

4. Nordam's employee handbook contains the requirement of a probationary "period of at least six (6) months" for new employees.

5. On January 28, 1991, during her probationary period, Plaintiff received a verbal warning for work quality and production deficiencies.

6. On March 7, 1991, during her probationary period, Plaintiff received a second warning, this time a formal written warning, again for work quality deficiencies.

7. Plaintiff does not know of any evidence that would lead her to believe these warnings were racially discriminatory.

8. At the end of her probationary period on April 29, 1991, Plaintiff did not receive a pay raise but was retained in her position by Nordam.

9. Other than the fact that she is black, and her allegation that she knows three other white Nordam employees who were given raises at the end of their respective probationary periods, Plaintiff has no evidence that the failure to give Plaintiff a raise at the end of her probationary period was racially motivated.

10. On July 18, 1991, Plaintiff wrote to Nordam's CEO about a number of issues including:

- a. an allegation that she had "locked horns" with her supervisor over various job-related issues;
- b. there was too much insurance claim work at the East Tulsa Plant for one person;
- c. she had complained to the Human Resources department about her job-related problems, including a "rude and obnoxious" co-worker, Cindy Smith, and that Human Resources had not adequately addressed the complaints.

In July, 1991, Ms. Smith made a racially-motivated offensive remark to Plaintiff.

11. On September 24, 1991, Steve Andrew, Glynda Starkey, and Debra Shewmake from Human Resources met with Plaintiff. Plaintiff was advised at the September 24, 1991 meeting that she would not ever have to work with Ms. Smith and that she was to receive a pay

raise retroactive to April 29, 1991, which had been withheld at the conclusion of her six (6) month probationary period.

12. Plaintiff never worked with Ms. Smith again.

13. Other than the racially-motivated offensive remark by Ms. Smith in July, 1991, no other racial remark was made to Plaintiff while she worked at Nordam.

14. In addition to the September 5, 1991 raise, retroactive to April 29, 1991, on October 28, 1991, Plaintiff received an annual increase in hourly pay.

15. On January 8, 1992, Plaintiff was moved to a downtown facility of Nordam, retaining the same title, wage, supervisor, and duties.

16. Glynda Starkey videotaped Plaintiff's wedding for Plaintiff in 1992, without compensation, and Plaintiff received a copy of such videotape.

17. On Friday, July 23, 1993, Plaintiff suffered an on-the-job injury requiring medical attention.

18. A State of Oklahoma Workers' Compensation Form 2, prepared by Plaintiff's supervisor, Glynda Starkey, was filed on July 26, 1993.

19. On one occasion, Glynda Starkey drove Plaintiff home from work early after Plaintiff could not continue to work due to a headache.

20. Plaintiff was unable to work from August 23, 1993 until September 7, 1993 due to these headaches and received her doctor's excuse for such period.

21. As of September 1, 1993 Plaintiff "had improved significantly with less headache and neck pain."

22. A September 27, 1993 letter from Dr. Park indicated no "disability neurologically" and no permanent disability.

23. Plaintiff, by her attorney, filed an Employee's First Notice of Accidental Injury and Claim for Compensation with the Workers' Compensation Court on September 27, 1993.

24. On October 13, 1993 Human Resources Manager, Debra Shewmake, and Plaintiff's supervisor, Glynda Starkey, and Steve Andrew tried to meet with Plaintiff.

25. On October 14, 1993, Debra Shewmake was unavailable to meet with Plaintiff, so Steve Andrew, an attorney representing Nordam on labor and employment law matters, assumed Ms. Shewmake's responsibilities in this respect.

26. On October 14, 1993, Steve Andrew and Glynda Starkey met with Plaintiff. Plaintiff was advised by Steve Andrew that Nordam was placing her on six (6) months probation.

27. Plaintiff was provided a copy of a memorandum dated October 13, 1993 setting forth the probation requirements and Plaintiff's alleged job performance deficiencies. Plaintiff did not remain at the meeting. Before leaving, she was advised that if she left, she could consider herself terminated as an employee of Nordam. The facts as to what occurred during the meeting are in dispute.

28. Plaintiff's employment at Nordam terminated as of October 14, 1993.

29. The Chief Executive Officer of Nordam never refused to help Plaintiff and never failed to address any problem Plaintiff brought to him, including securing a \$500.00 bank loan for Plaintiff in a time of need.

30. On March 29, 1994, Plaintiff filed a Charge of Discrimination with the Oklahoma Human Rights Commission and the EEOC.

31. Plaintiff received a Notice of Right to Sue from the EEOC on July 31, 1996.

II

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Widon Third Oil & Gas Drilling Partnership v. Federal Deposit Ins. Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

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

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

III

A

In its brief, Defendant argues that there is no factual basis for Plaintiff's claim of racial discrimination and thus Defendant is entitled to judgment as a matter of law. In her brief and at the hearing, Plaintiff identified four items in the record that she believes support her claim and preclude summary judgment at this time. Those items are:

- 1) In 1991, Ms. Smith, an employee of Nordam, made a racially-motivated offensive remark to Plaintiff;
- 2) Plaintiff's tardiness record maintained by Nordam must have been fabricated because it appears to be so dismal that, if accurate, she would have been discharged;
- 3) At the meeting between Plaintiff and certain Nordam employees on October 14, 1993, Plaintiff was told that if she left she would be discharged; and
- 4) Plaintiff did not receive a raise at the end of her probationary period when three white employees received raises at the end of their respective probationary periods.

Based upon a careful review of the record, the Court finds that the four facts and allegations identified by Plaintiff are insufficient to defeat Defendant's motion. Each item will be addressed in turn.

- 1) The facts do not in any way connect the racially-motivated offensive remark by Ms. Smith in 1991 to Plaintiff's termination in 1993. In fact, Ms. Smith was transferred following the remark and never again worked with Plaintiff; Ms. Smith was not her supervisor; and she was not involved in any way with Plaintiff's termination.

- 2) Plaintiff's tardiness record is uncontroverted. Plaintiff's bare assertion that her record could not be this poor is unsupported by any facts and therefore must be rejected. Furthermore, assuming arguendo that the tardiness record was inaccurate, there is nothing in the record to establish that such inaccuracy is attributable to racial discrimination.
- 3) The facts do not establish, or even suggest, that there was racially-motivated animus at the meeting on October 14, 1993. This Court simply rejects the sweeping argument that if an employer is "mad as hell" (in the words of Plaintiff) at an employee who happens to be black, that anger must be racially-motivated. To accept this assertion would be to create two standards in the workplace: one for dealing with white employees, and another for dealing with black employees. This result would stand the statute on its head. The purpose of Title VII is to ensure that employers maintain a single standard for dealing with employees in the workplace, applicable equally and without regard to race or color, religion, gender, or national origin or reprisal. The record does not indicate that anything other than a single standard, unrelated to race, was applied by Nordam at the October meeting. Accordingly, there is no support for a claim of racial discrimination arising out of Defendant's conduct at the meeting on October 14, 1993.
- 4) Plaintiff did not receive a pay raise following her probationary period. She asserts, and the Court accepts as true, that certain white employees did receive pay raises at the end of their respective probationary periods. What is lacking, however, are any facts to support the claim that Plaintiff was treated differently from any white employees with similar work records

during their respective probationary periods. It is uncontroverted that Plaintiff had various work problems during her probationary period; but the record is silent on the work performance of any white employee. Thus, there is nothing in the record to support a claim of disparate treatment in this case.

The response by Plaintiff does not controvert the material facts recited above, which form the record in this case. Based on this record, the claim that Defendant discriminated against Plaintiff on the basis of race fails as a matter of law. Summary judgment on Plaintiff's claim of racial discrimination under Title VII is hereby granted.

B

Plaintiff's second claim for relief alleges that Ms. Morrison's termination was due to the exercise of her rights under the Oklahoma Workers' Compensation Act, in violation of Oklahoma law.

Defendant contends that summary judgment is appropriate because Plaintiff has failed to prove a prima facie case under Oklahoma law. According to Defendant, Plaintiff's sole basis for her claim of retaliation is that she was terminated from her job shortly after she filed a workers' compensation claim. In response, Plaintiff contends that the following evidence is sufficient to defeat summary judgment: that she retained a lawyer to assist her in her claim for workers' compensation; that her lawyer had some interaction with Defendant; that Steve Andrew informed her at the October 14, 1993 meeting that he and Nordam's CEO were "mad as hell" at her; and she was subsequently terminated.

In support of this contention, Plaintiff submitted a transcript of her own testimony before the Oklahoma Employment Security Commission ("OESC") regarding her termination. In part, such testimony, which the Court accepts as true for purposes of this motion, describes the events at the October 14, 1993 meeting. The transcript, in relevant part, provides:

[w]hen we when I walked in uh Glenda Starkey was sitting. Mr. Andrew was on the other side of the table and he was pacing back and forth and had his hand behind his back and he was staring up at the ceiling and just pacing. And uh he asked me uh how I was doing and I said fine. And uh he asked me did I know why I was there and I said no. Uh so he said, well I'm gonna tell you. And prec [sic] proceeded to tell me, he said but first I want you to know that Mr. Siegfried is mad as hell at you. And so am I. And so is Deb Shewmake. Well I'm I asked him I said well Mr. Siegfried has my number, why hasn't he called if he's this ..inaudible.. you know, and he said well that's why I'm here. And uh, told me that he had heard some things and I said, well what things. He says, you know, never you mind and so then I just wanted to cut to the chase, I said wait a minute, I said Steve does this have anything to do with my worker's comp case. I said because if it does, I'd like to call David Garrett, he was the attorney that I had retained for my worker's comp. injury. And he said no and uh then he uh started I I I the word I can't think of the word I want to use but it was you know, very insulting tone and manner, and very belligerent telling me that I owe Nordam so much and Nordam had been really good to me and was this my way of thanking Nordam and then he uh had this paper here [the October 13, 1993 memorandum outlining Plaintiff's performance problems referenced herein at ¶ 27 above] and he just kind a like pushed it across the table at me. And the first thing that caught my eye was this this the purpose of this letter is to inform you that effective immediately and until the next six months uh your employment relationship with Nordam will be on probation and so I said, probation, you know, what are you talking about? And uh he just he didn't read this word for word, he verbatim went through each one of these and uh then he start you know, and while he was going through this he had his he had set [sic] down by that time and had his elbow on the table and he was just a shaking his finger at me. And I told him I said look uh you not gonna I'm not gonna allow you to threaten me. It's not gonna work, now if you want to talk to me we can talk, but I'm I I don't I will not have you threaten me or making me feel afraid and that was the tone of voice that he was using. That was the manner in which he was delivering all of this to me and ..inaudible.. threatening uh manner.

Q: Did you raise your voice?

No I didn't, I didn't raise my voice at all but I did I was very insistent that I did not have to be spoken to in the manner that I was spoken to you know, and uh I asked him, I said, uh you know, I said, well if I am such a bad employee, why did you all wait till 2 months after I retained an attorney. You know, to decide to put me on probation and I kept telling him I said, you know, I said this has to do with my worker's comp. And he's like no and he was just going on and on and on and the jest [sic] of the conversation I don't you know, I don't remember and so at that point in time, I said, look I don't I'm not I don't have to take this .. inaudible.. you know, have talk to me like this, I don't have to sit here and have you shake your finger at me, if you want to talk, you know, then we'll talk. Ok and so I and I stood up and I said I do not have to take this type of harassment from you.

* * *

And and I stood up, and when I stood up I hadn't gotten ready to leave because he told me, he says, well you know what and he slammed this pad thing he had down

on the table. He says you what Willa, he said then I'll tell you what, he says, you go down stairs right now and you get your things together because your services are no longer required at Nordam.

Plaintiff's Exhibit C at 14-15.

Under Oklahoma law, a Plaintiff is required to prove the following elements to demonstrate a prima facie case under Okla. Stat. tit. 85, § 5: (1) Plaintiff was employed; (2) Plaintiff sustained an injury at work; (3) Plaintiff received medical treatment putting the employer on notice or the good-faith commencement of workers' compensation proceedings; and (4) consequent termination of employment. Buckner v. General Motors Corp., 760 P.2d 803, 806 (Okla. 1988). The final element requires Plaintiff to produce evidence that gives rise to an inference that her termination was "significantly motivated" by retaliation for filing the claim. Wallace v. Halliburton Co., 850 P.2d 1056, 1058 (Okla. 1993).

It is settled law that self-serving statements containing conclusory allegations without specific supporting facts lack probative value. See Thomas v. Int'l Business Mach., 48 F.3d 478, 485 (10th Cir. 1995). Self-serving testimony, without more, cannot form the basis of a successful defense against summary judgment. See Murray v. City of Sapulpa, 45 F.3d 1417, 1422 (10th Cir. 1995) ("To survive summary judgment, 'nonmovant's affidavits must be based on personal knowledge and set forth facts that would be admissible into evidence; conclusory and self-serving affidavits are not sufficient.'"). Applying these principles to the record in this case, Plaintiff's claim fails on the fourth element articulated in Buckner. Even accepting as true Plaintiff's account of what transpired at the October 14, 1993 meeting between her, Ms. Starkey, and Mr. Andrew, Plaintiff never alleges that anyone at Nordam mentioned her workers' compensation claim as a basis for her termination. See Plaintiff's Exhibit C at 14-16. Plaintiff offers nothing more than the fact that she was told that some at Nordam were mad at her, and the fact that she was terminated. Even assuming that some persons at Nordam were angry with Plaintiff, there is nothing to controvert Defendant's evidence that such anger was attributable to Plaintiff's alleged inadequate

job performance, and, more specifically, to those items enumerated in the memorandum dated October 13, 1993 which was provided to Plaintiff at the meeting on October 14. Under these circumstances, Plaintiff's state claim must fail.

For the reasons set forth above, Defendant's motion for summary judgment is hereby granted.

IT IS SO ORDERED.

This 9TH day of September, 1997.



Sven Erik Holmes
United States District Judge

ENTERED ON DOCKET

DATE

9-10-97

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

FILED

SEP 10 1997

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

MARKIE K. GARNER, in person and for
all persons similarly situated,

Plaintiff,

vs.

MAYES COUNTY JAIL, et al.,

Defendants.

Case No.96-CV-91-K

REPORT AND RECOMMENDATION

Plaintiff, Markie K. Garner's, EMERGENCY REQUEST FOR A PRELIMINARY INJUNCTION AGAINST OKLAHOMA DEPARTMENT OF CORRECTIONS [Dkt. 48] is before the undersigned United States Magistrate Judge for report and recommendation. The Court RECOMMENDS that Plaintiff's request be DENIED.

Mr. Garner requested a order directing the Department of Corrections to transfer him back to Joseph Harp Correctional Center (JHCC) and to direct officials at JHCC to permit him to make the photocopies necessary for further prosecution of this case. Subsequently, the Court received correspondence indicating that Garner was back at JHCC. The Court directed Garner to inform the Court whether his motion was moot. [Dkt. 50]. Mr. Garner's response [Dkt. 53] verified that he was back at JHCC. However, he outlined a number of complaints related to his incarceration there, including access to research materials.

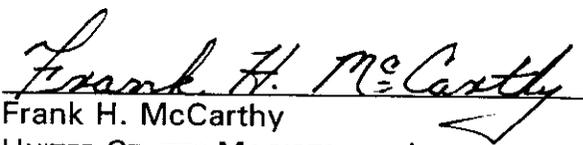
Since the Court has appointed counsel for Mr. Garner, [Dkt. 65], actions taken by the Oklahoma Department of Corrections will have no effect on the prosecution

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of his case. Furthermore, the present lawsuit is a civil rights action concerning conditions at the Mayes County Jail. Mr. Garner's request for an injunction addresses actions taken by persons who are not parties to this lawsuit and not connected to the events at issue herein. Mr. Garner's complaints against the Oklahoma Department of Corrections are not appropriately brought in the context of this lawsuit. Fed.R.Civ.P. 65(d)(injunctions are binding only upon parties to an action, their officers, agents, servants, employees, and attorneys, and upon those in active concert or participation with them who receive actual notice of the order). Accordingly MR. GARNER'S REQUEST FOR INJUNCTIVE RELIEF [DKT. 48] SHOULD BE DENIED.

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

DATED this 10th day of September, 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

SEP 09 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JACQUELINE CARSON,)
)
 Plaintiff,)
)
 -vs-)
)
 ALLIED BOND & COLLECTION)
 AGENCY, INC., A Delaware)
 Corporation,)
)
 Defendants.)

Case No. 97-CV-0075-H /

RELEASE AND SATISFACTION OF JUDGMENT

COMES NOW Plaintiff, JACQUELINE CARSON, and acknowledges her approval of a settlement and release agreement entered into by Plaintiff and Defendant, and hereby releases, acquits, and forever discharges Defendant of and from any liability to and demand of the Plaintiff in respect to all causes herein.

Respectfully submitted,

JACQUELINE CARSON, Plaintiff

By:



David J. Praska, O.B.A. #016770
LAW OFFICES OF KORT A. BESORE
10 East 13th Street
P.O. Box 450939
Grove, Oklahoma 74345-0939
Telephone: (918) 786-6002

ATTORNEYS FOR PLAINTIFF

JA

ENTERED ON DOCKET

DATE 9-10-97

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

FILED

SEP - 9 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-1153K

MACHINERY RESOURCES, INC.,
an Oklahoma corporation,

Plaintiff,

vs.

CON-WAY TRANSPORTATION SERVICES,
INC., d/b/a CON-WAY SOUTHERN
EXPRESS, a Foreign corporation,

Defendant.

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Machinery Resources, Inc., and Defendant, Con-Way Transportation Services, Inc., d/b/a Con-Way Southern Express, and file this Stipulation of Dismissal With Prejudice pursuant to Rule 41(a). Each party will bear its own costs and attorney fees.

Respectfully submitted,

[Handwritten signature]

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[Handwritten signature]

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ATTORNEY FOR DEFENDANT CON-WAY TRANSPORTATION SERVICES, INC. D/B/A CON-WAY SOUTHERN EXPRESS

AC

CT

ENTERED ON DOCKET

DATE 9-10-97

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

F I L E D

SEP 09 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN D. THARP

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

No. 96-CV-1020-K ✓

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised that the parties to this action have reached an agreement in the above-captioned matter, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to N.D. LR 41.0.

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

ORDERED this 5 day of September, 1997.



TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ALICE KING and ERWIN KING,)
husband and wife,)
)
Plaintiffs,)
)
vs.)
)
ACCESS AMERICA, INC., a Delaware)
corporation; WORLD ACCESS SERVICE)
CORP., a Virginia corporation; BCS)
INSURANCE COMPANY, an Illinois)
corporation; and BCBS INSURANCE)
COMPANY, an Illinois corporation,)
)
Defendants.)

ENTERED ON DOCKET

DATE SEP 10 1997

Case No. 97 CV 53E

FILED

SEP - 9 1997 *pw*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

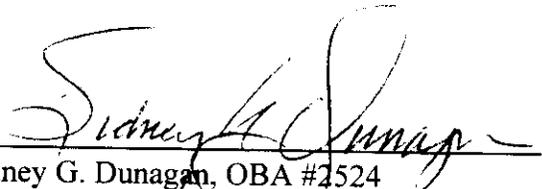
STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41, Federal Rules of Civil Procedure, the Plaintiffs, Erwin King and Alice King, and the Defendants, and each of them, hereby stipulate and agree the Complaint and First Amended Complaint and each and every claim for relief set forth therein are hereby dismissed with prejudice to the bringing of a future action thereon, each party to bear their own costs and attorneys' fees incurred herein.

Respectfully submitted,

John H. Tucker

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Attorneys for Defendants

[18771]

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

CHARLES BARNES,)
)
 Plaintiff,)
)
 vs.)
)
 CENTRAL FREIGHT LINES,)
)
 Defendant.)

Case No. 96-C-908-E

FILED

SEP - 9 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE SEP 10 1997

ORDER

Now before the Court is the Application for Order of Dismissal (Docket #13) of the Plaintiff Charles Barnes.

Barnes seeks an Order of Dismissal, without prejudice, of this matter. Barnes claims in support of his motion that he has not received all requested discovery; that his counsel does not believe he can be ready for trial; and that extensive investigation is necessary to prepare the case. This matter, which was filed *pro se* on October 3, 1996, is scheduled for trial on October 6th, 1997. Barnes' counsel filed an entry of appearance on July 10, 1997, and a scheduling order was entered on July 29, 1997.

Central Freight Lines objects to the application for dismissal, claiming that it has gone to "considerable expense in defending itself." Central Freight Lines asserts that, if the dismissal is granted, conditions, such as the payment of attorney fees, should be placed on refiling.

The standard for granting a voluntary dismissal is discussed by the Court in Ohlander v. Larson, 114 F.3d 1531, 1536-37 (10th Cir. 1997):

Once a defendant files an answer, as was the case here, a plaintiff may voluntarily

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dismiss an action only upon order of the court. Fed.R.Civ.P. 41(a)(2). We review the district court's decision to deny a voluntary dismissal under such conditions for abuse of discretion. [citations omitted]. Absent "legal prejudice to the defendant, the district court normally should grant such a dismissal. [citations omitted]. The parameters of what constitutes "legal prejudice" are not entirely clear, but relevant factors the district court should consider include: the opposing party's effort and expense in preparing for trial; excessive delay and lack of diligence on the part of the movant; insufficient explanation of the need for a dismissal; and the present stage of the litigation. [citations omitted]. Each factor need not be resolved in favor of the moving party for dismissal to be appropriate, nor need each factor be resolved in favor of the opposing party for denial of the motion to be proper.

Interestingly, in Ohlander, the Court found that the district court abused its discretion in denying the application for voluntary dismissal, despite that fact that the movant blatantly violated the orders of the court.

