. Dr. McArthur's physical examination of Plaintiff revealed lower thoracic area tenderness, midline lumbar region tenderness, fairly full forward flexion of the low back, some limitation of extension and lateral movement. He prescribed Relafen and planned to conduct lab tests and order x-rays. On December 7, 1993, Dr. McArthur wrote Dr. Mease a letter, stating that he had initially evaluated Plaintiff for immune deficiency, lupus or other type of arthritic process. [R. 318]. He stated he had found no evidence of lupus or significant immune deficiency. He stated that Plaintiff does have some degenerative arthritis at L5, S1 and some mild to moderate inflammatory arthritis, fairly diffuse especially involving the shoulders. He reported that she had some benefit with Relafen and Parafon Forte. *Id.*

Dr. McArthur's office notes of December 7, 1993 contain the results of the lab work and a report that the x-rays revealed degenerative disk disease at L5, S1. [R. 319]. The left shoulder x-rays were normal. Dr. McArthur advised Plaintiff to see a dermatologist with her concerns about vitiligo but he did not think there was any association with that condition and the other symptoms. He urged her to check with a gynecologist regarding vaginal infections. He noted that she had some tenderness all the way up and down the spine and paraspinous muscles. He told her that she probably has inflammatory polyarthritis and that she does have degenerative disk disease in the lumbosacral spine. Dr. McArthur decided the best approach would be

to increase the Relafen and take Parafon Forte as needed. *Id.*

At the follow-up examination by Dr. McArthur three months later, Plaintiff reported that the Relafen helped her joint pain "quite a lot" but that she had pain in her back after riding in the car for a while. [R. 317]. Physical examination revealed tenderness down the lumbosacral spine in the mid line and some over in the sacroiliac joints. Forward flexion of the back was "only about 40 degrees" and extension and lateral movements very limited. Dr. McArthur stated that degenerative arthritis of the lumbosacral spine "seems to be the major problem." Overall, she seemed to be doing some better with the Relafen. He advised her to continue exercises and planned to see her again in about six months. *Id.*

On April 19, 1994, Dr. McArthur reported to the Disability Determination Unit that Plaintiff has degenerative arthritis of the low lumbosacral spine, which was her predominant symptom, that this diagnosis had been confirmed by x-ray and that she had benefited some with muscle relaxation and medication. [R. 316]. He wrote that work-related activity such as sitting, standing, walking, weight lifting that requires bending over, or carrying objects requiring bending over, would be quite difficult and painful for her and would likely exacerbate symptoms. He did not expect any significant change in the future. He also suspected some component of inflammatory type peripheral polyarthritis. He stated that, while the x-ray of the left shoulder area was normal, Plaintiff had significant left shoulder pain and he suspected significant arthritis there. [R. 316]. Dr. McArthur's July 13, 1994 letter to the Disability Determination Unit reported that he had not seen Plaintiff since March 30, 1994 and

that he had nothing further to add to his previous letter. [R. 315].

Plaintiff was examined by Herndon A. Snider, Ph.D. for a psychological evaluation on August 1, 1994. [R. 324-327]. He estimated Plaintiff's intellectual level to be in the low normal to normal range and commented that the increase in her depressive feelings parallel increased problems of physical complaints and difficulties performing every day tasks. His diagnosis was: Major Depressive Disorder, Single Episode, Moderate with the level of recent stressors as moderate and Global Assessment of Function at 55.

On October 26, 1994, Dr. McArthur again examined Plaintiff. [R. 334]. He reported persistent and worsening pain in the low back with radiation down the right lower extremity. Plaintiff was tender in the S1 joints and midline lumbar spine and her forward flexion had decreased to "about 30 degrees, extension painful to about 15 degrees." He expressed concern that Plaintiff may have a herniated disc and ordered an MRI. *Id.* The MRI showed no evidence of herniation but confirmed dessiccation of disc material at L4-L5 as well as L5-S1 with an irregular appearance to the surface of the disc and vertebral bodies at L5-S1. [R. 335].