Applying that analysis to the present case, the court finds that the application for voluntary dismissal should be granted. In essence, the need for the dismissal results from the long amount of time that the plaintiff proceeded *pro se*, and the short amount of discovery time allowed after counsel's entry of appearance. Although clearly some trial preparation had been undertaken by defendant in the form of discovery requests, a motion to compel, and the filing of a trial brief, voir dire, and jury instructions, it should be noted that there were no dispositive motions filed, the deposition of the plaintiff had not been taken, and there is no evidence that the trial preparation undertaken in this case would not be applicable to a subsequent case, if filed. Dismissal will result in no real legal prejudice to the defendant.

Plaintiffs' Application for Order of Dismissal (Docket #13) is granted.

IT IS SO ORDERED THIS 8th DAY OF SEPTEMBER, 1997.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SEP - 9 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEE DEE LANG,

Petition,

vs.

BOBBY BOONE and the STATE OF
OKLAHOMA,

Respondent.

Case No. 96-C-003-C ✓

ENTERED ON DOCKET

DATE SEP 10 1997

REPORT AND RECOMMENDATION

Petitioner filed a Petition for a Writ of Habeas Corpus on January 3, 1996. [Doc. No. 1-1]. Respondent filed a Motion to Dismiss the Petition on February 21, 1996. Respondent asserted that Petitioner was procedurally barred from presenting the issues raised in the Petition. On September 30, 1996, the District Court entered an order granting in part and denying in part Respondents' Motion to Dismiss the Petition. The Court found that "issues of fact exist as to whether Petitioner sufficiently inquired about his appeal rights," and referred those issues to the undersigned Magistrate Judge for an evidentiary hearing and a Report and Recommendation. An evidentiary hearing was conducted on March 18, 1997. Following the evidentiary hearing both parties filed Supplemental Briefs. [Doc. Nos. 41-1, 42-1].

B

I. BACKGROUND

On May 1, 1986, Petitioner pled guilty to Murder in the First Degree. Petitioner was sentenced to life in prison. Petitioner did not file a direct appeal.

On September 3, 1986, Petitioner filed a Motion for Transcript at Public Expense. Petitioner asserted that one of the grounds for relief that he planned to allege was for "inadequate lawyer."

On September 11, 1991, Petitioner filed an Application for Post-Conviction Relief in the Rogers County District Court. Petitioner alleged that the trial court failed to make sufficient inquiry before accepting his guilty plea, that the trial court improperly concluded that the only available sentencing option was a life sentence, and that a pre-sentence investigation report was not conducted. Petitioner did not allege a claim based on ineffective assistance of counsel.

On August 17, 1992, Petitioner filed a "Motion to Amend" requesting that he be permitted to withdraw his plea of guilty. Petitioner additionally noted that he had been abandoned by his counsel on appeal and had therefore been deprived of effective assistance of counsel. Petitioner's application was denied on March 4, 1993.

On April 7, 1993, Petitioner appealed the March 4, 1993 district court denial of Petitioner's request for relief. The Oklahoma Court of Criminal Appeals affirmed the district court decision. The Court concluded that Petitioner had failed to provide a sufficient reason for his failure to file a direct appeal. The Court additionally noted that "failure to perfect a direct appeal waives all errors unless a defendant can establish

that he was denied an appeal through no fault of his own." See Petitioner's Application for a Writ of Habeas Corpus [Doc. No. 1-1], Attachment 3.

On November 14, 1993, Petitioner filed a Petition for a Writ of Habeas Corpus in the District Court of Rogers County. Petitioner asserted that the State was improperly attempting to assess a fine that had been imposed as part of his sentence, and he requested a writ of habeas corpus. The trial court concluded that the state had improperly assessed costs against Petitioner during his incarceration, but denied the Petition for a Writ of Habeas Corpus. On March 1, 1995, the Oklahoma Court of Criminal Appeals affirmed the decision of the trial court.

II. THE MARCH 18, 1997 EVIDENTIARY HEARING & THE DEPOSITION

Petitioner testified that during his preliminary hearing, his attorney, Mr. Gordon, made statements on a number of occasions that no evidence existed to support the charge of first degree murder. Tr. at 14. Petitioner stated that based on Mr. Gordon's statements the Petitioner believed that the evidence was not sufficient to support a charge of first degree murder. Tr. at 15. Petitioner acknowledged that he was bound over for trial in the district court at the preliminary hearing. Tr. at 15.

Petitioner stated that he does not specifically recall when, but that Mr. Gordon discussed the possibility of a plea bargain with him. Tr. at 15-16. Petitioner recalls Mr. Gordon explaining to him that if he pled guilty he would be given a life sentence. Petitioner testified that he told Mr. Gordon that he did not commit the crime and was therefore reluctant to plead guilty. Tr. at 16. According to Petitioner, Mr. Gordon told him that if he went to a jury trial, the process would take about four or five years to

"beat the case on appeal," but that if he entered into a plea agreement "it will be in a different Court and the case could be beaten a little quicker that way on appeal. . . ." Tr. at 16. Petitioner testified that at first he did not want to plead guilty and accept the plea bargain, but that based on the advice of counsel that it would be easier to clear him of the charges on appeal if he pled guilty, he decided to accept the plea. Tr. at 16. Petitioner stated he plead guilty because he believed his attorneys would appeal his case. Tr. at 16-17, 21.

Petitioner stated that he was held at the county jail for ten days to allow him to perfect his appeal with the assistance of his attorney. Tr. at 22. Petitioner testified that after entering his plea, and while he was being escorted out of the courtroom, Mr. Gordon approached Petitioner and told him that he would visit Petitioner in the county jail the next day to discuss his appeal. Tr. at 23. According to Petitioner, Mr. Gordon did not visit him the following day, and Petitioner began to get nervous about the state of his appeal. Tr. at 23. Petitioner stated that he talked to Honey Marcum, who worked at the jail, and asked her to contact Mr. Gordon with respect to Petitioner's appeal. Tr. at 23. Petitioner testified that Ms. Markham made two telephone calls on his behalf to Mr. Gordon's office. Tr. at 25. In addition, Petitioner stated that he sent at least two letters to Mr. Gordon. Tr. at 26.

Petitioner explained that after he was transferred into the prison system he discussed his appeal problem with some of the in-mate law clerks who informed him that he needed to first get his transcripts before he could determine what issues he wanted to appeal. Tr. at 27. Petitioner stated that he then filed a motion to get his

transcript and continued to write letters because he did not receive a response. Tr. at 27. Petitioner also testified that during the entire time he was attempting to appeal he never had a lawyer. Tr. at 28.

Mr. Jack Gordon, who represented Petitioner before the trial court, testified. Tr. at 53. Mr. Gordon's recollection of the case was that Petitioner had hit his grandmother on the head with a hammer and killed her. Tr. at 55. Mr. Gordon stated that Petitioner had told him that he "hit his grandmother in the head with a hammer and killed her and he cried and he cried and he cried." Tr. at 84. Mr. Gordon testified that Petitioner had made a statement to either the police department or the district attorney's office, and that the statement was on video. Tr. at 55-56. Mr. Gordon stated that the State of Oklahoma had talked about filing a bill and seeking the death penalty against Petitioner. Tr. at 56.

Mr. Gordon could not specifically recall the reason for Petitioner remaining in the Rogers County Jail, but he believed that Petitioner had family and that by remaining in the local jail he was permitted to see his family. Tr. at 58. Mr. Gordon testified that Petitioner never expressed an interest in withdrawing his plea of guilty. Tr. at 58. Mr. Gordon stated that he did not recall receiving any mail or telephone calls from Petitioner. Tr. at 58. Mr. Gordon stated that his secretary has worked for him for nineteen years and he is certain that if he had received a phone message he would have returned the message. Tr. at 59.

Mr. Gordon testified that if he had appealed the case he would have been paid on an hourly basis for his work. Tr. at 60-61. Mr. Gordon stated that it would have

been advantageous to him to appeal the case. Tr. at 61. Although not specifically recalling a visit to Petitioner while Petitioner remained jailed after his guilty plea, Mr. Gordon testified that he believed that he did visit Petitioner while Petitioner was in jail. Tr. at 61. Mr. Gordon stated that he would not have billed such a visit. Tr. at 84.

Mr. Gordon additionally testified that a defendant would never be bound over for trial after a preliminary hearing unless there was competent evidence to support the charge. Tr. at 63. In Mr. Gordon's opinion, sufficient evidence existed to bind Petitioner over for trial, although Mr. Gordon acknowledged that he probably argued to the court at the preliminary hearing that sufficient evidence had not been presented. Tr. at 80. In response to the question "[w]ould it have been an effective trial strategy to recommend the client build [sic] guilty and then seek to withdraw the plea and argue the case before the Court of Criminal Appeals?", Mr. Gordon testified "Lord no." Tr. at 63.

Mr. Richard Mosier additionally testified and stated that he had also been an attorney for Petitioner at the trial court level. Tr. at 86. Mr. Mosier stated that the most damaging evidence that the State of Oklahoma had against Petitioner was a videotaped interview with him concerning the events which occurred when his grandmother died. Mr. Mosier testified that he would characterize Petitioner's statement as a confession. Tr. at 89. Mr. Mosier could not recall if Petitioner had specifically informed Mr. Mosier that he had murdered his grandmother. Tr. at 89-90. In Mr. Mosier's opinion, the evidence was "fairly overwhelming in support of a conviction in the case and that given the state's intent or expressed an intent to file

a bill of particulars with the possibility of the death penalty, that a sentence of life in prison was in the best interest of Del Lang." Tr. at 90. Mr. Mosier testified that he believes that the Petitioner understood his options. Tr. at 90. Mr. Mosier stated that he recommended that Petitioner accept a plea. Tr. at 90-91.

Mr. Mosier testified that he believed Petitioner understood his obligations with respect to withdrawing his plea of guilty, but that Petitioner never expressed an interest in withdrawing his plea. Tr. at 91. Mr. Mosier noted that eleven years have passed, but that his recollection is that he did not receive any telephone calls or correspondence from Petitioner until January 1987. Tr. at 92-93. Mr. Mosier testified that in January of 1987 Petitioner sent a letter to Mr. Mosier requesting assistance in obtaining a transcript of the proceedings at state expense. Tr. at 93. Mr. Mosier stated that he went to the courthouse and discovered that the transcript request had been denied. Mr. Mosier then asked Petitioner why he was requesting the transcript, and Petitioner responded that he wanted to appeal his case. Tr. at 94.

Following the hearing, the parties took the deposition of Honey Francis Norma Marcum. Ms. Marcum testified that she had been employed by the sheriff's office in Rogers County for twelve years. She began working for the sheriff in 1985, and retired in 1990. Dep. at 8. She worked as a jail supervisor. Dep. at 8. Ms. Marcum's recollection was that the prisoners were always permitted to make phone calls. "[I]f they were sober enough to make a phone call they were allowed. Oftentimes we would contact the persons themselves -- people themselves for them, but they were always allowed a phone call." Dep. at 10. Ms. Marcum testified that

usually a prisoner was permitted to make their own phone calls, but that it was not uncommon for her to make a phone call for a prisoner. Dep. at 11. Ms. Marcum did not specifically recall Petitioner, although his name sounded familiar to her. Dep. at 14.

III. FINDINGS & CONCLUSIONS

Petitioner was sentenced on May 1, 1986. Petitioner did not raise, as an issue before the courts, his "ineffective assistance of counsel" until an amended application for post-conviction relief was filed in August of 1992.^{1/}

Both of the attorneys representing Petitioner at the trial court level testified that because of the evidence against Petitioner, and because of the possibility^{2/} of the filing of a bill of particulars, in their opinion, Petitioner made the correct decision to plead guilty. Neither of Petitioner's attorneys recalled Petitioner giving any indication of wanting to withdraw his plea of guilty, and neither attorney recalls Petitioner contacting either of them within the ten day period after Petitioner's guilty plea was entered and accepted by the trial court.

Petitioner explained that the reason he pled guilty was because it would make it easier to "beat the case" on appeal. Petitioner's attorneys testified that they would not have given such advice to Petitioner.

^{1/} On September 3, 1986, in his "Motion for a Transcript at Public Expense," Petitioner did note that he planned to raise, as a ground for relief, "inadequate lawyer."

^{2/} One of Petitioner's attorneys notes that he viewed this possibility as remote.

Petitioner remained in the Rogers County Jail for ten days. He testified that he attempted to contact his attorneys by (1) asking Honey Marcum on two occasions to telephone one of his attorneys,^{3/} and (2) sending two letters to his attorneys. One of Petitioner's attorney testified that he is fairly certain that he visited Petitioner during that ten day time period, but that Petitioner did not indicate that he wanted to withdraw his guilty plea.

One of Petitioner's attorney additionally noted that he would have been paid by the State for an appeal of Petitioner's case.

After careful consideration of the testimony of the witnesses, and after fully reviewing the briefs filed by the parties, and the pleadings filed in this action, the Magistrate Judge concludes that Petitioner's testimony is not fully credible. Nothing in the record corroborates Petitioner's testimony that he intended to withdraw his guilty plea within the requisite ten day period, or that he attempted to contact his attorneys. In addition, Petitioner's explanation that he was convinced by his attorneys to plead guilty because it would be easier to "beat the case" on appeal is not credible. Furthermore the testimony of Petitioner's attorneys is fully credible and plausible.

By Order dated September 30, 1996 [Doc. No. 22-1], the District Court concluded that Petitioner has procedurally defaulted his claims and must establish either cause and prejudice or actual innocence to overcome the procedural default. The District Court referred to the Magistrate Judge the issue of whether or not

^{3/} The evidence indicates that Petitioner attempted to contact only Mr. Gordon. [Doc. No. 17-1]. No mention is made of an attempt to contact Mr. Mosier although Petitioner did initiate contact with Mr. Mosier in 1987 for assistance with respect to his transcript.

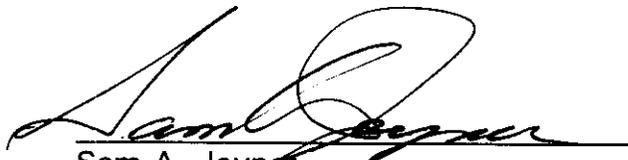
Petitioner could overcome the burden of establishing cause and prejudice.^{4/} The Magistrate Judge concludes that Petitioner has not met his burden.

RECOMMENDATION

The United States Magistrate Judge recommends that the District Court find that Petitioner has failed to establish cause and prejudice. If Petitioner cannot establish cause and prejudice, his claims are procedurally barred and this Court should not address Petitioner's claims on the merits.

Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days after being served with a copy of this notice. **Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's order.** See Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 9 day of September 1997.



Sam A. Joyner
United States Magistrate Judge

^{4/} Overcoming this hurdle would allow the federal court the opportunity to address Petitioner's claims on the merits.

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

FILED

SEP 08 1997

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

COLLEEN WHITEHEAD, an individual
and as a representative of unknown
members of the class; FRED
BLAYLOCK, an individual, and as
representatives of unknown members
of the class; BARNEY TAYLOR, an
individual, and as representative of
unknown members of the class,

Plaintiffs,

vs.

Case No. 94-CV-682-H ✓

OKLAHOMA GAS & ELECTRIC
COMPANY, an Oklahoma Corporation;
OKLAHOMA GAS AND ELECTRIC
RETIREMENT PLAN, a qualified
retirement plan trust; and H. L.
GROVER, IRMA ELLIOT, and ROB
SCHMID, in their capacities as members
of the Oklahoma Gas and Electric
Retirement Plan Committee,

Defendants.

ENTERED ON DOCKET

DATE 9-9-97

REPORT AND RECOMMENDATION

Defendants' MOTION TO DISMISS COUNTS II, IV, V, VI AND VII OF PLAINTIFFS' AMENDED COMPLAINT [Dkt. 37], Defendants' MOTION FOR SUMMARY JUDGMENT ON COUNTS I AND III [Dkt. 73] and Plaintiffs' MOTION FOR PARTIAL SUMMARY JUDGMENT [Dkt. 76] are before the undersigned United States Magistrate Judge for report and recommendation.

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I. BACKGROUND

The plaintiffs were long-time employees of Oklahoma Gas & Electric ("OG&E") who quit working at OG&E for a period of time and were later re-hired.¹ On May 20, 1994, the plaintiffs received materials from OG&E informing them of their eligibility for an early retirement window offering ("offer") made to employees who were over 50 years of age and who had five years of service with OG&E. The offer provided enhanced pension benefits which the employees were required to accept by July 8, 1994, at 4:00 p.m., after which time the offer would be withdrawn. OG&E was restructuring its workforce and continued employment with OG&E was unlikely. As a term of the offer employees were required to execute a release of claims against OG&E.

Ms. Whitehead was credited with 21 years of service, Mr. Blaylock with 23.708 years, and Mr. Taylor with 31.917 years for retirement calculations. These years of service included only the time since their latest date of hire at OG&E. In other words, the time before Plaintiffs' break in service was not included. On May 24, 1994, Ms. Whitehead requested the Retirement Committee to include her years of employment before her break in service in her retirement credit. Her request was denied on July 1, 1994. She was advised that she had 60 days to appeal the decision. On July 6, 1994 Ms. Whitehead and Mr. Blaylock wrote to the Retirement

¹ Ms. Whitehead was first hired 6/3/57. On 9/5/69 she was involuntarily terminated because of a pregnancy. She was rehired on 7/16/73. Mr. Blaylock was first hired on 3/11/63. On 8/29/69 he terminated his employment to pursue further education; he was rehired 11/16/70. Mr. Taylor was first hired 4/16/56. On 10/1/61 he was called up for active service in the United States Army Reserves. He was rehired by OG&E on 8/15/62.

Committee requesting an exemption from the requirement that they sign the release as a term of the offer. Their request for exemption was denied. Ms. Whitehead did not accept the offer or sign the release. She accepted a new position with OG&E, which was a promotion for her. Mr. Blaylock and Mr. Taylor accepted the offer and signed the release.

Plaintiffs' amended complaint alleges in Count I that failure to recognize all the Plaintiffs' years of service is a discriminatory act, contrary to public policy, violative of 26 U.S.C. §§ 401(a), 411, and 501(a), and 29 U.S.C. §§ 1051-53, 1104(a), 1109(a) and 1132 (b)(1) and (g) ("ERISA claim"). Count II alleges that the release violated provisions of the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f)(1) which sets forth requirements that must be met for a release of claims made in conjunction with an early retirement offer to be considered "knowing and voluntary." Count III alleges that OG&E's actions with respect to Plaintiff Taylor are violative of the Veterans Reemployment Act, 38 U.S.C. § 4321.

In Count IV Plaintiff reasserts the Title VII claim that was previously dismissed as time-barred by Order dated August 23, 1994. [Dkt. 30]. Counts V, VI, and VII allege state law tort claims for gross negligence and fraudulent misrepresentation.

II. DEFENDANTS' MOTION TO DISMISS [Dkt. 37]

Defendants seek to dismiss Counts II, IV, V, VI, and VII of Plaintiffs' amended complaint for failure to state a claim upon which relief can be granted, pursuant to Fed.R.Civ.P. 12(b)(6).

A. LEGAL STANDARD

A court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P 12(b)(6). However, a complaint may not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)(footnote omitted). A court reviewing the sufficiency of a complaint under Rule 12(b)(6) presumes all of the plaintiff's factual allegations are true and construes them in the light most favorable to the Plaintiff. *Hall v. Bellmon*, 935 F.2d 1106,1109 (10th Cir. 1991).

Basically, in reviewing a 12(b)(6) motion, "the court will accept the pleader's description of what happened to him along with any conclusion that can reasonably be drawn therefrom." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure, Civil 2d*, § 1357. However, the court is not required to accept the conclusory allegations concerning the legal effect of the events plaintiff has set out if these allegations do not reasonably follow from the description of what happened. *Id.*, See also *Hall*, 935 F.2d at 1110.

B. COUNT II

In Count II Plaintiffs allege that the release Mr. Blaylock and Mr. Taylor signed as part of the early retirement offer did not comply with the requirements of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* as amended by the Older Employee Benefit Protection Act ("OWBPA"). Specifically, Plaintiffs claim that they were not given sufficient time in which to make their election to

participate in the offer. They claim that as a result their elections were made under duress and the releases were not knowingly and voluntarily signed. The defendants argue that an invalid release is not in and of itself an act of age discrimination cognizable under the ADEA.

Statutory requirements for a knowing and voluntary release under the ADEA are enumerated in 29 U.S.C. § 626(f)(1), which provides in relevant part:

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum--

* * *

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

The matter at issue is the 45 day provision. Plaintiffs dispute the accuracy of OG&E's calculation of their pension benefits. Because of the length of time it takes to present their dispute to the Pension Plan Committee and get a decision, Plaintiffs claim that they were not really given 45 days within which to consider the offer, although Plaintiffs' amended complaint avers they received the offering materials on May 20, 1994, and were given until July 8, 1994 (49 days) to reject the offer. Without deciding, and for purposes of this motion only, the Court presumes that the waiver did not comport with the 45 day statutory requirement. The legal question

before the Court is whether providing an inadequate waiver constitutes a discriminatory act under the ADEA. The Court concludes it does not.

Cases addressing compliance with OWBPA waiver requirements debate whether defective releases are void or merely voidable, and whether a defective release is ratified by retention of benefits received.² Although OWBPA requirements have often been discussed in reported cases, Plaintiffs have not cited a single case, nor has the Court found any, in which a failure to comply with the requirements of the OWBPA was found to constitute discrimination. However, one court has found that there is no cause of action based solely on a OWBPA violation as alleged in Count II.

In *E.E.O.C. v. Sears, Roebuck and Co.*, 883 F.Supp 211 (N.D. Ill. 1995) the EEOC asserted that a violation of the waiver requirements of 29 U.S.C. § 626(f) may serve as the basis of an age discrimination claim. In concluding that such a claim must be dismissed as a matter of law, the court stated:

Section 626(f) governs whether an employee's waiver of ADEA rights qualifies as a knowing and voluntary waiver. *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir.1993), *cert. denied*, --- U.S. ----, 114 S.Ct. 2104, 128 L.Ed.2d 665 (1994). Section 626(f) sets forth a litany of minimum standards in order for such a waiver to be

² See *Long v. Sears Roebuck & Company*, 105 F.3d 1529 (3rd Cir. 1997)(Plaintiff not required to tender back severance benefits before proceeding with age discrimination claims when employer failed to comply with OWBPA waiver requirements); *Raczak v. Ameritech Corp.* 103 F.3d 1257 (6th Cir. 1997)(former employees not required to tender back waiver payments to maintain age discrimination suit); *Blistein v. St. John's College*, 74 F.3d 1459 (4th Cir. 1996) (agreement which does not meet requirements of OWBPA is voidable, not void, and may be ratified by acceptance of benefits); *Blakeney v. Lomas Information Systems, Inc.*, 65 F.3d 482 (5th Cir. 1995)(retaining consideration after learning that OWBPA release is voidable constitutes ratification of release).

knowing and voluntary. Neither section 626(f), nor any other section of the ADEA, however suggests that Congress intended to create a separate cause of action. 29 U.S.C. § 626(f). On the other hand, section 616(f) does state that the affect of an invalid release, one which was not executed knowingly and voluntarily, is to bar the employer from relying on the release as a defense. 29 U.S.C. § 616(f). The fact that Congress could have created a separate cause of action, but chose not to, precludes this Court from reading one into the statute now. Accordingly, to the extent the EEOC is attempting to create a cause of action based solely on an OWBPA violation, 29 U.S.C. § 626(f), the Court concludes that such a claim must be dismissed as a matter of law.

Id., at 215. The Court finds the foregoing analysis persuasive and therefore recommends that the claim asserted in Count II of Plaintiffs' Amended Complaint be dismissed.³

C. COUNT I -- IRS CLAIMS

At the April 14, 1997 hearing, Plaintiffs announced their agreement to the dismissal, without prejudice, of the portion of Count I containing the claim arising under the Internal Revenue Code and Counts IV, V, VI and VII of their amended complaint. However, this Court is of the opinion that the dismissal of those counts should be with prejudice.

The Court's order filed August 23, 1994 dismissed Plaintiffs' original complaint, including Plaintiffs' claim for damages resulting from violations of sections of the Internal Revenue Code, 26 U.S.C. §§ 401, 411(d) and 501(a). The Court found that

³ This ruling does not address the validity of the release as a bar to any claim properly asserted under the ADEA.

there is no private right of action for violations of those sections. [Dkt. 30] Plaintiffs' motion to reconsider that ruling was denied. [Dkt. 67]. The Plaintiffs have reasserted the IRS claims in Count I of the amended complaint. This Court views the August 23, 1994 ruling as the law of the case and Plaintiffs' agreement to dismiss the claim notwithstanding, the Court finds it appropriate to dismiss the IRS claims contained in Count I of Plaintiffs' amended complaint with prejudice.

D. COUNTS IV, V, VI, AND VII

Count IV of the amended complaint raises Title VII sex discrimination claims which the Court has previously dismissed as time-barred. [Dkt. 30, p. 6]. Counts V, VI, and VII of the amended complaint raise state law tort claims. The Court's August 23, 1994 Order found that there is no question but that the factual basis of the cause of action involves an employee benefit plan, and therefore Plaintiffs' state law tort claims are preempted by ERISA. [Dkt. 30, p. 9-10]. Again, the Court's August 23, 1994 Order stands as the law of the case and requires that the claims contained in Counts IV, V, VI and VII be dismissed with prejudice.

E. RECOMMENDATION

The undersigned United States Magistrate Judge RECOMMENDS that the Defendants' MOTION TO DISMISS COUNTS II, IV, V, VI AND VII OF PLAINTIFFS' AMENDED COMPLAINT [Dkt. 37] be GRANTED and that the portion of Count I containing the claim arising under the Internal Revenue Code be DISMISSED.

III. DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT [Dkt. 73]

Defendants seek summary judgment on Plaintiffs' remaining claims brought under ERISA (Count I) and Mr. Taylor's Veterans' Act Claims (Count III).

A. SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate if the pleadings, affidavits and exhibits show that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). To survive a motion for summary judgment, the non-moving party "must establish that there is a genuine issue of material fact . . ." and "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, 585-86, 106 S.Ct. 1348, 1455-56 (1986).

B. PROHIBITED TRANSACTION

Defendants are entitled to judgment as a matter of law on Plaintiffs' claim that Defendants breached their duty as Plan fiduciaries by seeking a release of claims in favor of OG&E in exchange for enhanced retirement benefits paid from the Plan. In *Lockheed Corp. v. Spink*, ___ U.S. ___, 116 S.Ct. 1783, 1792, 135 L.Ed.2d 153 (1996), the Supreme Court ruled that "payment of benefits in exchange for the performance of some condition by the employee is not a 'transaction' within the

meaning of [ERISA] § 406," 28 U.S.C. § 1106. The Supreme Court also noted that federal law expressly approves the use of early retirement incentives conditioned upon the release of claims. *Id. at 1791, n. 6. See 29 U.S.C. § 626(f).*

C. DENIAL OF BENEFITS

The facts concerning this claim are undisputed. The Plaintiffs each had a break in service. Both at the time their breaks occurred and the time they returned to employment with OG&E, they were aware the retirement plan in effect did not add (bridge) pre-break service with post-break service to calculate retirement benefits. Plaintiff's claim however, that the 1993 summary plan description ("SPD"), which was in effect at the time the 1994 early retirement offering was made permitted bridging such that their retirement benefits should have included their pre-break service. They argue that by enforcing a different interpretation, the defendants have violated ERISA.

1-Arbitrary and Capricious Standard

In *Firestone & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), the Supreme Court held that the language of the plan determines the standard of review to which the decisions of plan administrators or fiduciaries are subjected. If the plan grants no discretion to the fiduciary to construe plan terms or determine eligibility, a *de novo* standard applies. *Id. at 956-57.* However, when the plan vests the fiduciary with discretion to construe plan terms or determine eligibility, an arbitrary and capricious standard is applied. *Id. See also Averhart v. US WEST Management Pension Plan*, 46 F.3d 1480, 1485 (10th Cir. 1994).

The OG&E retirement plan provides that the Retirement Committee shall have the duty and power "to construe and interpret the Plan, decide all questions of eligibility and determine the amount, manner and terms of payment of any benefits hereunder;" and "to make equitable adjustments for any mistakes or errors made in the administration of the Plan[.]" [Dkt. 75; Tab B-1, § 7.5]. This language clearly grants the Retirement Committee the discretion to construe plan terms and determine eligibility. The Committee's decision must therefore be reviewed under the arbitrary and capricious standard. A decision is not arbitrary and capricious if it is a reasonable interpretation of the plan's terms and was made in good faith. *Averhart*, at 1485; *Torix v. Ball Corp.*, 862 F.2d 1428, 1429 (10th Cir. 1988). Furthermore, when reviewing a denial of benefits under ERISA, the Court may only consider the evidence and arguments available to the plan committee at the time the final decision was made. "An administrator's decision is not arbitrary or capricious for failing to take into account evidence not before it." *Id.* at 381.

2-Exhaustion of Remedies

The parties agree that, generally, parties are required to exhaust the plan-provided administrative remedies as a prerequisite to maintaining an ERISA action for denial of benefits. "[A]n ERISA cause of action accrues when an application for benefits is denied." *Held v. Manufacturers Hanover Leasing Corp.*, 912 F.2d 1197, 1205 (10th Cir. 1990)(citations omitted). "Therefore, exhaustion of administrative (i.e. company or plan-provided) remedies is an implicit prerequisite to seeking judicial

relief. If the rule were otherwise, lawsuits likely would be-- and should be-- dismissed for lack of ripeness." *Id.* at 1206.

One of the Plaintiffs, Mr. Taylor, admits he has never submitted a claim of any kind to the Retirement Committee for consideration. [Dkt. 75; Tab E, p. 161]. Pursuant to *Held*, the Court finds that Mr. Taylor's claim has not accrued and RECOMMENDS that it be dismissed for lack of ripeness.

Plaintiffs, Ms. Whitehead and Mr. Blaylock both requested the Retirement Committee to review the calculation of their years of service for the early retirement offering. [Dkt. 78; Tab F-25; F-27; F-64]. Their requests were denied and, although both were advised of the appeal process, neither of them pursued an appeal. Mr. Blaylock signed the release of claims and accepted the early retirement offering. [Dkt. 78; Tab F-62; F-72]. Although Ms. Whitehead did not follow the Plan appeal procedures, she asked that either the early retirement offering be extended or that she be exempted from the offering's release requirements to enable her to appeal. [Dkt. 78; Tab F- 27; F-28].

Because ERISA itself does not specifically require the exhaustion of remedies available under pension plans, courts have applied this requirement as a matter of judicial discretion. *See, e.g., Amato v. Bernard*, 618 F.2d 559, 566-68 (9th Cir. 1980); *Communication Workers of America v. American Telephone and Telegraph Company*, 40 F.3d 426, 432 (D.C. Cir. 1994), *Hudson v. Aetna Life Insurance Co.* 66 F.3d 338 (Table), 1995 WL 541644 (10th Cir. (Okla.)). Plaintiffs acknowledge

that they have not exhausted Plan remedies but contend that they should not be required to exhaust because it would have been futile.

Plaintiffs argue that they were prevented from pursuing their administrative remedies because the Retirement Committee denied their requests to extend the offering deadline while they pursued their appeals. This left them with the difficult choice to either: (1) accept the early retirement offering, sign the release, and then attempt to pursue the administrative appeal despite the release; or (2) forego the early retirement offering, pursue their administrative appeals and hope for a favorable result and reinstatement of the early retirement offering under the Committee's power to "make equitable adjustments for any mistakes or errors made in the administration of the Plan[.]" [Dkt. 77, Tab B, p. 7-d]. In addition, they point to the deposition testimony of Harvey Harris, Plan Administrator, that if Ms. Whitehead had appealed the denial of her request for recalculation of retirement benefits she "would have probably been turned down." [Dkt. 86; Exhibit 1, p 151].

3- Colleen Whitehead

On July 8, 1994, Ms. Whitehead obtained an order in state court temporarily restraining OG&E from "withdrawing the offer of employment benefits to Whitehead and others similarly situated . . . until such time as a hearing on the merits to determine a permanent injunction can be heard or a trial on the merits." [Dkt. 4, Exhibit A]. Following removal of the action to federal court, the court issued a preliminary injunction on July 29, 1994 which prevented OG&E from withdrawing the early retirement offer to "the plaintiff, Colleen Whitehead, and other persons similarly

situated, with a break in service due to pregnancy, who have been denied years of service under the Early Retirement Window Program earned prior to a break in service." [Dkt. 20]. The preliminary injunction remained in effect until August 23, 1994 when the Court granted Defendants' motion to dismiss and granted Plaintiff 20 days to amend her complaint to state a claim for which relief can be granted.⁴ [Dkt. 30]. While the injunction was in effect, Ms. Whitehead took no action to pursue an appeal under the plan. In the Court's opinion, Ms. Whitehead's failure to exhaust her administrative remedies despite having the opportunity to do so without risk of losing the early retirement window eviscerates her claim of futility.

Furthermore, the deposition testimony of Harvey Harris, Plan Administrator, that any appeal by Ms. Whitehead "would have probably been turned down" does not establish futility. Futility requires more than a high degree of likelihood that the outcome of an internal appeal would result in an unfavorable decision. See *Communications Workers of America v. American Telephone and Telegraph Company*, 40 F.3d 426, 433 (D.C. Cir. 1994) (where record reveals only denial of initial claims, strict futility standard not met even if one were to concede that an unfavorable decision was highly likely). Mr. Harvey was asked his *opinion* about the outcome of an appeal. However, the result of an appeal would be determined, not by Mr. Harvey, but by a majority vote of the Retirement Committee members, which

⁴ The August 23, 1994 Order did not specifically dissolve the injunction, and Plaintiffs argue that it is still in effect. Regardless of the status of the injunction, the same result should obtain.

the Plan specifies shall consist of at least three and not more than seven members. [Dkt. 77, Tab B; p. 7-b to 7-e].

The Court finds Ms. Whitehead has not made a "clear and positive showing" that pursuing available administrative remedies would be futile, as required to excuse her failure to exhaust available administrative remedies. *See, Fizer v. Safeway Stores, Inc.*, 586 F.2d 182, 183 (10th Cir. 1978).

Requiring exhaustion in ERISA cases serves several purposes: (1) to uphold Congress' desire that ERISA trustees be responsible for their actions, not federal courts; (2) to provide a sufficiently clear record of administrative action if litigation should ensue; and (3) to assure that any judicial review of fiduciary action (or inaction) is made under the arbitrary and capricious standard, not de novo. *Kennedy v. Empire Blue Cross and Blue Shield*, 989 F.2d 588, 594 (2nd Cir. 1993) (quoting *Denten v. First Nat. Bank of Waco, Texas*, 765 F.2d 1295, 1300 (5th Cir. 1985)).

In the present case the Retirement Committee has discretionary authority to construe the terms of the plan and determine eligibility. Therefore it is important for the plan to provide a final, fully considered, and reasoned explanation for the court to evaluate under the arbitrary and capricious standard. However, because the Retirement Committee was never asked to give one, there is no final reasoned explanation available for the court to review, therefore application of the proper standard of review is frustrated. This is particularly troublesome in the present case where Plaintiffs argue that "[t]he very manner in which the Retirement Committee considered Plaintiffs' requests is a breach of fiduciary duty." [Dkt. 86, p. 12].

Plaintiffs ask the Court to consider the documents the Committee reviewed and to conclude that the Retirement Committee failed to act "rationally" or "reasonably."

Ms. Whitehead asks the Court to determine that her request for bridging should have been granted based on the 1993 SPD. However, she did not identify the 1993 SPD as a basis for her request for bridging. Even if the Court were to find that exhaustion would be futile for Ms. Whitehead, under *Sandoval*, the Court's review would be limited to the evidence and arguments before the Committee at the time the decision was made. This Court does not find the Committee's decision to deny Ms. Whitehead's request for bridging arbitrary and capricious for failing to take into account evidence not before it.

The undersigned United States Magistrate Judge RECOMMENDS that the Defendants' motion for summary judgment [Dkt. 73] be GRANTED as to Ms. Whitehead's⁵ denial of benefits claims.

4-Fred Blaylock

Mr. Blaylock presents a different situation. Although Mr. Blaylock did not exhaust his remedies, the preliminary injunction did not pertain to his situation. Therefore, OG&E was not prevented from withdrawing the offer from him. He was faced with the difficult choice concerning loss of benefits discussed earlier. Further, in his request for bridging of his service,[Dkt. 75; Tab 64], Mr. Blaylock specifically

⁵ Ms. Whitehead was killed in an automobile accident on January 23, 1996. Defendants contend that all issues relating to Ms. Whitehead are moot. Plaintiffs argue that issues remain for the sake of Ms. Whitehead's daughter. Plaintiffs' motion to substitute [Dkt. 87] is pending. Since summary judgment in Defendants' favor is recommended, this Report does not address the effect of Ms. Whitehead's death.

raised the 1993 SPD language as the basis for his request, which is the same issue presented to this Court. For purposes of the following discussion, the Court will assume that exhaustion would have been futile.

The question before this Court is whether the refusal to bridge Mr. Blaylock's service is arbitrary and capricious. To make such a determination, the Court must review the reasons for the decision. The correspondence advising Mr. Blaylock that his request for bridging of service was denied explained:

According to the Plan document in effect at the time you left the Company and when you returned in 1970, your service for participation in the Retirement Plan commenced as of your last employment as a fulltime regular employee. This is the date that has been used in your calculation.

The Retirement Committee has reviewed your request and cannot act favorably in allowing the service prior to this last employment date as a fulltime employee. This is covered in the Plan document under Section 1.4(F)(2) and also in the Summary Plan Description that you were provided at the time you were re-employed.

[Dkt. 75; Tab 63]. Section 1.4(F)(2) of the Plan document provides, in relevant part:

(2) with respect to any such employee whose service was terminated prior to the Effective Date of the Plan [1/1/89] . . . and who had reentered the active service of the Employer prior to the Effective Date of the Plan . . . his rights under the Plan with respect to the period of his service prior to such date of reentry into the service of the Employer shall be determined under the applicable provisions of the Superseded Plan as in effect on the date of this prior termination of service;

[Dkt. 75; Tab 1, p. 1-ee].

Mr. Blaylock does not dispute that § 1.4 (F)(2) is the section of the Plan document applicable to him, nor does he dispute that bridging was not permitted by the plan in effect at the time he re-entered employment with OG&E. [Dkt. 75, Tab D; p. 27, 31]. He claims that the following language of the 1993 SPD entitled him to bridging and the Committee's failure to apply the 1993 SPD to his situation constitutes an ERISA violation:

Loss of Service

If you leave the Oklahoma Gas and Electric Company and are later reemployed, your rights and benefits will depend upon the length of your prior service and length of your absence. Briefly, the rules are:

If you return to work after a Break in Service, we will calculate your Years of Vesting Service and Years of Credited Service as follows. Your Years of Vesting Service and Years of Credited Service both before and after the Break in Service will be counted if one of the following conditions applies:

1. Your retirement benefit is 100% vested.
2. The number of years in your Break in Service is less than 5.

If neither of these conditions apply, the Oklahoma Gas and Electric Company will only count your Years of Vesting Service and Years of Credited Service completed after your Break in Service.

Mr. Blaylock does not dispute that § 1.4 (F)(2) is the section of the Plan document applicable to him, nor does he dispute that bridging was not permitted by the plan in effect at the time he re-entered employment with OG&E. [Dkt. 75, Tab D; p. 27, 31]. He claims that the following language of the 1993 SPD entitled him to bridging and the Committee's failure to apply the 1993 SPD to his situation constitutes an ERISA violation:

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If you leave the Oklahoma Gas and Electric Company and are later reemployed, your rights and benefits will depend upon the length of your prior service and length of your absence. Briefly, the rules are:

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1. Your retirement benefit is 100% vested.
2. The number of years in your Break in Service is less than 5.

If neither of these conditions apply, the Oklahoma Gas and Electric Company will only count your Years of Vesting Service and Years of Credited Service completed after your Break in Service.

For example, if you have less than five Years of Vesting Service when you quit and your Break in Service is not less than five years you lose the Years of Vesting Service and Years of Credited Service you had when you quit.

As another example, if your Break in Service is less than five years, you get to keep the Years of Vesting

Service and Years of Credited Service you accrued prior to the date you quit.

[Dkt. 75; Tab 47, p. 15-16].

Although this provision could arguably be read as bridging former service, the mere existence of this provision is not sufficient to render the Committee's determination arbitrary and capricious. The Plan section cited as the basis for the denial decision specified that bridging of service would *not* occur for Mr. Blaylock's situation. On the other hand, the SPD language relied on by Mr. Blaylock speaks in future tense: "if you leave, . . . and are later reemployed . . . your benefits will depend . . ." *Id.* Thus, the Committee had an ample textual basis for its decision. Furthermore, Mr. Blaylock has pointed to nothing in the 1993 SPD evincing any intention to reinstate benefits lost more than 20 years earlier.

The Court rejects Mr. Blaylock's purported reliance on the 1993 SPD as a basis to change the Committee's decision. The Court notes that Mr. Blaylock's break in service took place under rules which undisputably did not permit bridging of service. When the 1993 SPD was published, he had already lost credit for his past service according to the terms of properly published rules. What Mr. Blaylock believed or did not believe about the terms of the 1993 SPD could not affect his previous actions in taking his earlier break in service, *See Govoni v. Bricklayers, Masons & Plasterers Intern, Union of America, Local No. 5 Pension Fund*, 732 F.2d 250, 252 (1st Cir. 1984)(no reliance or prejudice based on faulty plan description where past service credit has already been lost).

The Court finds that the determination that the Plan did not provide for bridging of benefits in Mr. Blaylock's case is based on a reasonable interpretation of the Plan document and the 1993 SPD. The decision was not arbitrary or capricious. Therefore, the undersigned United States Magistrate Judge RECOMMENDS that Defendants be GRANTED summary judgment on Mr. Blaylock's ERISA denial of benefit claims. [Dkt. 73].

Based on the foregoing analysis and result, the Court finds it unnecessary to reach the question of the efficacy of Mr. Blaylock's release.

D. VETERANS REEMPLOYMENT ACT

Count III of the amended complaint is brought under the Veterans Reemployment Act ("Act"), 38 U.S.C. § 4312, and concerns only one Plaintiff, Barney Taylor, as he was the only one of the Plaintiffs who left employment at OG&E for military service.

The Act provides that when an honorably discharged veteran who applies for reemployment within 90 days after being discharged and who is still qualified to perform the duties of his former job must be re-instated by his employer to his former position or "to a position of like seniority, status and pay." There is no dispute that Mr. Taylor is entitled to protection of the Act. Mr. Taylor maintains that OG&E has violated the Act by failing to bridge his pre-break service in calculation of his retirement benefits.

Mr. Taylor was first employed at OG&E on April 16, 1956. He left the company on October 1, 1961 when he was called to active duty in the armed forces.