On March 7, 1995, Dr. McArthur filled out and signed a Residual Functional Capacity Questionnaire for Dorothy Key. [R. 336-339]. He limited her to sitting 1 hour, standing 1 hour and walking 0 hours in an 8-hour work day, with a full capacity of 2 hours of work in an 8-hour work day. He assessed a lifting limitation of up to 10 lbs., due to back pain, and limited her ability to carry up to 10 lbs. occasionally. He marked Plaintiff as able to use her hands for simple grasping and fine manipulation

but unable to use them for pushing and pulling and unable to use her feet for repetitive movements. Those limitations were also due to back pain. He limited her ability to bend, squat, crawl, climb, stoop, crouch and kneel to "never", due to arthritis in her lower back, but able to reach above "occasionally". He also checked "never" on Plaintiff's ability to tolerate exposure to unprotected heights, being around moving machinery, exposure to marked temperature changes, driving automotive equipment and he marked "occasionally" on exposure to dust, fumes, gases and noise. Objective signs of pain were x-ray and limited range of motion of low back. He checked the level of pain as "moderate" and remarked: "MRI of the lumbosacral spine shows degenerative disc disease at L4, L5 and L5-S1. This causes significant pain and limited range of motion of her low back precluding any ability to work an eight hour work day as described above." *Id.*

#### The ALJ's Decision

The ALJ concluded that Plaintiff has severe impairment consisting of degenerative disc disease, arthritis, vitiligo and depression and decided that Plaintiff could not return to her previous relevant work as a cook in a school cafeteria. [R. 27]. He determined, however, that Plaintiff has the residual functional capacity to perform light work reduced by inability to perform work that requires working outside or in temperature extremes, work that requires complex or detailed work tasks or work that requires overhead reaching with the left shoulder.

#### Plaintiff's Treating Physician's Report

Plaintiff's first allegation of error is that the ALJ improperly disregarded the

findings of her treating physicians.

The ALJ rejected the March 7, 1995 RFC Assessment of Dr. McArthur, stating:

Dr. McArthur stated that he had based his opinion on X-ray evidence and limited range of motion of the claimant's spine. There is no doubt that the claimant has arthritis in her spine. However, based on the record as a whole, Dr. McArthur's restrictions are surely overstated. Even the claimant, in describing her own capacity during the hearing, did not consider herself to be as limited as Dr. McArthur's report would suggest.

[R. 25]. The ALJ's rejection of Dr. McArthur's RFC Questionnaire, which is a form filled out almost five months after his final physical examination and treatment of Plaintiff, is not unreasonable. The form is short, conclusory and obviously at odds with the daily activities reported by Plaintiff in her testimony. A treating physician's opinion may be rejected if it is brief, conclusory and unsupported by medical evidence. Good cause must be given for rejecting the treating physician's views and, if the opinion of the claimant's physician is to be disregarded, specific, legitimate reasons for rejection of the opinion must be set forth by the ALJ, *Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987); *Byron v. Heckler*, 742 F.2d 1232, (10th Cir. 1984). The rationale expressed by the ALJ for rejecting the restrictions in the RFC Questionnaire filled out by Dr. McArthur on March 7, 1995 is sound.

This was the only report by any of Plaintiff's treating physicians that the ALJ outright "rejected." His finding that Plaintiff cannot return to her past relevant work as a cook in a school cafeteria and in determining Plaintiff's residual functional capacity as less than a full range of light work reflects that he considered and

weighed all the remaining evidence in the record. His discussion of the objective medical findings, reports and records of all of Plaintiff's treating and examining physicians indicates that the ALJ reviewed and evaluated all the medical evidence. That the ALJ relied upon the objective medical evidence of vitiligo in the record is evidenced by his inclusion of outside work activities as an exception to Plaintiff's RFC for light work. The Court finds that the ALJ did not improperly reject the reports and records of Plaintiff's treating physicians.

#### Evaluation of the evidence

Plaintiff's second allegation of error is that the ALJ did not correctly evaluate Plaintiff's subjective complaints of pain and other non-exertional impairments. After review of the record and the ALJ's decision, the Court finds this allegation without merit.

The vast majority of Plaintiff's arguments go to the weight of the evidence. Plaintiff argues the strength of the evidence in her favor, recounts her subjective complaints of pain, depression and vitiligo-related restrictions and seeks to overturn the ALJ's credibility determination. She is, essentially, urging the Court to reweigh the evidence. This, the Court cannot do. *Hargis v. Sullivan*, 945 F.2d 1482, 1482 (10th Cir. 1991).