Mr. Taylor withdrew his contributions to the Employee's Retirement Plan shortly after beginning his military service. [Dkt. 75; Tab F-1, F-2, F-3]. He was honorably discharged and returned to OG&E on August 14, 1962. At the time Mr. Taylor left the company to join the military and at the time he returned from military leave, the 1952 Plan was in effect. Under the 1952 Plan, vesting did not occur until an employee had been with the company for twenty years, therefore, Mr. Taylor's rights were not vested at the time he left and returned from military service. Under the 1952 Plan those leaving work to serve in the military could receive retirement credit for the period prior to and during their absence if they either (a) left their contributions in the Plan, or (b) returned any contributions they had withdrawn within five years of their return to OG&E. [Dkt. 75; Tab B-3, p. 33]. It is undisputed that Mr. Taylor withdrew his contributions and did not return them. The calculation of Mr. Taylor's retirement benefits was adjusted to reflect his failure to return his contributions to the Plan.

Mr. Taylor has testified that he read each version of the OG&E Retirement Plan published during the time he was employed at OG&E. [Dkt. 75; Tab E, p. 44]. However, he claims that Defendants had an affirmative duty to advise him that he was required to return the withdrawn funds in order to preserve his retirement. He also claims that all employee contributions ever made to the Plan have been distributed to all employees or transferred into the Thrift Plan for the participants, so it should not matter that he failed to return the withdrawn funds. Mr. Taylor has cited no authority for either of these propositions.

The Court finds that OG&E did not violate the Veterans Reemployment Act. The reduction in Mr. Taylor's retirement benefits is not due to any action taken by OG&E, but is the result of Mr. Taylor's own actions: his withdrawal of and failure to return his contributions to the Plan.

Furthermore, other courts have determined that veterans can waive their rights to reemployment and the perquisites of seniority if done so clearly and unequivocally. *Paisley v. City of Minneapolis*, 70 F.3d 722, 724 (8th Cir. 1995), *Leonard v. United Air Lines*, 972 F.2d 155 (7th Cir. 1992). Here the record indicates that Mr. Taylor signed the Release and Separation Agreement. [Dkt. 75; Tab F-76]. Mr. Taylor has testified that he read the Release and Separation Agreement and signed it voluntarily. [Dkt. 75; Tab E, p. 140, 171]. Regardless of whether the Release and Separation Agreement would be effective to release any ERISA claims under the requirements of the OWBPA, the Court finds that the Agreement is sufficient as a clear and unequivocal expression of his intention to release OG&E from liability for any violations of the Veterans Reemployment Act.

The undersigned United States Magistrate Judge RECOMMENDS that Defendants' motion for summary judgment [Dkt. 73] be GRANTED on the claims asserted in Count III of the amended complaint.

E. BREACH OF FIDUCIARY DUTY

Plaintiffs have asserted that the Plan fiduciaries breached certain duties owing to the plan participants. In their amended complaint, Plaintiffs allege that Defendants

are liable under a number of statutory provisions, including 29 U.S.C. 1190(a), which provides:

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

Plaintiff's amended complaint does not provide any information as to what actions or omissions constitute the alleged breach of fiduciary duty. However, in their motion for partial summary judgment [Dkt. 76] Plaintiffs assert a two-pronged breach of fiduciary duty claim, based on allegations of: (1) a prohibited transaction, and (2) misrepresentations and omissions in the 1993 SPD. The prohibited transaction claim has previously been addressed in Section III B of this report.⁶

For Plaintiffs' remaining breach of fiduciary duty claim, they argue that the 1993 SPD fails to accurately inform them of their entitlement to benefits. Because the duty to prepare an SPD rested with the Retirement Committee, and because ERISA § 102, 29 U.S.C. § 1022, requires that accurate SPDs be provided which

⁶ Plaintiffs have advanced several additional allegations concerning breach of fiduciary duty: failure to follow "prudent man" standard; failure to consult an attorney independent of OG&E attorneys; failure to consider the SPD when reviewing Plaintiffs' claims; and refusal to extend the offering to enable Plaintiffs to pursue plan appeals. The Court views these claims as ancillary to, and dependent upon, a finding that the Committee acted arbitrarily and capriciously in denying Plaintiffs' requests for bridging. In view of the Court's determination that the Committee's actions were not arbitrary and capricious, there is no need to separately address these allegations.

apprise participants and beneficiaries of their rights and obligations under the plan, they claim the Retirement Committee has breached its fiduciary duties under ERISA.

29 U.S.C. § 1022(a) requires the administrator of a plan to furnish participants and beneficiaries with copies of an SPD which "shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such parties and beneficiaries of their rights and obligations under the plan." The terms of an ERISA plan, including SPDs, are construed by the Court as a matter of law. *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1511 (10th Cir. 1996).

In *Chiles* the plaintiffs sought relief under ERISA for breach of contract and breach of fiduciary duty, claiming the SPD which differed from the plan documents inaccurately described their entitlement to benefits. The Court acknowledged that the SPD is a document which is intended to give employees an understanding of the plan upon which they are entitled to rely and which should be easily interpreted by a layman. However, the Court stated that the "mere demonstration" that the SPD is inconsistent with the terms outlined in the plan itself does not entitle ERISA plaintiffs to relief. Even where an SPD incorrectly describes benefits in the plan, plaintiffs "must show some significant reliance upon, or possible prejudice flowing from, the faulty plan description" in order to secure relief. *Id.*, 95 F.3d at 1519 (*quoting Aiken v. Policy Management Systems Comp.*, 13 F.3d 138, 140 (4th Cir. 1993) and *Govoni*, 732 F.2d at 252).

In the present case there has been no evidence presented demonstrating detrimental reliance on the questioned SPD language, that the Plaintiffs were misled, or were otherwise damaged. Therefore, the undersigned United States Magistrate Judge RECOMMENDS that Defendants be granted summary judgment [Dkt. 73] on Plaintiffs' claims of breach of fiduciary duty.

F. RECOMMENDATION

The undersigned United States Magistrate Judge RECOMMENDS that Defendants' MOTION FOR SUMMARY JUDGMENT ON COUNTS I AND III [Dkt. 73] be GRANTED.

IV. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT [Dkt. 76]

The recommendations on Defendants' motions disposes of this case entirely, the undersigned United States Magistrate Judge therefore RECOMMENDS that Plaintiffs' MOTION FOR PARTIAL SUMMARY JUDGMENT [Dkt. 76] be DENIED.

V. CONCLUSION

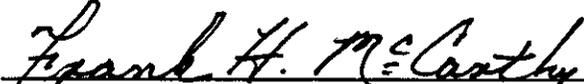
In accordance with the foregoing findings, the undersigned United States Magistrate Judge recommends that the following orders be entered:

- (1) Defendants' Motion to Dismiss Counts II, IV, V, VI and VII of Plaintiff's Amended Complaint [Dkt. 37] is GRANTED;
- (2) Defendants' Motion for Summary Judgment on Counts I and III [Dkt. 73] is GRANTED;
- (3) Plaintiff's Motion for Partial Summary Judgment [Dkt. 76] is DENIED.

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

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

DATED this 8th day of September, 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 4th Day of Sept, 1997.

C. Scully, Deputy Clerk.

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

FILED

SEP 05 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT



REX BRINLEE,)
)
Petitioner,)
)
vs.)
)
RON WARD,)
)
Respondent.)

No. 96-CV-487-H



ENTERED ON DOCKET

DATE 9.9.97

ORDER

Petitioner, a state prisoner appearing *pro se* and *in forma pauperis*, filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on May 30, 1996. Respondent filed his response to the petition on August 2, 1996. Petitioner replied to the response on August 20, 1996, and supplemented the legal authority submitted in his reply by filing a "Judicial Notice" on June 12, 1997. As more fully set out below, the Court concludes that this petition should be denied.

I. Background

On November 29, 1971, Petitioner was convicted by a jury of first degree murder in the District Court for Okmulgee County, State of Oklahoma. He was sentenced to life imprisonment. The Oklahoma Court of Criminal Appeals dismissed Petitioner's direct appeal since he had escaped from custody of the Department of Corrections and remained at large. Brinlee v. State, 513 P.2d 343 (Okla. Crim. App. 1973). The decision to dismiss Petitioner's direct appeal was affirmed by the Oklahoma Court of Criminal Appeals when that Court affirmed the state district

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court's denial of Petitioner's application for post-conviction relief. Brinlee v. State, 554 P.2d 816 (Okla. Crim. App. 1976). On May 17, 1995, Petitioner filed a petition for writ of habeas corpus in the District Court for Pittsburg County raising the same issues he raises in the instant action. His petition was denied, a decision affirmed by the Oklahoma Court of Criminal Appeals on April 15, 1996.

In the present petition for a writ of habeas corpus, Petitioner alleges that officials at the Oklahoma Department of Corrections (ODOC) have applied Oklahoma statutory law in violation of the *ex post facto* clause of the United States Constitution resulting in the improper calculation of his time served. Petitioner asserts that pursuant to the version of 57 Okla. Stat. § 138 in effect at the time of his conviction, he is entitled to an award of good time credits and that those credits must be deducted from a sentence of forty-five (45) years.¹ Had ODOC officials properly calculated his time served, Petitioner claims he would have been entitled to immediate release more than six (6) years ago. As a result, Petitioner alleges that his current incarceration is in violation of the Constitution.

In his response, Respondent argues that Petitioner's petition must fail because (1) it is barred by the one year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and (2) the issue raised by Petitioner is an issue of state law that is not cognizable in a federal habeas proceeding.

¹For purposes of 57 Okla. Stat. § 332.7, used to determine eligibility for consideration for parole, the Oklahoma Pardon and Parole Board equates a life sentence to a sentence of 45 years.

II. ANALYSIS

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by either (a) showing the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) that at the time he filed his federal petition, he had no available means for pursuing a review of his conviction in state court. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). The exhaustion doctrine is "principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." Harris v. Champion, 15 F.3d 1538, 1554 (10th Cir. 1994) (quoting Rose v. Lundy, 455 U.S. 509, 518 (1982)).

Respondent concedes, and this Court finds, that Petitioner meets the exhaustion requirements under the law. The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record. See Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part on other grounds, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). The granting of such a hearing is within the discretion of the district court, and this Court finds that a hearing is not necessary.

A. Statute of Limitations

The AEDPA, enacted April 24, 1996, amended 28 U.S.C. § 2244 by providing for a one-year period of limitation applicable to a petition for writ of habeas corpus filed by a person in custody pursuant to the judgment of a state court. 28 U.S.C. § 2244(d)(1). Although the

AEDPA, as it applies to non-capital cases, contains no effective date, a statute generally becomes effective as of the date of its enactment. See Bradshaw v. Story, 86 F.3d 164, 166 (10th Cir. 1996). However, if application of a new statute has an impermissible retroactive effect, i.e., if application of the statute would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," the statute will not govern absent "clear congressional intent favoring such a result." Landgraft v. USI Film Products, 511 U.S. 244, 280 (1994).

In this case, Petitioner filed his petition on May 30, 1996, only one month after enactment of the AEDPA. If the AEDPA applies to this case, the petition would be time-barred if it were filed more than one year after Petitioner's conviction became final. See 28 U.S.C. § 2244(d)(1)(A). Petitioner's conviction became final on August 8, 1973, when the Oklahoma Court of Criminal Appeals dismissed Petitioner's direct appeal since he had escaped from custody of the ODOC. Brinlee v. State, 513 P.2d 343 (Okla. Crim. App. 1973). More than twenty-two (22) years passed before Petitioner filed his federal habeas petition. Therefore, strict application of § 2244(d), as amended by the AEDPA, would produce the result that the petition was already time barred on the date of the AEDPA's enactment.

A party must be given a reasonable time or grace period in which to file suit in situations where a new statute of limitations is created that would bar preaccrued claims. See Block v. North, 461 U.S. 273, 286 n.23 (1986); see also Flowers v. Hanks, 941 F.Supp. 765, 769 (7th Cir. 1996) (citing Block). In Texaco v. Short, 454 U.S. 516, 527 n.21 (1982), the Court stated that "all statutes of limitation must proceed on the idea that a party has a full opportunity" to bring his suit. Otherwise, the purported statute of limitations would be an "unlawful attempt to extinguish

rights arbitrarily." Id. Any statute of limitations which will apply to interests created before the enactment of the statute must allow a reasonable time in which to file preaccrued claims. Id.

In United States v. Simmonds, 111 F.3d 737 (10th Cir. 1997), the Tenth Circuit Court of Appeals analyzed the AEDPA in the context of a 28 U.S.C. § 2255 motion and held that where literal application of the amended statute would have barred the motion more than three (3) years prior to the effective date of the new statute, application of the new limitations period would result in an impermissible retroactive application in contravention of the principles of Landgraf v. USI Film Prods., 511 U.S. 244 (1994), even where the motion was filed after the date of enactment. Concerns of "fair notice, reasonable reliance, and settled expectations" require that "a new time limitation cannot be so unfairly applied to bar a suit before the claimant has had a reasonable opportunity to bring it." Simmonds, at 745.

According to Simmonds, a one-year grace period should provide claimants sufficient time to file actions which accrued prior to the enactment of the AEDPA. Id., at 746. Other courts have reached the same conclusion, providing that a reasonable grace period is necessary to protect settled expectations of claimants. See, e.g., Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir. 1996), *rev'd on other grounds*, 117 S.Ct. 2059 (1997); Flowers v. Hanks, 941 F.Supp. 765, 771 (N.D. Ind. 1996).

In the instant case, as in Simmonds, application of the new time limitation to extinguish the petition filed soon after the enactment date of the AEDPA, would strip Petitioner of his fair expectation, which existed at the time his claims accrued. Therefore, Petitioner's claims should not be barred by the one-year limitation. Because Petitioner filed his petition within a reasonable time after enactment of the AEDPA, the Court concludes that this petition is not time-barred.

B. Propriety of Federal Habeas Review

A federal district court entertaining a petition for habeas corpus relief does not sit as a court of appeals from judgments of state appellate courts. Those courts interpret state statutes, such as those at issue here, and a federal court is bound by those interpretations unless those interpretations are violative of the federal constitution. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (stating that "it is not the province of a federal habeas court to reexamine state court determinations on state law questions"); Manlove v. Tansy, 981 F.2d 473, 478 (10th Cir. 1992).

At issue in the case at bar are Oklahoma's good time/earned credit statute, 57 Okla. Stat. § 138, specifically the pre-1976 versions contrasted to the version as amended in 1976, and the written policy of the Oklahoma Pardon and Parole Board providing that when determining eligibility for parole, a life sentence is presumed equal to 45 years for purposes of 57 Okla. Stat. § 332.7. The Oklahoma Court of Criminal Appeals denied Petitioner's state application for habeas relief, rejecting Petitioner's interpretation of these statutes. This Court is bound by the Oklahoma appellate court's interpretation unless that interpretation is unconstitutional.

Petitioner attempts to find a constitutional violation by arguing that Oklahoma's application of the good time credit statute, as amended in 1976, violates the *ex post facto* clause of the federal constitution. "To fall within the *ex post facto* prohibition, a law must be retrospective and 'disadvantage the offender affected by it' by, *inter alia*, increasing the punishment for the crime." Lynce v. Mathis, 117 S.Ct. 891, 892 (1997) (quoting Weaver v. Graham, 450 U.S. 24, 29 (1981)). Petitioner contends that although he was convicted in 1971, the ODOC applies the 1976 version of 57 Okla. Stat. § 138 to prevent the deduction of good time credits from his sentence. Petitioner argues that the retrospective application of the 1976 version

of § 138 effectively increases the punishment for his crime, an action prohibited by the *ex post facto clause*, and that his continued confinement is unconstitutional.

Section 138, as amended in 1976, provided, for the first time explicitly, that "[n]o deductions shall be credited to any inmate serving a sentence of life imprisonment." 57 Okla. Stat. 1976 § 138. The quoted language does not appear in the version of the statute in effect during the 1967-1973 period, the version Petitioner believes should be applied in his case (see Reply to Respondent's response at 16). The 1968 and 1970 versions of the statute provided, in pertinent part, as follows:

Every convict who shall have no infractions of the rules and regulations of the prison or laws of the State recorded against him shall be allowed for his term a deduction of two (2) months in each of the first two (2) years; four (4) months in each of the next two (2) years; five (5) months in each of the remaining years of said term, and prorated for any part of the year where the sentence is for more or less than a year. . . .

Okla. Stat. tit. 57, § 138 (1968, 1970) (emphasis added). Pursuant to this version of the statute, credits were to be allowed for an inmate's "term." The word "term" refers to a term of years and not to a sentence of life imprisonment.² Therefore, the pre-1976 version of the statute implied that inmates serving life sentences would not be entitled to credit deductions. Furthermore, in an unpublished opinion, the Tenth Circuit Court of Appeals analyzed the identical issue and held that the 1973 statute implies what was made explicit by the 1976 amendment to the statute, i.e., good time credits shall not be deducted from the sentence of an inmate serving a sentence of life imprisonment. See Collins v. State, No. 95-6099, 1995 WL 405112 (10th Cir. July 10, 1995).

²"Term" is defined as a fixed and definite period of time; implying a period of time with some definite termination. Black's Law Dictionary 1470 (6th ed. 1990) (citing First-Citizens Bank & Trust Co. V. Conway Nat'l Bank, 317 S.E.2d 776, 778 (S.C. Ct. App. 1984)).

Accordingly, Petitioner is ineligible for good time credits under all versions of Section 138. Therefore, the 1976 and subsequent versions of the statute are not more onerous than the earlier versions, i.e., the 1968, 1970, and 1973 versions, with respect to this Petitioner and application of the later versions do not disadvantage Petitioner as long as he is serving a life sentence. The Court concludes that no *ex post facto* violation has occurred and that this Court is bound by the interpretations of the state court. The petition for a writ of habeas corpus should be denied.

Petitioner's argument fails for another reason. Petitioner urges that his good time credits should be deducted from a sentence of 45 years, the length of imprisonment used by the Oklahoma Pardon and Parole Board to determine when an inmate sentenced to serve life imprisonment may be considered for parole pursuant to 57 Okla. Stat. § 332.7. The figure of 45 years is used only for purposes of determining eligibility for parole, not for establishing a release date, and has no application to 57 Okla. Stat. § 138, the statute defining eligibility for and calculation of good time/earned credits. See Collins, at *1. As Petitioner's eligibility for parole is not the issue before the Court, the 45 year figure has no applicability. Therefore, even if Petitioner were entitled to have good time credits deducted from his sentence pursuant to the pre-1976 versions of 57 Okla. Stat. § 138, the deduction would be from a sentence of life imprisonment. As pointed out by Respondent, any good time credits to which Petitioner may be entitled would be deducted from a life sentence, leaving him with a remainder of life to serve. Again, the Court concludes that Petitioner's continued imprisonment does not violate the federal constitution and federal habeas relief should be denied. 28 U.S.C. § 2254(a).

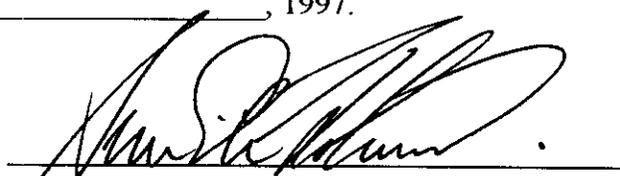
III. CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus be denied.

IT IS SO ORDERED.

This 4TH day of SEPTEMBER, 1997.



Sven Erik Holmes
United States District Judge

ENTERED ON DOCKET

DATE 9-9-97

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

FILED

CLIMATE CONTROL INSTITUTE OF
OF OKLAHOMA, INC.,

Plaintiff,

vs.

RICHARD W. RILEY, Secretary of the
UNITED STATES DEPARTMENT OF
EDUCATION, in his official capacity,

Defendant.

SEP - 8 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97 CV 678 K(J)

STIPULATION OF DISMISSAL

COMES NOW Plaintiff, Climate Control Institute of Oklahoma, Inc. ("CCI"), and, pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure, hereby stipulates as follows:

1. CCI filed its Complaint in this action on July 23, 1997.
2. Defendant, the Secretary of Education (the "Secretary"), has not filed an Answer or otherwise formally responded to the Complaint.
3. The Secretary has not asserted any counterclaims in this case.
4. CCI has not previously filed and dismissed any action asserting the same claims that were presented in this case.
5. The Court's August 27, 1997 Order, upholding the Secretary of Education's use of a "no-corrections" appeal process and upholding his June 16, 1997 termination of CCI's federal student loan program eligibility, has left CCI with the inability to continue operating its

school and the inability to further prosecute its claims in this matter, even though CCI continues to believe that its claims are valid and that the Court's August 27, 1997 ruling is in error.

6. CCI hereby dismisses, without prejudice, this case and all of the claims it has asserted in it, with each party to bear its own costs

WHEREFORE, Plaintiff, Climate Control Institute of Oklahoma, Inc., hereby dismisses this case without prejudice.

Respectfully submitted,

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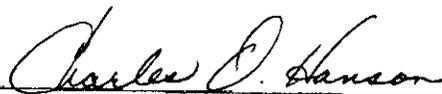
CERTIFICATE OF SERVICE

I hereby certify that, on the 5th day of September, 1997, a true and correct copy of the above and foregoing Stipulation for Dismissal was mailed, postage prepaid, on the following counsel of record:

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ATTORNEYS FOR DEFENDANT



Attorney for Plaintiff

state a claim upon which relief can be granted. [Doc. No. 14]. For the reasons discussed below, the United States' motion is **GRANTED**.

I. INTRODUCTION

While considering the United States' motion to dismiss, the Court will take as true all well-pleaded facts, distinguished from conclusory allegations, in Claimants' counterclaim. Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). Claimants are entitled to all reasonable inferences which can be drawn from the well-pleaded facts in their Counterclaim. Swanson v. Bixler, 750 F.2d 810, 813 (10th Cir. 1984). Following is a summary of the facts from Claimants' Counterclaim, which the Court will treat as true for purposes of Plaintiff's motion to dismiss.

A. ACTIONS BY STATE AND LOCAL LAW ENFORCEMENT OFFICERS

Jesus Chavez and Jose Vazquez deal in fireworks. Luciano Chavez is related to Jesus Chavez and he is the owner of a 1996 Dodge Ram extended-cab pickup truck. By agreement, Ivan Faron Velazquez agreed to travel from Laredo, Texas to Tulsa, Oklahoma to purchase fireworks for Jesus Chavez. Luciano Chavez agreed that Ivan could use Luciano's truck to make the trip. Ivan left in the truck for Tulsa with his nephew Eduardo Rangel Velazquez. Neither Ivan nor Eduardo speak English.

On May 3, 1996, Eduardo Velazquez was driving Luciano's truck West on Interstate Highway 44 in Tulsa, Oklahoma. Ivan Velazquez was riding in the truck as a passenger and was asleep in the extended cab. In the truck was an overnight bag,

a pillow and a jacket. At approximately 7:30 a.m., Second Lieutenant Jackson of the Oklahoma Highway Patrol ("OHP") stopped the truck.^{2/}

Eduardo provided Lieutenant Jackson with a Mexican driver's license, a Texas identification card, an alien identification card, a border crossing card, and vehicle registration information. Lieutenant Jackson ran a National Crime Information Center ("NCIC") search on Eduardo and Ivan and a vehicle registration search on the truck. Neither search revealed any prior criminal activity or outstanding warrants.^{3/}

At approximately 8:15 a.m., Lieutenant Jackson had Eduardo and Ivan move the truck off the highway and into a restaurant parking lot, a distance of approximately one and a half miles. Lieutenant Jackson searched the inside of the truck and searched the overnight bag. By this time, Ronnie G. LeMaster of the a Tulsa Police Department arrived on the scene with a drug-searching dog. Officer LeMaster used his dog to search the inside of the truck. No guns, drugs or contraband of any kind was found inside the truck or in the overnight bag.^{4/}

^{2/} The United States alleges that the truck was stopped after Lieutenant Jackson observed the truck weaving back and forth and after he observed an unsafe lane change. Lieutenant Jackson reports that at the time of the stop, the truck's tailgate and licence plate were out of alignment and appeared to have been tampered with. Lieutenant Jackson also reported smelling a strong odor of gasoline coming from the truck.

^{3/} The United States alleges that NCIC reports indicate that (1) Ivan's true name is Jeffery Renne Lazaro, (2) Lazaro has three separate theft convictions in Texas, and (3) Lazaro has also used the name Ivan Velazquez Serrato.

^{4/} The United States alleges that Officer LeMaster's dog alerted on the cab area and passenger side area. The United States alleges that the search by the drug-searching dog occurred before the truck was moved to the restaurant parking lot. The United States further alleges that after the truck was moved to the parking lot, Lieutenant Jackson observed that the gas tank straps on the truck's undercarriage appeared to have been removed and replaced. According to Lieutenant Jackson, the truck's undercarriage was worn and dirty, but the gas tank straps and the nuts and bolts holding the straps were clean.

At approximately 8:30 a.m., unnamed law enforcement personnel drove the truck to a service station near OHP headquarters, approximately five miles away. The truck was raised on a lift at the service station. Larry Edwards, Tulsa County Assistant District Attorney, was then called to the scene. The gas tank of the truck was removed and taken apart. Inside the gas tank were eleven bundles containing a total of \$189,825.00 in United States currency. Members of the Tulsa Police Department's Special Investigations Unit took possession of the \$189,825.00.^{5/} Mr. Edwards then ordered that Ivan and Eduardo be arrested. Ivan and Eduardo were transported to OHP headquarters at approximately 10:45 a.m. by OHP Troopers Milton Hanson and R.B. Crockett.

While the truck was being inspected at the service station, Officer Demita G. Kinard of the Tulsa Police Department arrived on the scene and attempted unsuccessfully to speak to Ivan and Eduardo in Spanish.^{6/} Ivan attempted to explain to Officer Kinard that he and his nephew, Eduardo, were traveling from Laredo to purchase fireworks for Jesus Chavez and they were using Luciano Chavez's truck. Ivan told Officer Kinard that he and Eduardo were in Tulsa to purchase fireworks from O.K. Fireworks Corp. ("O.K. Fireworks") and that the people at O.K. Fireworks knew Jesus Chavez and could verify Ivan's story.

^{5/} The United States alleges that the money was taken into custody by Second Lieutenant Leon Spencer of the OHP and that it was transported to the Department of Public Safety's vault in Oklahoma City.

^{6/} The United States alleges that Officer Kinard read Ivan and Eduardo their Miranda rights in Spanish. The United States alleges that both Ivan and Eduardo disclaimed any knowledge about the \$189,825.00 found in the truck's gas tank. The United States further alleges that at some point Officer Kinard explained and witnessed Ivan's and Eduardo's signing of a Voluntary Disclaimer of Interest and Ownership in the \$189,825.00.

Ivan is a 46 year old man with a heart condition. During his conversation with Officer Kinard, Ivan attempted to explain that he was having chest pains and asked if he could take his heart medication. Officer Kinard refused to allow Ivan to take his medication and then relayed Ivan's request to other officers, who began to laugh. Ivan was permitted to sit down at the service station only after he began having breathing difficulties and became faint.

After arriving at OHP headquarters at 10:45, Ivan was transported by Trooper Hanson to Saint Francis Hospital at 11:55 a.m. for an evaluation of Ivan's alleged heart condition. Ivan was treated for high blood pressure and a prescription for Ivan was given to Trooper Hanson. Ivan was released from Saint Francis and returned by Trooper Hanson to OHP headquarters by 4:00 p.m. Ivan's prescription was not filled. While at OHP headquarters, Ivan was questioned. Ivan and Eduardo were then taken by Troopers Hanson and Crockett to the Tulsa County Jail at approximately 8:20 p.m., where they were booked for possession of concealed proceeds known to be derived from a violation of the Oklahoma Uniform Controlled Dangerous Substances Act ("OUCDSA"), 63 O.S. § 2-503.1(A); and for transporting anything of value known to be used for violating the OUCDSA, 63 O.S. § 2-503.1(B).

Claimants allege that the reports filed by Troopers Hanson and Crockett contained material inaccuracies and that these reports were used to obtain from a judge a finding of probable cause to detain Ivan and Eduardo. Ivan and Eduardo's first arraignment on May 8, 1996 was continued to June 10, 1996 because the State of

Oklahoma had not yet filed charges. At the time of the first arraignment, Ivan had still not received his doctor-prescribed medication.

On May 9, 1996, Robert Flannagan, Executive Vice President of O.K. Fireworks mailed Claimants' counsel a letter. The letter confirmed that Jesus Chavez and Jose Vazquez had a customer account listed in both of their names at O.K. Fireworks and that they had made purchases from O.K. Fireworks since 1993. Mr. Flannagan also indicated that he had not been contacted by any law enforcement officer to verify Ivan and Eduardo's story. Claimants' counsel gave a copy of Mr. Flannagan's letter to the district attorney prosecuting the case on May 10, 1996.

Claimants' counsel also obtained invoices from O.K. Fireworks indicating that Jose Vazquez and Jesus Chavez had a history of large cash purchases of fireworks from O.K. Fireworks' Tulsa and Waxahachie, Texas offices. These invoices were not provided to the prosecutor at the time Mr. Flannagan's letter was provided to the prosecutor. On June 10, 1996, the prosecutor did not appear at Ivan and Eduardo's continued arraignment and the charges against them were dismissed.

B. ACTIONS BY FEDERAL LAW ENFORCEMENT OFFICERS

On June 12, 1996, Claimants' counsel contacted Danny Pearson of the OHP to inquire about the return of the \$189,825.00. Claimants' counsel was informed that on May 10, 1996, a week after the original seizure, Mr. Pearson turned the case over to the Federal Bureau of Investigation ("FBI"), exchanged the money for a cashier's check, and gave the cashier's check to a United States Marshal. On July 16, 1996, the FBI mailed notice of its intent to seek forfeiture of the \$189,825.00 to Claimants'

counsel. Claimants' counsel received the notice on July 18, 1996. On August 13, 1996, Claimants posted a cash bond with the FBI. This action for forfeiture in rem was filed November 22, 1996.

C. CLAIMANTS' COUNTERCLAIM

Claimants' Counterclaim seeks to hold the United States, the United States of America, liable for money damages in excess of \$75,000.00 on five separate legal theories. First, Claimants allege that the United States' acts and/or omissions "directly interfered with Claimants' . . . business relations with O.K. Fireworks Corp. and others." [Doc. No. 12, ¶ 43]. Second, Claimants allege that the United States has converted the \$189,825.00 to its use by wrongfully seizing it and seeking its forfeiture with the intent to defraud Claimants. [Doc. No. 12, ¶¶ 46-47]. Third, Claimants allege that the United States' negligence violated federal laws and Claimants' Fourth and Fifth Amendment rights under the United States Constitution. [Doc. No. 12, ¶ 50]. Fourth, Claimants allege that the United States has intentionally inflicted them with emotional distress by wrongfully seizing their property. [Doc. No. 12, ¶¶ 53-55]. Fifth, Claimants allege that the United States' acts and/or omissions "directly violated the 14th Amendment Civil Rights of the Claimants" [Doc. No. 12, ¶ 59].

II. SOVEREIGN IMMUNITY AND THIS COURT'S SUBJECT MATTER JURISDICTION -- FED. R. CIV. P. 12(B)(1)

It is axiomatic that the United States is entitled to sovereign immunity and that it cannot be sued without its consent. The existence of consent (i.e., a waiver of sovereign immunity) is a prerequisite to this Court's subject matter jurisdiction. Loeffler v. Frank, 486 U.S. 549, 554 (1988); Federal Housing Admin. v. Burr, 309 U.S. 242, 244 (1940); United States v. Sherwood, 312 U.S. 584, 586 (1941); United States v. Mitchell, 463 U.S. 206, 212 (1983). The Court must, therefore, determine whether the United States has waived its sovereign immunity as to the claims asserted in Claimants' Counterclaim.

A waiver of the United States' sovereign immunity must be unequivocally expressed by Congress in a statute. A waiver of sovereign immunity will not be implied and a statute's legislative history cannot supply a waiver that does not unambiguously appear in the statutory text. See, e.g., United States v. Nordic Village, Inc., 503 U.S. 30, 33-37 (1992); Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95 (1990). The scope of a particular waiver of sovereign immunity by Congress will be strictly construed in favor of immunity. The Court will also construe any ambiguities in the statutory text in favor of immunity. See, e.g., United States v. Williams, 115 S.Ct. 1611, 1616 (1995); Library of Congress v. Shaw, 478 U.S. 310, 318 (1986); Lehman v. Nakshian, 453 U.S. 156, 161 (1981). To hold the United States liable for money damages, Congress' waiver of sovereign immunity must extend unambiguously to claims for money. Nordic Village, 503 U.S. at 34. Once it is

determined that Congress has waived the United States' sovereign immunity for a particular type of claim, the claim may be asserted in a complaint or in a counterclaim.

Claimants argue that there are two Congressional Acts which waive the United States' sovereign immunity with respect to the claims asserted in their Counterclaim -- the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491 & 2402 and the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b)(1), 2402, & 2671-2680. With these two Acts, Congress does waive the United States' sovereign immunity with respect to certain claims. However, the Court has reviewed both of these Acts and finds that neither Act waives the United States' sovereign immunity as to the counterclaims being asserted by Claimants.

A. THE TUCKER ACT

The Tucker Act provides as follows:

The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

Any other⁷¹ civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon [certain contracts subject to the Contract Disputes Act of 1978]. . . .

28 U.S.C. § 1346(a)(2).

⁷¹ The "other" refers to all civil actions other than civil actions for the recovery of any internal revenue tax. Civil actions for the recovery of internal revenue taxes are covered by 28 U.S.C. § 1346(a)(1).

Claimants do not assert claims founded on an express or implied contract with the United States. Claimants do, however, assert claims which could be construed as being founded either upon the Constitution, an Act of Congress, or a valid regulation of an executive agency or department.^{8/} The United States, through the Tucker Act, has waived its sovereign immunity as to these claims. However, the Tucker Act limits this Court's subject matter jurisdiction to claims "not exceeding \$10,000 in amount." Claimants are seeking damages in excess of \$75,000 on each of the claims asserted in their Counterclaim. Thus, the Tucker Act cannot provide this Court with jurisdiction over any of the claims asserted in Claimants' Counterclaim.^{9/}

B. THE FEDERAL TORT CLAIMS ACT

The Federal Tort Claims Act provides as follows:

Subject to the provisions of [28 U.S.C. §§ 2671-2680], the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1).

^{8/} See Simons v. United States, 497 F.2d 1046 (9th Cir. 1974) and Menkarell v. Bureau of Narcotics, 463 F.2d 88 (3d Cir. 1972) (both suggesting that claims founded on the unlawfulness of a seizure or forfeiture are in reality based on the Constitution or an Act of Congress).

^{9/} The Court wishes to make it clear that it express no opinion as to whether or not Claimants' claims are cognizable under the Tucker Act. The Court simply finds that if they are, the Act would not provide this Court with subject matter jurisdiction because Claimants are seeking more than \$10,000. For Tucker Act claims in excess of \$10,000, subject matter jurisdiction lies exclusively in the Court of Federal Claims. See 28 U.S.C. § 1491(a)(1).

Claimants assert claims which could be construed as claims for loss of property or personal injury caused by the negligent or wrongful acts and/or omissions of an employee of the United States acting within the scope of his employment. It would appear, therefore, that based on the language of § 1346(b)(1), the United States has waived its sovereign immunity as to these claims. Section 1346(b)(1) is, however, made expressly subject to the procedural requirements of 28 U.S.C. § 2675(a) and to the specific exceptions to the United States' waiver of sovereign immunity in 28 U.S.C. § 2680. The Court finds that Claimants are not required to comply with § 2675(a)'s procedural requirements. However, the exceptions to the United States' waiver of sovereign immunity in §§ 2680(a), 2680(c) and 2680(h) apply to Claimants' counterclaims.

1. **The FTCA's Exhaustion Requirement**

The FTCA has an exhaustion requirement. Under the FTCA,

[a]n action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. . . . The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

28 U.S.C. § 2675(a).

The United States relies on the first sentence of § 2675(a) and argues that before Claimants could file this lawsuit they were required to present their claims to the appropriate federal agency. Claimants admit that they have not complied with § 2675(a)'s exhaustion requirement. Relying on the last sentence of § 2675(a), however, Claimants argue that § 2675(a)'s exhaustion requirement does not apply because their claims are asserted as counterclaims under Rule 13 of the Federal Rules of Civil Procedure.^{10/} The United States recognizes that the last sentence of § 2675(a) exempts from § 2675(a)'s exhaustion requirement claims asserted by way of counterclaim. However, the United States interprets the term "counterclaim" in the last sentence of § 2675(a) as referring to "compulsory" counterclaims as defined in Fed. R. Civ. P. 13(a), not permissive counterclaims as defined in Fed. R. Civ. P. 13(b). The United States further argues that Claimants' counterclaims are permissive, not compulsory, and are, therefore, subject to § 2675(a)'s exhaustion requirement. The Court does not agree with the United States.

The last sentence of § 2675(a) exempts all claims asserted as counterclaims under the Federal Rules of Civil Procedure from § 2675(a)'s exhaustion requirement. The last sentence of § 2675(a) does not distinguish between compulsory and permissive counterclaims. At the time § 2675(a) was passed, Rule 13 of the Federal Rules of Civil Procedure defined two distinct classes of counterclaims in separate subsections -- permissive and compulsory counterclaims. The Court finds it

^{10/} Rule A of the Supplemental Rules makes the Federal Rules of Civil Procedure applicable to actions *in rem* to the extent they are not inconsistent with the Supplemental Rules.

unreasonable to conclude that in light of Rule 13's specific definitions of compulsory and permissive counterclaims and Congress' specific reference to the Federal Rules of Civil Procedure in § 2675(a) that Congress would have used the term "counterclaim" as a reference to compulsory counterclaims only. The Court finds it more reasonable that Congress said what it meant. All counterclaims under Rule 13 of the Federal Rules of Civil Procedure are exempt from § 2675(a)'s exhaustion requirement.

The Court finds that its interpretation of § 2675(a)'s counterclaim exemption is also consistent with § 2675(a)'s legislative history. The FTCA's exhaustion requirement was added by Public Law 89-506 in 1966. Prior to the 1966 amendment, claims viable under the FTCA could be settled by an administrative agency only when the claim was for \$2,500.00 or less. For claims in excess of \$2,500.00, a claimant had no other choice but to file litigation. Statistics before Congress in 1966 established that, of the meritorious claims filed under the FTCA, 80% of those claims settled prior to trial and a majority of those claims were filed against only a few agencies (e.g., the Post Office, Defense Department, FAA, VA, and Interior Department). Congress believed that by allowing agencies to settle claims and requiring claimants to first submit their claims to the agency involved, many claims could be resolved more quickly and without the need for expensive and time consuming litigation. Congress was also concerned about court congestion because statistics indicated that each year 1,500-2,000 new tort cases were being filed against the United States. Thus, the primary objective of the FTCA's exhaustion requirement was to ease court congestion and avoid unnecessary and expensive litigation by

making it possible for federal agencies to expedite the fair settlement of tort claims. Senate Report 89-1327 reprinted in 1966 U.S.C.C.A.N. 2515 (June 24, 1966).

By definition a counterclaim against the United States can only be filed after litigation has been commenced by the United States. Requiring that counterclaims be subjected to an administrative review process could not, therefore, significantly advance Congress' goal of reducing court congestion by avoiding litigation between the parties. It is reasonable to conclude, therefore, that Congress intended what it said -- counterclaims are not be subject to the FTCA's exhaustion requirement.

The Court recognizes that some courts have interpreted the counterclaim exception to § 2675(a)'s exhaustion requirement as applying only to compulsory counterclaims. See United States v. Taylor, 342 F. Supp. 715, 716-17 (D. Kan. 1972); United States v. Chatham, 415 F. Supp. 1214, 1216-17 (N.D. Ga. 1976); and Northridge Bank v. Community Eye Care Center, 655 F.2d 832, 836 (6th Cir. 1981) (adopting holdings in Taylor and Chatham). These courts reached their conclusion that § 2675(a)'s counterclaim exception only applies to compulsory counterclaims without providing any rationale for their decision. Taylor decided the issue in 1972 and Chatham and Northridge Bank simply cite Taylor as support for their holdings. Taylor relied on the Fifth Circuit's decision in Frederick v. United States, 386 F.2d 481 (5th Cir. 1967).

Frederick was a case dealing with the United States' liability for "recoupment counterclaims." A recoupment counterclaim is a counterclaim that meets the following requirement: (1) it must arise out of the same transaction or occurrence as the United

States' claim; (2) it must seek the same type of relief as is sought by the United States; and (3) it must seek only to defeat or reduce the United States' claim, not to recover affirmative relief.^{11/} Recoupment counterclaims asserted against the United States do not require a statutory waiver of sovereign immunity because when the United States comes into court to assert a claim, it takes the position of a private suitor and agrees to a full and complete adjudication of all matters and issues which are reasonably incident to its claim.^{12/} The court in Frederick did determine that to be able to assert a recoupment counterclaim against the United States, the counterclaim had to be a compulsory counterclaim. Frederick does not, however, provide any support for the conclusion reached by Taylor and its progeny that § 2675(a)'s counterclaim exemption to the FTCA's exhaustion requirement only applies to counterclaims that are compulsory under Rule 13.

Even if § 2675(a) were limited to compulsory counterclaims, the Court finds that Claimants' counterclaims are compulsory under Fed. R. Civ. P. 13(a). Rule 13(a)

^{11/} The Court notes that the "recoupment counterclaim" doctrine might apply to the counterclaims asserted by Claimants and provide a basis for this Court's jurisdiction over those claims. However, Claimants have neither plead their counterclaims as recoupment counterclaims nor argued in their briefs or at oral argument that their counterclaims are recoupment counterclaims. Therefore, the Court will not decide whether the "recoupment counterclaim" doctrine is applicable to Claimants' counterclaims. See United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481, 1490 (10th Cir. 1984) (discussing recoupment counterclaims in a forfeiture action).

^{12/} United States v. Martin, 267 F.2d 764, 769 (10th Cir. 1959); United States v. Lockheed L-188 Aircraft, 656 F.2d 390, 395 n. 11 (9th Cir. 1979); United States v. Gold Mountain Coffee, Ltd., 601 F. Supp. 215, 217-219 (Ct. Int'l Trade 1984); United States v. Atlas Minerals and Chemicals, Inc., 797 F. Supp. 411, 421 (E.D. Pa. 1992); United States v. Iron Mountain Mines, Inc., 812 F. Supp. 1528 (E.D. Cal. 1992); United States v. Menard, Inc., 795 F. Supp. 1182, 1189 (Ct. Int'l Trade 1992); 6 Wright, Miller & Kane, Federal Practice and Procedure: Civil § 1427 (2nd ed. 1990). See also Rothensies v. Electric Storage Battery Co., 329 U.S. 296, 299 (1946) and Bull v. United States, 295 U.S. 247 (1934) (discussing recoupment generally).

defines a compulsory counterclaim as a claim that "arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim" To promote judicial economy, the terms "transaction" and "occurrence" have been given flexible and realistic constructions by courts. The goal of Rule 13 is to promote trial in one action of all related controversies between the parties to avoid multiplicity of suits. Pipeliners Local Union No. 798 v. Ellerd, 503 F.2d 1193, 1198 (10th Cir.1974); Moore v. New York Cotton Exch., 270 U.S. 593, 610 (1926) (holding that "transaction" has a flexible meaning which includes a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship). Rather than attempt to define the terms "transaction" and "occurrence" precisely, most courts ask the following questions to determine whether a counterclaim is or is not compulsory: (1) Are the issues of fact and law raised by the claim and counterclaim largely the same; (2) Would *res judicata* bar a subsequent suit on defendants' counterclaim; (3) Will substantially the same evidence support or refute the claim and the counterclaim; and (4) Is there a logical relation between the claim and the counterclaim? Fox v. Maulding, 112 F.3d 453, 457 (10th Cir. 1997). The Court finds that all of these questions must be answered in the affirmative in connection with the United States' forfeiture claim and Claimants' counterclaims.