When a social security case comes before a district court, the court's review is limited to a determination of whether the record as a whole contains substantial evidence to support the agency's decision, and whether the agency applied the proper legal standards. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d

1495, 1501 (10th Cir. 1992). Substantial evidence, while something less than the weight of the evidence, is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if different conclusions also might be supported by the evidence. *Kenworthy v. Conoco, Inc.*, 979 F.2d 1462, 1467 (10th Cir. 1992) citing *Gibraltar Sav. v. Ldbrinkman Corp.*, 860 F.2d 1275, 1297 (5th Cir. 1988), cert. denied, 490 U.S. 1091, 109 S.Ct. 2432, 104 L.Ed. 2d 988 (1989). This Court's limited scope of review precludes the reweighing of the evidence or substituting its judgment for that of the Commissioner. *Hargis*, p. 1486. As long as substantial evidence supports the ALJ's determination, the Commissioner's decision stands. *Hamilton*, p. 1500. If the Commissioner's decision denying Social Security disability benefits is supported by substantial evidence, the decision must be affirmed. *Casias v. Secretary of Health & Human Services*, 933 F.2d 799 (10th Cir. 1991).

In applying the above standards, the Court finds that the ALJ's determination was based on the record as a whole, including the records and reports of Plaintiff's other treating physicians and the testimony of Plaintiff who, in describing her own capabilities, such as sitting in church every Sunday, sitting and watching television, cooking, cleaning, laundry, needlepoint and taking evening walks, did not consider herself to be as limited as Dr. McArthur had set forth. While evidence that a claimant engages in limited activities may not establish her ability to work, it may be considered, along with other relevant evidence, in considering entitlement to benefits. *Gossett v. Bowen*, 862 F.2d 802, 807 (10th Cir. 1988).

The ALJ's conclusion that Plaintiff's physical condition could reasonably

produce pain, but not to the extent alleged by Plaintiff, is supported by substantial evidence and properly discussed in his decision. Likewise, substantial evidence supporting the ALJ's determination of Plaintiff's mental limitations, is found in the record, along with support for the credibility determination. Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence. *Diaz v. Secretary of Health and Human Services*, 898 F.2d 774 (10th Cir. 1989); *Hamilton*, p. 1499.

Conclusion

The Court finds that the record contains substantial evidence to support the ALJ's decision and RECOMMENDS that the decision of the Commissioner finding Plaintiff not disabled, be AFFIRMED.

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

Dated this 20<sup>th</sup> day of AUG., 1997.

  
FRANK H. MCCARTHY  
UNITED STATES MAGISTRATE JUDGE

RECORDED ON DOCKET

8-21-97

FILED

AUG 20 1997

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

IN THE UNITED DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

HOWARD ABRAMS, et al  
Plaintiffs,

vs.

HOME OF HOPE, INC.  
Defendant.

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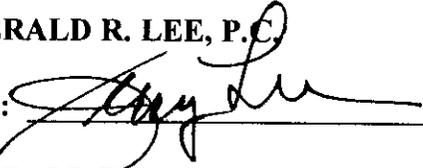
Case No.: 96-CV-1042H

DISMISSALL WITHOUT PREJUDICE

Comes now, Richard Stepp, by and through his attorney, Gerald R. Lee, and hereby enters this Dismissal Without Prejudice.

GERALD R. LEE, P.C.

BY:



GERALD R. LEE, OBA # 5335  
ATTORNEY AT LAW  
117 SOUTH ADAIR  
POST OFFICE BOX 1101  
PRYOR, OK 74362  
918-825-2233  
ATTORNEY FOR PLAINTIFF

CERTIFICATE OF MAILING

I, Gerald R. Lee, do hereby certify that on the 19<sup>th</sup> day of August 1997, I placed in the U.S. mail a true and correct copy of the foregoing Dismissal Without Prejudice with postage fully prepaid to the following address:

Brian Dittrich  
Oneok Plaza  
100 West 5<sup>th</sup> Street, Suite 808  
Tulsa, OK 74103-4225

  
GERALD R. LEE



SECRET  
8-21-97  
FILED

IN THE UNITED DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

AUG 20 1997

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

HOWARD ABRAMS, et al  
Plaintiffs,

vs.

HOME OF HOPE, INC.  
Defendant.

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Case No.: 96-CV-1042H

DISMISSAL WITHOUT PREJUDICE

Comes now, Betty Hamilton, by and through her attorney, Gerald R. Lee, and hereby enters this Dismissal Without Prejudice.