The United States forfeiture claim turns on whether the \$189,825.00 was to be used to violate federal drug laws or whether it is the proceeds of a violation of federal drug laws. The United States' suit cannot, however, be considered in isolation. The United States' forfeiture action carries all defenses with it. FDIC v. Hulsey, 22

F.3d 1472, 1487 (10th Cir. 1994). As a defense to the forfeiture action, Claimants will be permitted to challenge the lawfulness of the seizure of the money and the United States' detention and attempted forfeiture of the money. See, e.g., One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania, 380 U.S. 693 (1965) (use of Fourth Amendment as a defense); and United States v. 51 Pieces of Real Property, Roswell, NM, 17 F.3d 1306, 1315 (10th Cir. 1994) (use of Fifth Amendment as a defense). Claimants' counterclaims against the United States turn primarily on the lawfulness of the seizure of the money and the United States' detention and attempted forfeiture of the money. Thus, the factual basis, legal basis and evidence for one of Claimants' major defenses to the United States' forfeiture action will be substantially similar to the factual basis, legal basis and evidence for Claimants' counterclaims.

The doctrine of *res judicata* will also affect Claimants' counterclaims, if they are not brought in this action. In the United States' forfeiture action, the Court must determine whether the seizure, detention and forfeiture of the money was proper. 28 U.S.C. § 2465. If the Court determines that the seizure, detention and forfeiture were proper, Claimants' would be prevented by the doctrine of *res judicata* from bringing claims based on the assertion that the seizure, detention and/or forfeiture of their money were unlawful. Claimants' counterclaims are, therefore, compulsory and they are not required to comply with 28 U.S.C. § 2675(a)'s exhaustion requirement.

2. Exemptions From The FTCA's Waiver of Sovereign Immunity

The FTCA provides a general waiver of sovereign immunity for those tort claims defined in 28 U.S.C. § 1346(b)(1). Section 1346(b)(1) is, however, expressly made subject to 28 U.S.C. § 2671-2680. Section 2680 contains several exceptions to § 1346(b)(1)'s general waiver of sovereign immunity. Relevant to this case are subsections (a), (c) and (h). The Court finds that all of these exceptions to the United States' waiver of sovereign immunity in § 1346(b)(1) are applicable to Claimants' counterclaims. Thus, the FTCA fails to provide this Court with subject matter jurisdiction over Claimants' counterclaims.

a. Contract Rights Exception -- 28 U.S.C. § 2680(h)

Section 2680(h) exempts from the FTCA's general waiver of sovereign immunity "[a]ny claim arising out of . . . interference with contract rights." The clear weight of judicial authority establishes that § 2680(h)'s "contract rights" exception includes all conduct which can be viewed as an interference, intentional or negligent, with existing and/or prospective contractual rights. Moessmer v. United States, 760 F.2d 236 (8th Cir. 1985); Small v. United States, 333 F.2d 702 (3d Cir. 1964); Radford v. United States, 264 F.2d 709 (5th Cir. 1959); Dupree v. United States, 264 F.2d 140 (3d Cir. 1959); Saratoga Savings & Loan Assoc. v. Federal Home Loan Bank of San Francisco, 724 F. Supp. 683 (N.D. Cal. 1989); United States v. Ken Mar Associates, Ltd., 697 F. Supp. 400 (W.D. Okla. 1987); United States v. Gregory Park, Section II, Inc., 373 F. Supp. 317 (D.N.J. 1974); Duncan v. United

States, 355 F. Supp. 1167 (D.D.C. 1973); Taxay, M.D. v. United States, 345 F. Supp. 1284 (D.D.C. 1972), aff'd 487 F.2d 1214 (D.C. Cir. 1973).

Claimants point out that their Counterclaim does not allege an interference by the United States with Claimants' contract rights. Rather, Claimants allege an interference by the United States with their "business relations." Claimants argue, therefore, that § 2680(h)'s "contract rights" provisions does not apply to their "business relations" claim. The Court does not agree.

Claimants argument has been specifically rejected by the Third Circuit. In Small v. United States, plaintiff was a commissioned officer in the Army "Standby" Reserve and he operated a dental practice in Delaware. On August 1, 1961, Congress and the President ordered into active service all members of the Army "Ready" Reserve. Plaintiff received an order from Fort George G. Meade in Maryland to report for active service on October 24, 1961. It was not until March 3, 1962 that it was discovered that plaintiff was a member of the "Standby" and not the "Ready" reserves. Once the error was discovered, plaintiff was released from service. Plaintiff sued the United States, alleging that his erroneous recall was due to the United States' negligence and that the negligence had interfered with his business (i.e., his dental practice). Small v. United States, 333 F.2d 702, 703 (3d Cir. 1964).

With the following language, the Third Circuit found plaintiff's suit barred by § 2680(h)'s "contract rights" exclusion:

The Federal Torts Claims Act specifically exempts from its application 'any claims arising out of . . . interference with contract rights.' 28 U.S.C. § 2680(h). The exemption

extends not only to an action for unlawful interference with existing contract rights but also to actions for the unlawful interference with prospective contractual relations. Dupree v. United States, supra, 264 F.2d [at] 143, 144. The latter action is the equivalent of one for the unlawful interference with business.

Small, 333 F.2d at 704. The Court finds the Third Circuit's analysis persuasive. The Court also finds that plaintiff's claim in Small is indistinguishable from Claimants' counterclaim in this case. Thus, Claimants' "business relations" claim is barred by 28 U.S.C. § 2680(h).^{13/}

Claimants cite Nottingham, Ltd. v. United States, 741 F. Supp. 1445 (C.D. Cal. 1990). The Court in Nottingham held that a claim for conversion is not the same as a claim for interference with contract rights. The Court agrees with this proposition and, to the extent that Claimants' Counterclaim states a claim for conversion, it is not barred by § 2680(h)'s "contract rights" exclusion. Claimants also cite United States v. 2751 Peton Woods Trail, 66 F.3d 1164 (11th Cir. 1995). The Court in 2751 Peton stated in *dicta* that one remedy for seizure of real property in violation of the Fifth Amendment might be an award of lost profits for the period of time during which the property was under the control of the United States. The Court in 2751 Peton never discussed the tort of interference with contractual relations.^{14/} Neither of these

^{13/} Even if § 2680(h) does not bar Claimants' "contract rights" claim, the Court finds, based on the discussion *infra*, that Claimants' "business relations" claim is barred by 28 U.S.C. § 2680(a) and (c).

^{14/} In 2751 Peton the Court was discussing remedies for violations of the Fifth Amendment to the United States Constitution. The fact that a particular remedy might be available to compensate the victim of a Constitutional tort provides no guidance as to appropriate remedies for torts under the FTCA. Constitutional torts are not cognizable under the FTCA. FDIC v. Meyer, 510 U.S. 471, 477-78 (1994).

cases compels the Court to reach a different conclusion regarding the scope of § 2680(h)'s "contract rights" exclusion.

**b. Detention of Goods By Law Enforcement
Officer Exception -- 28 U.S.C. § 2680(c)**

Section 2680(c) exempts from the FTCA's general waiver of sovereign immunity "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer." The parties have identified a split in the Circuit Courts of Appeal caused by the ambiguous wording of the last phrase of § 2680(c) -- the "or any other law-enforcement officer" language. Section 2680(c)'s last phrase subjects the whole section to at least two meanings. Either § 2680(c) applies to any detention of goods and merchandise by any law enforcement officer or it applies only to detention of goods and merchandise by law enforcement officers who are attempting to assess or collect a tax or customs duty. Claimants' counterclaims against the United States are all premised on the unlawful seizure and detention of the \$189,825.00. Under the facts of this case, it is undisputed that the \$189,825.00 was not seized or detained in an effort to collect any tax or customs duty.

The United States cites United States v. Lockheed L-188 Aircraft in which the Ninth Circuit held that § 2680(c) is not limited to detentions by law enforcement officers seeking to assess or collect a tax or customs duty. Lockheed, 656 F.2d 390, 397 (9th Cir. 1979). Claimants' cite Kurinsky v. United States in which the Sixth Circuit held that § 2680(c) applies only to detentions by law enforcement officers

acting in a tax or customs capacity. Kurinsky, 33 F.3d 594, 598 (6th Cir. 1994). The parties argue these two cases extensively. However, neither party cites the Tenth Circuit's decision in United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481 (10th Cir. 1984). The Sixth Circuit in Kurinsky recognized that its holding created a split among the circuits. To demonstrate this split, the Court cited decisions from six other circuits which had held that § 2680(c)'s "other law-enforcement officer" phrase applied to all types of officers, whatever their duties. One of the decisions was the Lockheed case relied on by the United States. Another was the Tenth Circuit's holding in 2,116 Boxes. The Court is at a loss to understand why neither party has addressed this controlling precedent from the Tenth Circuit.

The Food and Drug Administration ("FDA") forbids the use of diethylstilbestrol ("DES") as a growth hormone in cows. In 2,116 Boxes, the FDA seized 273 cow carcasses after it observed DES pellets implanted in the cow's ears. The FDA then filed a seizure and condemnation action, alleging that the beef was subject to seizure and condemnation because it was adulterated within the meaning of the Federal Meat Inspection Act. The owners of the beef filed a counterclaim for money damages, alleging that the beef had been wrongfully seized and detained. Citing § 2680(c) and Lockheed, the Tenth Circuit held that the United States had not waived its sovereign immunity as to the owner's counterclaim. Thus, the Tenth Circuit agrees with the Ninth Circuit that § 2680(c) applies to a seizure and detention of goods by any law enforcement officer and not just a law enforcement officer acting in a tax or customs capacity. Other than the fact that 2,116 Boxes involved the seizure and condemnation

of beef and this case involves the seizure and forfeiture of money, the Court finds 2.116 Boxes indistinguishable from this case. Thus, § 2680(c) applies and prevents § 1346(b)(1)'s waiver of sovereign immunity from extending to any of Claimants' counterclaims. See also Todd R. Wright, 'Any Other Law-Enforcement Officer': Federal Tort Claims Act § 2680(c) 83 Ky. L.J. 707 (1994-95) (analyzing the cases and concluding that the majority view, of which the Tenth Circuit is a part, is correct and that Kurinsky is wrongly decided).

c. Discretionary Function Exception -- 28 U.S.C. § 2680(a)

The United States did not become involved with the \$189,825.00 at issue in this case until after the money had been seized by Oklahoma law enforcement officials and turned over to the FBI. The gravamen of Claimants' counterclaim is (1) that the state law enforcement officials lacked probable cause to stop Ivan and Eduardo Velazquez in the first place; (2) that the state law enforcement officials no longer had probable cause to detain the \$189,825.00 after they were informed about the letter from Robert Flannagan, detailing Claimants' previous transactions with O.K. Fireworks; (3) that the FBI knew or should have known, based on alleged conversations with the involved state law enforcement officials, that the \$189,825.00 was not forfeitable; and (4) that in the face of this knowledge, the FBI's decision to proceed with forfeiture of the \$189,825.00 was wrongful and injurious to Claimants' rights.

Section 2680(a) exempts from the FTCA's general waiver of sovereign immunity "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee

of the Government, whether or not the discretion involved is abused." Thus, the question is: Was the FBI performing a discretionary function when its employees accepted the \$189,825.00 from the Oklahoma law enforcement officers and decided to seek its forfeiture? The clear weight of authority answers this question in the affirmative and Claimants cite no authority to the contrary.

The investigation and pursuit of criminal activity is a discretionary function performed by law enforcement officials. "The decision whether to prosecute a seizure and forfeiture is not . . . a routine day-to-day operational duty, but rather requires an exercise of judgment and a consideration of policy." United States v. Articles of Drug, 825 F.2d 1238, 1249 (8th Cir. 1987). Assessing the evidence gathered in an investigation and deciding whether to prosecute a forfeiture action is a discretionary function performed by law enforcement officials. Thus, all of the steps taken by the FBI to determine whether to prosecute this forfeiture action, as well as the actual prosecution of this forfeiture action, were discretionary functions as described in § 2680(a).^{15/} Thus, § 2680(a) applies to this case and prevents § 1346(b)(1)'s waiver of sovereign immunity from extending to any of Claimants' counterclaims.

^{15/} See United States v. Real Property In Mecklenburg County, 814 F. Supp. 468 (W.D.N.C. 1993); United States v. Articles of Drug, 825 F.2d 1238 (8th Cir. 1987); Moore v. Valder, 65 F.3d 189 (D.C. Cir. 1995); Gasho v. United States, 39 F.3d 1420 (9th Cir. 1994); McElroy v. United States, 861 F. Supp. 585 (W.D. Tex. 1994); and Black Hills Aviation, Inc. v. United States, 34 F.3d 968 (10th Cir. 1994).

III. HAVE CLAIMANTS STATED A CAUSE OF ACTION? -- FED. R. CIV. P. 12(B)(6)

The United States argues that all of the claims asserted in Claimants' Counterclaim must be dismissed because each fails to state a claim upon which relief can be granted. The Court will grant the United States' request to dismiss only if it determines that Claimants can prove no set of facts which would entitle them to judgment. LaFoy v. HMO Colorado, 988 F.2d 97, 98 (10th Cir. 1993). With this standard in mind the Court reviewed all of Claimants' counterclaims. The Court finds that each count of the Counterclaim, except Count V, states a cause of action against the United States. However, based on the discussion, *supra*, the Court lacks subject matter jurisdiction over all of Claimants' counterclaims.

In Count V, Claimants seek money damages for the United States' alleged violations of their "14th Amendment Civil Rights." The 14th Amendment to the United States Constitution is not applicable to the United States under the facts of this case. In the context of this case, the 14th Amendment only prohibits certain types of conduct by the States not the federal government. For instance the privileges and immunities, due process, and equal protection clause of the 14th Amendment all place obligations on the States, not the federal government.^{16/} Claimants cannot, therefore, state a claim against the United States for violations of the 14th Amendment.

^{16/} The 14th Amendment does have some provisions which do arguably apply to the United States (e.g., citizenship clause, apportionment of Representatives, insurrection or rebellion as a disqualification from being a Representative or Senator, and debts incurred for suppressing a rebellion or insurrection). However, none of these provisions are applicable under the facts of this case.

To the extent Claimants meant to ground their "Civil Rights" claim on violations of the Fourth and Fifth Amendments, which are applicable to the United States, those claims would also be barred. Money from the United States treasury is not an available remedy for a violation by federal agents of the Fourth or Fifth Amendment. FDIC v. Meyer, 510 U.S. 471 (1994); Noel v. United States, 15 Cl. Ct. 166, 169 (1989); Golder v. General Elec. Credit Corp., 15 Cl. Ct. 513, 517 (1988) (holding that, other than in the takings context, neither the Fourth nor the Fifth Amendments mandate the payment of money damages by the United States, and Congress has not seen fit to enact a statute authorizing money damages against the United States for violations of the Fourth or Fifth Amendments). Thus, Count V of Claimants' counterclaim is dismissed for failure to state a claim upon which relief can be granted.

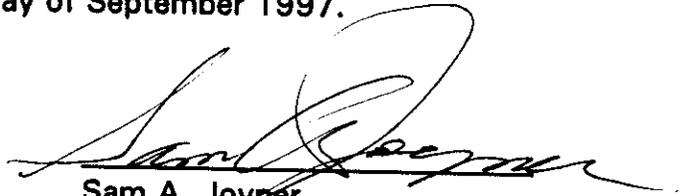
IV. OTHER DISPOSITIVE MOTIONS

Claimants' motion to dismiss the United States' Complaint for Forfeiture In Rem is pending, but not at issue. Claimants' motion for leave to amend is pending and at issue. The motion for leave to amend is under advisement and the motion to dismiss will be considered once it is at issue.

CONCLUSION

The United States' motion to dismiss is **GRANTED**. [Doc. No. 14]. The United States has not waived its sovereign immunity as to any of the counterclaims asserted by Claimants. Claimants' counterclaims against the United States are, therefore, dismissed.

IT IS SO ORDERED this 8 day of September 1997.



Sam A. Joyner
United States Magistrate Judge

FILED

SEP 5 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

RALPH SPRAGGS,)
)
 Plaintiff,)
)
 vs.)
)
 SUN OIL COMPANY, a Delaware)
 corporation,)
)
 Defendant.)

Case No. 96-CV-275-B

ENTERED ON DOCKET
DATE SEP 08 1997

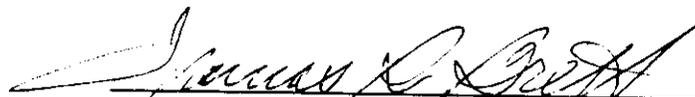
JUDGMENT

In keeping with the Order granting the Motion For Summary Judgment of Defendant Sun Oil Company entered this date, judgment is hereby entered in favor of Defendant Sun Oil Company and against Plaintiff Ralph Spraggs and Plaintiff's action is hereby dismissed.

Costs are granted to Defendant upon timely application pursuant to ND L.R. 54.1.

The parties are to pay their own respective attorney fees.

IT IS SO ORDERED this 5th day of September, 1997.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

SEP 5 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RALPH SPRAGGS,)
)
Plaintiff,)
)
vs.)
)
SUN OIL COMPANY, a Delaware)
corporation,)
)
Defendant.)

Case No. 96-CV-275-B ✓

ENTERED ON DOCKET

DATE SEP 10 1997

ORDER

Before the Court for consideration is Defendant, Sun Oil Company's ("Sun"), Motion For Summary Judgment pursuant to Fed.R.Civ.P. 56. (Docket # 45). Plaintiff claims damages for employment termination under the Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.*, and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* Being fully advised in the matter, the Court hereby GRANTS Sun's Motion For Summary Judgment.

The Court has personal jurisdiction over the parties and subject matter jurisdiction pursuant to 28 U.S.C. § 1332.

UNDISPUTED MATERIAL FACTS

1. Plaintiff, Ralph Spraggs' date of birth is August 11, 1945. [Sun Brief, Exhibit 1].
2. Plaintiff was employed by Sun and its predecessors from 1969 until July 17, 1996. [Plaintiff's Depo., Sun Brief, Exhibit A, p. 51; Affidavit of Robert Schaeffer, Sun

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Brief, Attachment B, ¶11].

3. Prior to 1988, Plaintiff performed various duties throughout his entire employment with Sun and its predecessors, including washing trucks, mechanic work, repairing tires, driving trucks, maintenance, and janitorial work. [Plaintiff's Depo., pp. 51-53; Sun Brief, Exhibit 2].

4. In 1988, Plaintiff acquired the title of "Locksmith." [Plaintiff's Depo., pp. 101-02].

5. When Plaintiff became Locksmith, Mark Czerwiec ("Czerwiec") became his supervisor. [Plaintiff's Depo., p. 208].

6. As a Locksmith, Plaintiff repaired and built "Best Locks" and file and cabinet locks, repaired radios, performed some video production work, worked on the security card systems, worked on the lockout/tagout system, performed security and safety orientation, and worked on the fire brigade. [Plaintiff's Depo., pp. 104-09; Plaintiff's Affidavit, Response, Exhibit C].

7. In 1992, Sun initiated a reorganization at the refinery in Tulsa, Oklahoma. [Affidavit of Robert Schaeffer, Sun Brief, Attachment B, ¶ 3].

8. By the end of 1993, over 100 employees were dismissed and one-third of the refinery was shut down. [Affidavit of Robert Schaeffer, Sun Brief, Attachment B, ¶ 3].

9. As a result of the reduction in force and partial shutdown of the refinery,

as of October 1993, Michael Linville ("Linville"), then Manager of Health, Safety and Security for Sun, believed that there would be fewer locks and radios to maintain at the refinery. [Affidavit of Michael Linville, Sun Brief, Attachment C].

10. Additionally, Linville believed that as a result of Sun's decision to partially adopt the use of a different type of lock for use in Sun's lockout/tagout procedure, there would be less work for the Locksmith. [Affidavit of Michael Linville, Sun Brief, Attachment C].

11. Because of these changes, Sun decided to reassign Plaintiff's duties to other Sun employees including Czerwiec, who was under the age of forty. [Plaintiff's Depo. p. 53, lines 11-16]. Subsequently, Czerwiec transferred to another position. [Plaintiff's Depo., p. 117].

12. Sun asked employee Buster Genson ("Genson") to perform the duty of videotaping which had previous been assigned to Plaintiff. [Plaintiff's Depo., p. 109].

13. Sun assigned the duty of radio repair to employee Ed Brady. [Plaintiff's Depo., p. 111].

14. As a result of the reassignment of his duties, on or about November 1, 1993, Plaintiff was reassigned to another job working in Sun's Lube Service Center Warehouse in Tulsa, Oklahoma. [Plaintiff's Depo., pp. 61-62; Affidavit of Robert Schaeffer, Sun Brief, Attachment B, ¶ 5].

15. Plaintiff took a cut in pay and was assigned to work the night shift.

[Plaintiff's Depo., p. 54.]

16. In his new position, Plaintiff went to work on the "pick line" where he performed lifting and the movement of pallets in order to provide products for Sun's customers. [Plaintiff's Depo., pp. 61-62].

17. Plaintiff did not like this job. [Plaintiff's Depo., pp. 62-63].

18. During December of 1993 and January of 1994, Sun requested that Plaintiff perform some overtime work on radios, pagers, and Best Locks. [Sun Brief, Exhibit 3; Plaintiff's Depo., pp. 112-15; Affidavit of Robert Schaeffer, Sun Brief, Attachment B, ¶ 5].

19. Plaintiff agreed to provide this overtime work, which totaled less than thirty-three hours for the two-month period. [Id.]

20. On or about December 28, 1993, while moving a pallet, Plaintiff suffered an on the job injury to his neck. [Plaintiff's Depo., pp. 61, 63-65; Response, Exhibit L].

21. As a result of the injury, on or about January 24, 1994, Plaintiff went on Short Term Disability ("STD") leave, and did not return to work until August of 1994. [Plaintiff's Depo., pp. 90-91, 120-21; Exhibit 4 of Plaintiff's Deposition; affidavit of Robert Schaeffer, Sun Brief, Attachment B, ¶ 6].

22. Under Sun's STD or sick leave policy, an employee who is unable to perform their job because of an on the job injury can be eligible to receive full pay for twenty-six weeks. [Affidavit of Robert Schaeffer, Sun Brief, Attachment B, ¶ 6].

23. While Plaintiff was on STD, in April of 1996, Sun sent two employees, Jim Hodges ("Hodges") and Lyle Williams ("Williams"), to Dallas, Texas to attend Best Lock training. [Affidavit of Robert Schaeffer, Sun Brief, Attachment B, ¶ 7].

24. Hodges' date of birth is October 9, 1954, and Williams' date of birth is January 14, 1958. [Sun Brief, p. 8, fn. 1].

25. The training was necessary in order to assure that these employees were certified to repair and make Best Locks. [Affidavit of Robert Schaeffer, Sun Brief, Attachment B, ¶ 7].

26. Other than Plaintiff who was on STD leave and until Hodges and Williams were certified to work on Best Locks, Sun did not have anyone on staff who was qualified to work on these types of locks. [Id.; Plaintiff's Depo., p. 91].

27. After their training, Hodges and Williams did work on locks at Sun's Tulsa facilities when the need for such work arose. [Affidavit of Robert Schaeffer, Sun Brief, Attachment B, ¶ 7].

28. Hodges and Williams assumed responsibilities for working on locks while maintaining their other job duties. [Id.]

29. From 1994-1996, Hodges spent approximately twenty hours per year working on locks.¹ [Id.]

¹Plaintiff's responses to Sun's Uncontroverted Material Facts No. 26 and 27 attempt to controvert the statements by alleging Sun has failed to produce certain documentation evidencing the statements. As Plaintiff has not moved

30. In 1994, Williams spent approximately 4% of his time working on locks. In 1995, about 19% of his time was devoted to working on locks. In 1996, that amount of time dropped to less than 9%. [Id.]

31. On May 6, 1994, Plaintiff underwent surgery on his neck to repair the injury that he suffered at Sun in December 1993. [Dr. Frank Letcher Depo., pp. 10-11]. Plaintiff also suffers from lower back problems which predated his on the job injury. [Response, Exhibit L].

32. Plaintiff's neck surgery was performed by Dr. Frank Letcher. [Dr. Frank Letcher Depo., pp. 2, 9-11].

33. In July of 1994, Plaintiff filed his "First Notice of Accidental Injury and Claim for Compensation" with the Oklahoma Workers' Compensation Court for the injury that he sustained on December 28, 1993. [Sun Brief, Attachment G].

34. Sun admitted that Plaintiff had been injured at work. [Respondent's Answer and Pretrial Stipulation].

35. On August 1, 1994, Plaintiff received the following release from Dr. Letcher:

Ralph Spraggs may return to work at full time unrestricted activity now.
[Sun Brief, Attachment I].

for production of the documentation sought, nor otherwise controverted the statements, the Court deems the matter admitted.

36. On August 15, 1994, Plaintiff returned to work at Sun. This time he went to work in the Lube Service Center packaging area as a Line Operator. [Plaintiff's Depo., pp. 122-28; Sun Brief, Exhibit 4].

37. One of his duties was to place spouts in boxes that moved along a conveyor belt. [Plaintiff's Depo., p. 118].

38. While working along the line he was provided with a place to sit; however, the job could not be done while sitting. [Plaintiff's Depo., pp. 125-26].

39. Because he could not perform the job without pain, Plaintiff went back on leave from work on August 18, 1994. [Plaintiff's Deposition, p. 128; Response, Exhibit G].

40. On December 8, 1994, Dr. Robert Campbell, Sun's doctor, determined that Plaintiff could return to work, with restrictions including a twenty-five pound lift, push, pull limit, at the Lube Service Center packaging area. [Plaintiff's Depo., pp. 136-40; Sun Brief, Exhibit 5].

41. In order for Plaintiff to perform the duties of Line Operator, he was, among other things, required to lift, push, and/or pull weights in excess of twenty-five pounds on a daily basis, in violation of the restrictions imposed by Dr. Campbell. [Plaintiff's Depo., p. 141].

42. As a Line Operator, Plaintiff had to keep up with the product as it moved down a conveyor belt or rollers. [Plaintiff's Depo., pp. 164, 192-93].

43. As a Line Operator, he had to keep up with the product as it moved down a conveyor belt or rollers. [Plaintiff's Deposition, pp. 164, 192-93].

44. On or about March 31, 1995, Plaintiff ceased working at the Lube Service Center. [Plaintiff's Depo., pp. 199-201].

45. Plaintiff believes that the only accommodation that Sun could have made in order to allow him to continue working for the company was to give him another job that did not require him to "keep up with a machine." [Plaintiff's Depo., pp. 168-69, 201].

46. Although Plaintiff felt that he could not continue working as a Line Operator, he could do "a lot of jobs" as long as he could set his own pace. [Plaintiff's Depo., pp. 171-72, 182-83, 192-93].

47. While on disability leave from Sun, Plaintiff was self employed as a dump truck operator and a reserve deputy sheriff. [Plaintiff's Depo., pp. 5-6, 10-11, 33-34, 226-27, 231-40].

48. The duties of reserve deputy sheriff require the individual to be able to restrain criminal suspects, push or pull objects weighing in excess of twenty-five pounds, run and chase. [Sun Brief, Exhibit 10]. Plaintiff has been able to work as a reserve deputy since his injury without having to perform these specific tasks.

49. Plaintiff is capable of performing all the activities of a reserve deputy sheriff. [Plaintiff's Depo., pp. 231-34; Sun Brief, Exhibit 10; Plaintiff's Response to Sun's

Uncontroverted Material Fact No. 49].

50. On July 17, 1996, Sun notified Plaintiff of his termination. Sun stated Plaintiff's failure to qualify for Long Term Disability and failure to return to the Lube Service Center as reasons for the termination. [Affidavit of Robert Schaeffer, Sun Brief, Attachment B, ¶ 11].

Factual Summary

In an effort to provide a more complete picture of the factual fabric of this matter, the Court supplements the Undisputed Material Facts with the following observations.

Sun owns and operates a petroleum-related refinery in Tulsa, Oklahoma. Plaintiff was hired by Sun, or its predecessors, in late 1969. For approximately twenty-six years Plaintiff worked in various departments and at various positions within Sun, including that of crude oil truck driver. At some point prior to 1990, Plaintiff was assigned the duties of Locksmith which included maintenance on Sun's Best Locks, videotaping assignments, fire brigade duties, radio repair, and other duties associated with the Health, Safety and Security Department of Sun. The combination of duties allegedly kept Plaintiff busy for forty hours per week.

In August 1992, Sun publicly announced plans to downsize and reconfigure its Tulsa, Oklahoma operations. Poor refining economics and increasingly significant environmental regulatory costs were cited as reasons necessitating the downsizing. It was estimated 200 of the 490 jobs at the refinery would be eliminated. The notice also

stated displaced employees would be eligible for severance programs and some may be offered a transfer to other Sun facilities. By the end of 1993, over 100 employees had been terminated and approximately one-third of the refinery had been shut down.

Around the end of 1993, Plaintiff became aware that as a result of the downsizing and partial shut down of the refinery there would be fewer locks to maintain at the refinery. Additionally, Sun had made the decision to convert from Best Locks to Master Locks, thereby reducing the need for Plaintiff's skills as a Best Locks technician. It was decided Plaintiff's duties would be reassigned to other Sun employees.²

It appears no less than five employees were assigned or offered duties which were once performed by Plaintiff; Mark Czerwiec, Jim Hodges, Lyle Williams, Buster Genson, and Ed Brady. The bulk of the actual locksmith duties went, initially, to Czerwiec who was under the age of forty. After Czerwiec transferred to another position, the locksmith duties were assigned to Williams and Hodges, both of whom were under forty at the time. The ages of Genson and Brady are unknown.

As a result of the reassignment of Plaintiff's former duties, Plaintiff was transferred to a position with Sun's Lube Service Center. Plaintiff's new position as a Line Operator

²The Court notes the parties refer to the reassignment as an elimination of Plaintiff's position. Although a subtle distinction, the Court believes the proper designation of this event is a reassignment of duties. The record is clear that the duties performed by Plaintiff were not eliminated. Further, it appears the position of Locksmith was not eliminated, but remained a less than full-time position. See Response, Exhibit K, p. 7.

demanded intense, physical labor, unlike his previous position. In late 1993/early 1994, for approximately two months, Plaintiff was asked to and worked roughly thirty-three hours of overtime work performing his previously-assigned duties as Locksmith.

In late 1993, Plaintiff suffered an on the job injury while working at the Lube Service Center. Approximately one month later Plaintiff went on short term disability for some eight months. While on short term disability Plaintiff had neck surgery. After his neck surgery, Plaintiff filed a Worker's Comp claim, which the Court presumes has been concluded. While Plaintiff was on short term disability, Sun sent Williams and Hodges to Best Lock School in Texas as no other Sun employee was qualified to work on Sun's Best Locks.

The pertinent medical history contained in the record is as follows. On August 8, 1994, Dr. Campbell, Sun's physician, released Plaintiff to return to work on August 15, 1994, with certain lifting and rotation restrictions. Plaintiff returned to the Lube Service Center on August 15, 1994, and after three days went back on short term disability pursuant to Dr. Campbell's orders. Dr. Campbell further ordered Plaintiff to see his treating physician, Dr. Letcher. Plaintiff states that after doing so, Dr. Letcher released Plaintiff to return to work on September 28, 1994, to do whatever job he was capable of doing, and again on November 30, 1994, but he returned to work on neither date. The Court notes Dr. Campbell refused to return Plaintiff to work on September 8 and 20, 1994. On December 8, 1994, Dr. Campbell released Plaintiff to return to

work with various restrictions. The restrictions were to be in effect for three months, at which time Dr. Campbell expected to lift same. Plaintiff returned to work on December 9, 1994.³ On March 15, 1995, Plaintiff's restrictions were affirmed pending the outcome of his Final Impairment Evaluation, which was expected to take two weeks. Plaintiff continued working in the Lube Service Center until March 31, 1995. On October 23, 1995, Dr. Campbell provided to Plaintiff an ambiguous return to work form stating Plaintiff may return to work on said date "if as Mr. Spraggs states if [sic] there is any job he can do that he has complete control [and] does not require any bending or lifting [and] he can take breaks when he needs." Response, Exhibit H. Plaintiff never returned to work.

During his time on disability, Plaintiff operated a dump truck he had purchased. Additionally, Plaintiff continued to serve as a reserve deputy sheriff. In July 1996, Sun notified Plaintiff he was being terminated for failure to qualify for long term disability and for failing to return to work. This suit followed.

Plaintiff contends Sun violated the ADA by failing to accommodate him in his position at the Lube Service Center, or alternatively, for failing to offer him another job

³Plaintiff's duties at the Lube Service Center included lifting a fifty pound weight at least twice a day, dumping oil drums containing petroleum product under certain circumstances, bending, stooping, standing on concrete, and keeping up with a conveyor. Although Sun provided an oil drum upon which Plaintiff could sit, Plaintiff contends the job could not be performed from a seated position. The lifting requirements were in violation of Plaintiff's temporarily imposed restrictions.

within the refinery. Sun contends it tried to accommodate Plaintiff in his position at the Lube Service Center by providing him a place to sit. Sun contends Plaintiff was not offered another position within the refinery because none were available which did not violate Plaintiff's lifting restrictions and/or Plaintiff was not qualified for the position. See Schaeffer Supplemental Affidavit, Sun Reply.

Plaintiff further alleges Sun violated the ADEA by reassigning his duties to employees under the age of forty. Sun responds by stating the reasons for the reassignment of Plaintiff's duties were not based on his age, rather on the company's decision to downsize its work force, as well as, its decision to convert from Best Locks to Master Locks, thereby eliminating much of the need for Plaintiff's specialized skills.

The Standard of Fed.R.Civ.P. 56

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

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

To survive a motion for summary judgment, nonmovant "must establish that there is a

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

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

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

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

Discussion

Americans With Disabilities Act (“ADA”) Claim

Under the ADA, it is illegal for an employer to “discriminate against a qualified individual with a disability because of the disability of such individual.” 42 U.S.C. § 12112(a). A “qualified individual with a disability” means a person with (1) a “disability” who (2) can perform the essential functions of the employment position, with or without “reasonable accommodation.” 42 U.S.C. § 12111(8). Thus, to establish a *prima facie* case of discrimination, Plaintiff must prove (1) he is a disabled person within the meaning of the ADA; (2) he is qualified with or without reasonable accommodation, which he must describe, to perform the essential functions of the job; and (3) Sun terminated him due to the disability. See Burgard v. Super Valu Holdings, Inc., 113 F.3d 1245, 1997 WL 278974, *2 (10th Cir.(Colo.)) (citing White v. York Int'l Corp., 45 F.3d 357, 360-61 (10th Cir. 1995)).

The term “disability” means (a) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (b) a record of such impairment; or (c) being regarded as having such an impairment. 42 U.S.C. § 12102(2). In order to show that an impairment “substantially limits” a major life activity, Plaintiff must show a “significant restriction in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities.” Siemon v. AT&T Corporation, 1997 WL

358636 (10th Cir. (Colo.)) (citing Bolton v. Scrivner, Inc., 36 F.3d 939, 942 (10th Cir. 1994), cert. denied, 513 U.S. 1152 (1995)) (quoting 29 C.F.R. 1630.2(j)(3)(i)).

A “class of jobs” includes “jobs utilizing similar training, knowledge, skills[,] or abilities, within that geographical area,” while a “broad range of jobs in various classes” includes “jobs not utilizing similar training, knowledge, skills[,] or abilities, within that geographical area, from which the individual is also disqualified because of the impairment.” Siemon, 1997 WL 358636, *3 (citing 29 C.F.R. §§ 1630.2(j)(3)(ii)(B), (C)). “The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.” 29 C.F.R. § 1630.2(j)(3)(i). The ADA’s implementing regulations include lifting as a major life activity. See 29 C.F.R. pt. 1630, app. § 1630.2(i) (1996).

Plaintiff does not claim he is substantially limited in the major life activity of working; rather that he is substantially limited in the major life activities of lifting, stooping and bending, and standing in one place for an extended period. See Response, p. 19-20. “To determine whether Plaintiff is substantially limited in a major life activity other than working, we look to whether [Plaintiff] can perform the normal activities of daily living.” Ray v. Glidden Co., 85 F.3d 227, 229 (5th Cir. 1996) (citing Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 (5th Cir. 1995)).

Reviewing the facts in a light most favorable to Plaintiff, the undersigned concludes that Plaintiff does not suffer from a disability as the term is used within the

ADA because his impairment does not prevent him from performing a class of jobs or a broad range of jobs in various classes. Plaintiff has also failed to show he has a record of an impairment that substantially limits one or more of the major life activities. Likewise, Plaintiff has failed to show Sun regarded him as having such an impairment.

The twenty-five pound lifting restriction to which Plaintiff was subject, at least at one time, does not, as a matter of law, substantially limit Plaintiff from performing a class of jobs or a broad range of jobs in various classes. See Thompson v. Holy Family Hospital, 1997 WL 464695 (9th Cir.(Wash.)) (twenty-five pound lifting restriction not substantially limiting); Williams v. Channel Master Satellite Systems, Inc., 101 F.3d 346, 349 (4th Cir. 1996), cert. denied, 117 S.Ct. 1844 (1997) (holding as a matter of law that twenty-five pound lifting restriction did not constitute significant restriction on ability to lift, work, or perform any other major life activity); Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311, 1319 (8th Cir. 1996) (a twenty-five pound lifting restriction did not significantly restrict major life activities); Dutcher, 53 F.3d at 727. The only job Plaintiff claims to be unable to perform post-injury is a job requiring heavy lifting, bending and stooping, and standing in one place for an extended period, i.e., a job as a Line Operator. Such does not render Plaintiff disabled under the ADA. See Siemon, 1997 WL 358636, *3; Burgard, 113 F.3d 1245, 1997 WL 278974, *3; Welsh v. City of Tulsa, 977 F.2d 1415, 1416-20 (10th Cir. 1992) (analogizing disability under Rehabilitation Act to disability under ADA and holding plaintiff was not substantially

limited in major life activity because he could not perform work as a firefighter).

Plaintiff does not argue, nor does the record support, that Plaintiff has a record of an impairment which substantially limits him from performing one or more of the major life activities. No evidence has been presented Plaintiff suffered from any impairment prior to his neck injury. As stated above, Plaintiff's post-injury impairment does not substantially limit the performance of one or more of the major life activities.

Plaintiff presents no evidence or argument Sun regarded him as having an impairment that substantially limits one or more of the major life activities. The Court, however, does find it noteworthy Sun placed Plaintiff in the position of Line Operator which required Plaintiff to lift on a daily basis in excess of his twenty-five pound lifting restriction, yet, Sun would not offer Plaintiff a job as a crude oil truck driver, also requiring lifting of over twenty-five pounds, because Plaintiff had, at least temporarily, a lifting restriction.

As to whether Plaintiff can perform the normal activities of daily living, it is undisputed Plaintiff can perform the activities required of a dump truck driver and a reserve deputy sheriff. See Undisputed Material Facts 47-49. Plaintiff persists he is able to perform many jobs, including that of crude oil truck driver, as long as he can set his own pace and is not required to perform heavy lifting. See Response, pp. 21-22.

Further, Plaintiff fails to present any expert medical evidence from which a reasonable fact finder could find Plaintiff was disabled at any time prior to his

termination from Sun. In fact, during the pretrial conference held August 29, 1997, counsel for Plaintiff represented the only expert medical testimony to be offered by Plaintiff was that of Dr. Michael Farrar, D.O. The record is void of any medical evidence produced by Dr. Farrar. Further, counsel for Plaintiff stated the restrictions placed on Plaintiff by Dr. Farrar were not procured until January 1997, some six months after Plaintiff had been terminated.⁴

In light of Plaintiff's failure to make the predicate showing he is disabled under the ADA, it is unnecessary to determine whether Sun reasonably accommodated Plaintiff. See Bultemeyer v. Ft. Wayne Community Schools, 100 F.3d 1281 (7th Cir. 1996); Bombard v. Fort Wayne Newspaper, 92 F.3d 560 (7th Cir. 1996).

Sun is entitled to and granted summary judgment on Plaintiff's ADA claim.

⁴Exhibit H to Sun's Brief is a copy of a Worker's Compensation court document which lists Dr. Farrar as a witness who may be called at Plaintiff's Worker's Comp trial. The Court's analysis of the instant Motion does not address any opinions Dr. Farrar may have had regarding Plaintiff as of December 1994 (the file stamped date of the document) as no further evidence of Dr. Farrar's opinions of Plaintiff's medical condition in 1994 have been supplied to the Court. Also absent from the record is Dr. Farrar's January 1997 report. Other than the inference that Dr. Farrar treated Plaintiff prior to December 1994 in connection with his Worker's Comp claim, there is nothing in the record to indicate Plaintiff was treated further by Dr. Farrar prior to his termination from Sun.

Age Discrimination in Employment Act (“ADEA”) Claim

To defeat summary judgment on his ADEA claim, Plaintiff must raise an issue of fact that age was a “determining factor” in Sun's decision to reassign Plaintiff's duties to other Sun employees. See Lucas v. Dover Corp., Norris Div., 857 F.2d 1397 (10th Cir. 1988) (citing E.E.O.C. v. Sperry Corp., 852 F.2d 503, 507 (10th Cir. 1988)). Plaintiff need not prove that age was the sole reason for the challenged reassignment of duties, but he must show that age made a difference in Sun's decision. Id. (citing E.E.O.C. v. Prudential Federal Sav. & Loan Ass'n, 763 F.2d 1166, 1170 (10th Cir. 1985)).

Absent direct proof of discriminatory intent, the Court evaluates Plaintiff's ADEA claim under the burden-shifting analytical framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). “The framework for assessing the evidence in an age discrimination case parallels that applicable in a Title VII case.” Thomas v. International Business Machines, 48 F.3d 478 (10th Cir. 1995) (citing Spulak v. K Mart Corp., 894 F.2d 1150, 1153 (10th Cir. 1990)). To set forth a *prima facie* case of age discrimination, Plaintiff must (1) prove that he was within the protected age group; (2) prove that he was doing satisfactory work; (3) prove that adverse employment action was taken against him⁵; and (4) produce evidence from which a fact finder might reasonably conclude Sun intended to discriminate in reaching the decision to reassign Plaintiff's former duties.⁶

⁵See Thomas, 48 F.3d at 485.

⁶See Lucas, 857 F.2d at 1401 (citing Branson v. Price River Coal Co., 853 F.2d 768 (10th Cir. 1988)).

See Lucas, 857 F.2d at 1401 (citing Sperry Corp., 852 F.2d at 507; Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1547 (10th Cir. 1988) and Cockrell v. Boise Cascade Co., 781 F.2d 172, 177 (10th Cir. 1986)).