GERALD R. LEE, P.C.

BY: Gerald Lee

GERALD R. LEE, OBA # 5335  
ATTORNEY AT LAW  
117 SOUTH ADAIR  
POST OFFICE BOX 1101  
PRYOR, OK 74362  
918-825-2233  
ATTORNEY FOR PLAINTIFF

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Gerald Lee  
GERALD R. LEE

RECEIVED BY CLERK

8-21-97

FILED

AUG 20 1997

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

IN THE UNITED DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

HOWARD ABRAMS, et al  
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vs.

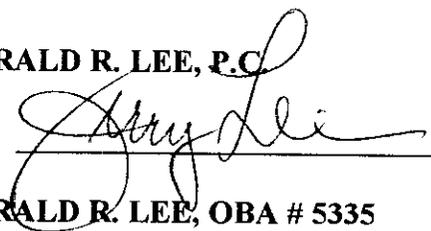
HOME OF HOPE, INC.  
Defendant.

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Case No.: 96-CV-1042H

DISMISSALL WITHOUT PREJUDICE

Comes now, Beverly Forrester, by and through her attorney, Gerald R. Lee, and hereby enters this Dismissal Without Prejudice.

GERALD R. LEE, P.C.  
BY: 

GERALD R. LEE, OBA # 5335  
ATTORNEY AT LAW  
117 SOUTH ADAIR  
POST OFFICE BOX 1101  
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918-825-2233  
ATTORNEY FOR PLAINTIFF

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GERALD R. LEE

RECEIVED ON DOCKET

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Phil Lombardi, Clerk  
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NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED DISTRICT COURT  
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HOWARD ABRAMS, et al  
Plaintiffs,

vs.

HOME OF HOPE, INC.  
Defendant.

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Case No.: 96-CV-1042H

DISMISSALL WITHOUT PREJUDICE

Comes now, John Ball, by and through his attorney, Gerald R. Lee, and hereby enters this Dismissal Without Prejudice.

GERALD R. LEE, P.C.  
BY: 

GERALD R. LEE, OBA # 5335  
ATTORNEY AT LAW  
117 SOUTH ADAIR  
POST OFFICE BOX 1101  
PRYOR, OK 74362  
918-825-2233  
ATTORNEY FOR PLAINTIFF

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GERALD R. LEE

8-21-97

IN THE UNITED DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

FILED

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Phil Lombardi, Clerk  
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HOWARD ABRAMS, et al  
Plaintiffs,

vs.

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Defendant.

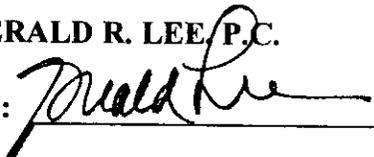
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Case No.: 96-CV-1042H

DISMISSALL WITHOUT PREJUDICE

Comes now, Cathryn Ball, by and through her attorney, Gerald R. Lee, and hereby enters this Dismissal Without Prejudice.

GERALD R. LEE P.C.

BY: 

GERALD R. LEE, OBA # 5335  
ATTORNEY AT LAW  
117 SOUTH ADAIR  
POST OFFICE BOX 1101  
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Brian Dittrich  
Oneok Plaza  
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FILED ON DECKET  
8-21-97

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

FILED

AUG 20 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DEBBIE A. COLLINS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 HALCYON COMMUNICATIONS, INC., )  
 )  
 Defendant. )

Case No. 96 CV 579K

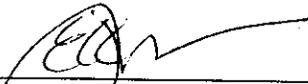
STIPULATION FOR DISMISSAL WITH PREJUDICE

Debbie A. Collins, Plaintiff, and Halcyon Communications, Inc., Defendant, hereby stipulate that the above-entitled action should be dismissed with prejudice without cost to either party.

Dated August 19, 1997.

Respectfully submitted,

ARMSTRONG, NIX & LOWE

By   
Jeff Nix

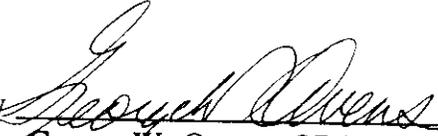
ATTORNEY FOR PLAINTIFF

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slj

THE OWENS LAW FIRM, P.C.

By

  
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