Once Plaintiff establishes a *prima facie* case of age discrimination, the burden shifts to Sun to “show a legitimate, nondiscriminatory reason motivated the decision.” Lucas, 857 F.2d at 1401 (citing Sperry Corp., 852 F.2d at 507). Plaintiff must then “rebut the employer’s showing by demonstrating that the proffered justification is a pretext.” Id. Plaintiff retains throughout the ultimate burden of proving that age was a determining factor in the challenged decision. See Texas Department of Affairs v. Burdine, 450 U.S. 248, 256 (1981).

For purposes of this Motion, the Court finds Plaintiff has established a *prima facie* case of age discrimination. The Court further finds Sun has offered legitimate, nondiscriminatory reasons motivated its decision to reassign Plaintiff’s duties to other Sun employees, i.e., the downsizing of its operations beginning in 1992 and the partial conversion to Master Locks from Best Locks. See Response, Exhibit J; Affidavit of Robert Schaeffer, Sun Brief, Attachment B, ¶¶ 3-5.

Although Plaintiff testifies he can’t think of any reason other than age discrimination that would prompt Sun to reassign his former job duties to younger Sun employees⁷, such self-serving testimony fails to provide even circumstantial evidence that

⁷See Plaintiff’s Depo., p. 209.

Sun's proffered reasons for reassigning Plaintiff's job duties were pretextual. See Branson, 853 F.2d at 771-72. Plaintiff makes much of the claim that Sun has not produced documentation reflecting the reassignment of his duties was related to the downsizing, nor documentation showing Plaintiff's department was being reorganized. See Response, p. 25. The absence of such evidence might be probative had Plaintiff formally moved for the production of such documentation after his requests were purportedly unanswered, thus forcing Sun to produce any documents or admit they do not exist. However, Plaintiff's failure to so move precludes the Court from finding no such documentation exists. Further, that Sun was downsizing was not kept a secret from Plaintiff, nor was the fact there would be less need for maintenance of the Best Locks after the partial conversion to Master Locks.

Sun's belief the duties of locksmith would remain less than a full-time job after the downsizing is borne out by the record. The percentage of time devoted to locksmith duties by Williams and Hodges from 1994-1996 does not exceed ten percent. See Affidavit of Robert Schaeffer, Sun Brief, Attachment B, ¶ 7.

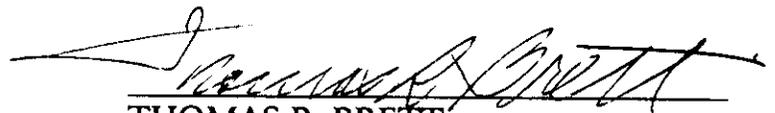
The record is insufficient to substantiate or rebut Plaintiff's argument that a by-product of Sun's downsizing, cost savings, have not been realized. In other words, Plaintiff has not presented evidence raising a material fact with regard to his claim of pretext as it relates to the proffered reason of cost savings.

Plaintiff contends Sun's proffered reasons were pretextual by pointing out that his

duties were reassigned some eight months after the purported downsizing had been completed. Such "evidence" does not raise an issue of material fact. Plaintiff offers no evidence the effects of the downsizing were, or were intended to be, immediate and static. Additionally, Plaintiff offers no evidence the conversion to Master Locks from Best Locks was to be a process completed over a short period of time contemporaneous with the downsizing.

The Court finds Plaintiff has failed to produce specific facts showing there remains a genuine issue of material fact for trial or evidence significantly probative as to Sun's proffered reasons being pretextual. Accordingly, Sun is entitled to and granted summary judgment on Plaintiff's ADEA claim.

IT IS SO ORDERED this 5th day of September, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

SEP 05 1997

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

JOHN F. ROURKE,

Plaintiff,

vs.

Case No.96-CV-629-M

JACK GRAHAM, d/b/a AUTO
SHOWCASE ONE; and OLD REPUBLIC
SURETY COMPANY as Issuer of Bond
No. LSC1016625,

Defendants.

ENTERED ON DOCKET
SEP 08 1997
DATE

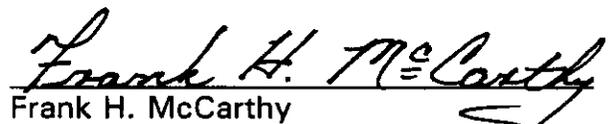
AMENDED JUDGMENT

This action came on for jury trial before the Court, The Honorable Frank H. McCarthy, United States Magistrate Judge, presiding by consent of the parties. The issues having been tried and the jury having rendered its verdict,

IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff, John F. Rourke, recover from the defendant, Jack Graham, d/b/a Auto Showcase One, on his claim for conversion, the sum of \$3,500.00 and, on his claim under the federal odometer act, the statutory minimum of \$1,500.00.

IT IS FURTHER ORDERED AND ADJUDGED that judgment be granted to the defendant, Jack Graham, d/b/a Auto Showcase One, on the plaintiff's claim for fraudulent misrepresentation.

DATED this 6th day of SEPT., 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

FILED

SEP 05 1997

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

JOHN F. ROURKE,

Plaintiff,

vs.

Case No.96-CV-629-M ✓

JACK GRAHAM, d/b/a AUTO
SHOWCASE ONE; and OLD REPUBLIC
SURETY COMPANY as Issuer of Bond
No. LSC1016625,

Defendants.

ORDER

Before the Court for consideration are the following matters: Defendant's Combined Motion for Judgment Pursuant to Rule 50(b), Motion For New Trial and Supporting Brief, [Dkt. 51]; Plaintiff's Application for Attorneys Fees and Costs [Dkt. 52]; and Plaintiff's Combined Motion To Modify Judgment and Response to Defendant's Motion Pursuant to Rule 50(b), Motion For New Trial and Supporting Brief [Dkt. 53].

Defendant's Combined Motion For Judgment Pursuant to Rule 50(b)
and
Motion For New Trial

By this motion, Defendant raises three challenges to the verdict of the Jury and the judgment previously entered thereon by the Court on June 24, 1997. Initially, Defendant asserts that there is no evidence to justify the award of punitive damages by the Jury. Because the Court intends to modify the judgment previously entered, removing any recovery from Defendant on Plaintiff's claim for fraudulent misrepresentation, which claim supported the punitive damage award by the Jury,

the issue of a punitive damage award will become moot. However, the Court would specifically note that its review of the evidence presented at trial fully supported the Jury's verdict with regard to the claim of fraudulent misrepresentation and the award of punitive damages on that claim.

Defendant next contends that the federal odometer act and misrepresentation claims are duplicative. The Court agrees with Defendant that Plaintiff may only recover on either the federal odometer claim or the state fraudulent misrepresentation claim. *S&S Toyota v. Kirby*, 649 So.2d 916 (Fla. Dist. Ct. App. 1995); *Freeman v. Myers*, 774 S.W.2d 892 (Mo. App. W.D., 1989); *Rice v. Gustavel*, 891 F.2d 594 (6th Cir. 1989); The Court specifically notes that the evidence in support of both claims was identical and further notes that the Court previously advised the parties and instructed the Jury that Plaintiff would be entitled to only one recovery for the damages suffered. Thus, the Court is persuaded that Plaintiff must elect his remedy under either the federal odometer act or the state fraudulent misrepresentation claim.

At the hearing on these motions, counsel for Plaintiff cited the case of *Wildstein v. TRU Motors, Inc.*, 547 A.2d 340, (N.J. Super. 1988), for the proposition that the Court could award damages under both the federal odometer act and punitive damages under a state law cause of action. The Court took the matter under advisement to review the cited authority, and, having done so, finds that the authority does not support Plaintiff's position. The Court notes that, in that case, the plaintiff specifically elected not to seek recovery under the federal odometer statute and, instead, sought recovery for common law fraud. Thus the Court remains

convinced that Plaintiff is entitled to only one recovery of damages on these two claims.

At the hearing, the Court was advised by counsel for Plaintiff that, if forced to elect a recovery under one of these claims, Plaintiff would elect his recovery under the federal odometer act. Based upon that election, the Court finds that Defendant's motion for judgment on the state fraudulent misrepresentation claim, including both actual and punitive damages, should be granted. Without a recovery of actual damages, Plaintiff cannot recover punitive damages. *Phillips Machinery Co. v. LeBland, Inc.*, 494 F.Supp. 318 (N.D. Okla. 1980).

There exists a conflict between the circuits as to whether the court need enter an amended judgment based upon the rulings in this Order. *Wright v. Preferred Research, Inc.*, 937 F.2d 1556 (11th Cir. 1991) (Fed. R. Civ. P. 58 does not require court to enter separate document whenever it alters judgment entered once in accordance with Rule 58); *Wekoff v. Vanderveld*, 897 F.2d 232, 237 (7th Cir. 1990) (Amendment of original judgment in accordance with Fed. R. Civ. P. 58 saves unnecessary expenditure of judicial resources concerning appellate jurisdictional questions). This Court is of the opinion that the approach of the Seventh Circuit is more in keeping with the purpose of Rule 58 to provide certainty with regard to when the time to appeal begins to run. Therefore, an appropriate amended judgment reflecting the rulings herein will be entered by the Court.

Finally, Defendant raises as an allegation of error, the Court's refusal to instruct the jury on the significance of Plaintiff's possession of an Oklahoma certificate of title.

Specifically, Defendant desired that the Court instruct the Jury that, under Oklahoma law, a certificate of title is not to be considered as evidence of ownership, claiming significance to this instruction in that the federal odometer act requires a transfer to occur before the defendant may be held liable. 49 U.S.C. § 32702(8).

As explained in some detail at the conference held by the Court to settle the jury instructions, this Court is convinced that a transfer within the purview of 49 U.S.C. § 32702(8) occurred in this case and that a liberal construction of the meaning of the term "transfer" within the statute is in keeping with the congressional purpose in enacting the odometer act. *See generally, Evans v. Paradise Motors, Inc.*, 721 F.Supp. 250 (N.D.Cal.1989). Thus, the Court concludes that Defendant's Motion For Judgment Pursuant to Rule 50(b) and/or Motion For New Trial based upon this allegation is without merit and will be denied.

Plaintiff's Motion To Modify Judgment

As set forth above, the Court intends to amend the judgment entered in this case granting judgment to Defendant on Plaintiff's Fraudulent Misrepresentation Claim. The Court also intends to amend the judgment to increase the damages awarded to Plaintiff for Defendant's violation of the federal odometer act to the minimum damages provided by statute of \$1,500.00. Thus, Plaintiff will be entitled to a judgment of \$3,500.00 on the conversion claim and \$1,500.00 on the federal odometer act claim.

Plaintiff's Application for Attorneys Fees and Costs

Having recovered under the federal odometer act, Plaintiff is entitled to his attorneys fees pursuant to 49 U.S.C. § 32710. Plaintiff submitted an application with the Court for both fees and costs with total hourly fees consisting of \$20,612.50 and total costs of \$539.86.

Applications for costs are governed by N.D. LR 54.1, which requires a Bill of Costs to be submitted within fourteen days after entry of judgment. The rule further provides that any party failing to comply with the rule will be deemed to have waived the claim. By failing to follow the local rule, Plaintiff has waived any claim for costs in this action and none will be awarded.

The Court has reviewed in detail the hourly billing statements for Plaintiff's attorneys in this matter and finds both the rate charged and the hours incurred reasonable, with the following exceptions:

2/25/97	.8 hours at \$100.00 per hour from Stephenson's bill;
3/03/97	.5 hours at \$100.00 per hour from Stephenson's bill;
3/26/97	.5 hours at \$100.00 per hour from Stephenson's bill;
4/29/97	4.5 hours at \$100.00 per hour from Stephenson's bill.

These amounts represent duplication of effort by both attorneys in the case and the Court finds that a total of 6.3 hours are unreasonable and will not be awarded. Subtracting the hours that the Court finds to be unreasonable from the total applied for, the Court finds a reasonable attorneys fee for both counsel to consist of \$19,982.50.

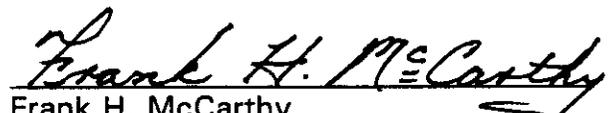
Despite Defendant's argument that the fees requested are not in proportion to the recovery obtained, this Court is persuaded that the factors set forth in Plaintiff's

application justify the fees requested. The Court is particularly sensitive to take into account the public service performed by Plaintiff's counsel in pursuing this type of claim. In the large majority of cases of this type, the amount of actual damage will be small. However, as evidenced by the work necessary to bring this case to a successful conclusion, substantial resources and time must be expended by Plaintiff's counsel. Therefore, if the Court seeks to implement the clear intent of congress to encourage the private prosecution of these actions, the Court must ensure adequate compensation to successful Plaintiffs' attorneys. *See generally, Fleet Investment Co. v. Rogers*, 620 F.2d 792 (10th Cir. 1980).

In accordance with the view set forth above, the Court will enter an appropriate amended judgment.

Defendant's Combined Motion for Judgment Pursuant to Rule 50(b), Motion For New Trial [Dkt. 51] is GRANTED IN PART and DENIED IN PART as stated above. Plaintiff's Application for Attorneys Fees and Costs [Dkt. 52] is GRANTED IN PART AND DENIED IN PART as follows: Plaintiff's attorneys are hereby awarded attorney's fees in the total amount of \$19,982.50 to be paid by Defendant. Plaintiff's Combined Motion To Modify Judgment and Motion For New Trial [Dkt. 53] is GRANTED IN PART and DENIED IN PART as stated above.

SO ORDERED this 6th day of Sept., 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

JAMES A. CHRISTOPHER,
an individual,

Plaintiff,

vs.

KENDAIVS HOLDING COMPANY, a Nevada
corporation; URE CO., a Texas corporation;
and TEREX CORPORATION, a
Delaware corporation,

Defendants.

ENTERED ON DOCKET

DATE SEP 05 1997

No. 96-CV-905H

FILED

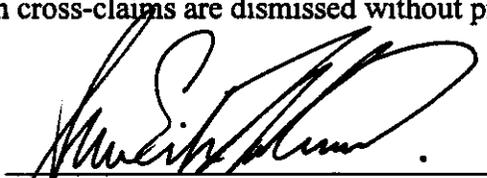
SEP 04 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITHOUT PREJUDICE

BEFORE THE COURT for consideration is the Stipulation of Dismissal Without Prejudice in which Defendant Terex Corporation seeks to dismiss without prejudice its cross-claims against Defendant Kendavis Holding Company. For good cause shown, the Court finds that such dismissal without prejudice should be granted.

IT IS HEREBY ORDERED that such cross-claims are dismissed without prejudice.


The Honorable Sven Erik Holmes
United States District Court Judge

ENTERED ON DOCKET

DATE 9-5-97

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff

v.

MICK A. RUPERT,

Defendant.

)
)
)
)
)
)
)
)
)
)
)

Civil Action No. 97CV468 K(M)

F I L E D

SEP 04 1997 (17)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEFAULT JUDGMENT

This matter comes on for consideration this 3rd day of September, 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, Mick A. Rupert, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Mick A. Rupert, acknowledged receipt of Summons and Complaint on May 15, 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.

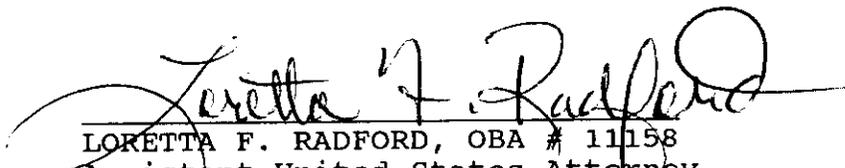
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Mick A. Rupert, for the principal amount of \$2,891.83, plus accrued interest of \$890.44, plus interest thereafter at the rate of 8 percent per annum until judgment, a surcharge of 10% of the amount

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of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.5% percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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

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

F I L E D

RICKY D. WILKERSON,)
)
 Plaintiff,)
)
 vs.)
)
 CHRYSLER CORPORATION, a Delaware)
 corporation.)
)
 Defendant.)

SEP - 3 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-1054K ✓
Judge Terry C. Kern

STIPULATION OF DISMISSAL

It is hereby stipulated by and between the Plaintiff, RICKY D. WILKERSON, and the Defendant, CHRYSLER CORPORATION, a Delaware corporation, by and through their attorneys of record a follows:

1. That the parties hereto have compromised and settled the claims between them and, as a result, the above-entitled case should be dismissed with prejudice.
2. That this stipulation does not constitute an admission on the part of the defendant of any liability or fault to the plaintiff.
3. That the parties to this stipulation have waived all claims for costs herein, including attorneys' fees.

DATED this 22 day of August, 1997.



Kort A. BeSore, Esq.
P.O. Drawer 450939
10 East 13th Street
Grove, OK 74345-0939

Attorney for Plaintiff



TIMOTHY E. McCORMICK, OBA #5920
McCORMICK, SCHOENENBERGER & DAVIS
1516 South Boston, Suite 320
Tulsa, Oklahoma 74119-4019
(918) 582-3655

Attorney for Defendant

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

FILED

SEP 03 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BONNIE MOORE,)

Plaintiff,)

v.)

No. 96-C-567E ✓

SOUTHWESTERN BELL)

TELEPHONE COMPANY,)

a Missouri corporation,)

ENTERED ON DOCKET

DATE SEP 04 1997

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW Plaintiff, Bonnie Moore, and Defendant, Southwestern Bell Telephone Company, individually and by and through their respective counsel of record, and hereby stipulate to the dismissal of the above-captioned and styled matter with prejudice to the refiling of same, each party to be responsible for their own attorney fees and costs.

Bonnie Moore

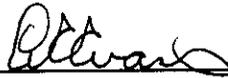
BONNIE MORE, Plaintiff
moore

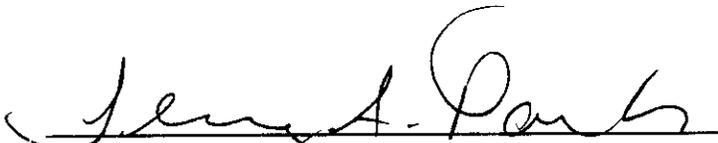
Jim Huber

JAMES R. HUBER OBA# 15173
MALLOY & ASSOCIATES
1924 South Utica, Suite 820
Tulsa, OK 74104-6515
Telephone: 918/747-3491

ATTORNEYS FOR PLAINTIFF

SOUTHWESTERN BELL TELEPHONE
COMPANY, Defendant

By: 
ART EVANS
Director-Labor Relations/Safety


TRACY A. PARKS OBA#14292
800 North Harvey, Room 310
Oklahoma City, OK 73102
Telephone: 405/291-6483

ATTORNEY FOR DEFENDANT

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

FILED

SEP - 3 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

OSAGE NATION TAX COMMISSION,)
)
Plaintiff(s),)
)
vs.)
)
DEPARTMENT OF INTERIOR, et al,)
)
Defendant(s).)

Case No. 95-C-1190-B

ENTERED ON DOCKET

SEP 04 1997

ADMINISTRATIVE CLOSING ORDER DATE

The Parties having advised the Court of their agreement to administrative closure of this case pending final adjudication of the case Fletcher vs. USA, 90-C-248-E, Northern District of Oklahoma, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any purpose required to obtain a final determination of the litigation.

IF, within 60 days of a final adjudication in the case of Fletcher vs. USA, 90-C-248-E, Northern District of Oklahoma, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this day of September, 1997.



THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 3 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GERALDINE PRINCE,
SS# 444-38-8216

Plaintiff,

v.

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

Defendant.

No. 95-C-1136-E

ENTERED ON DOCKET

DATE SEP 04 1997

JUDGMENT

In accord with the Order filed July 1, 1997, the Court hereby enters judgment in favor of the Defendant, John J. Callahan, Acting Commissioner of the Social Security Administration, and against the Plaintiff, Geraldine Prince. Plaintiff shall take nothing of her claim. Costs and attorney fees may be awarded upon proper application.

Dated this 3rd day of Sept. ~~August~~ 1997.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 9-4-97

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

F I L E D

MICHAEL LIVINGSTON,)
)
Petitioner,)
)
vs.)
)
LEROY L. YOUNG, ET AL.,)
)
Respondent.)

SEP 03 1997 *ML*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 94-C-879-K ✓

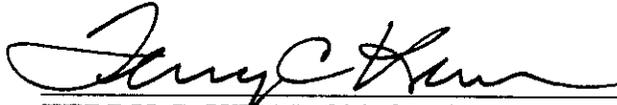
ORDER

Before the Court is Respondent's motion to dismiss as moot (Docket #23) filed in this matter on May 6, 1997. Petitioner did not file a response to Respondent's motion.

After careful review of the file in this case, the Court finds that Respondent's motion should be granted.

ACCORDINGLY, IT IS HEREBY ORDERED that Respondent's motion to dismiss as moot (Docket #23) is **GRANTED**. The petition for a writ of habeas corpus is dismissed as moot.

SO ORDERED THIS 2 day of September, 1997.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP - 3 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA

Plaintiff,

vs.

MICHAEL D. ZUGELDER

Defendant.

CIVIL ACTION NO. 96-C-633-J

ENTERED ON DOCKET

DATE SEP 04 1997

AGREED JUDGMENT

This matter comes on for consideration this 3rd
day of ^{September} ~~July~~, 1997, the Plaintiff, United States of America, by
Stephen C. Lewis, United States Attorney for the Northern
District of Oklahoma, through Loretta F. Radford, Assistant
United States Attorney, and the Defendant, Michael D. Zugelder,
appearing through Raymond Allred.

The Court, being fully advised and having examined the
court file, finds that the Defendant, Michael D. Zugelder,
acknowledged receipt of Summons and Complaint on July 28, 1996.
The Defendant filed an Answer but has agreed that Michael D.
Zugelder is indebted to the Plaintiff in the amount alleged in
the Complaint and that judgment may accordingly be entered
against Michael D. Zugelder in the principal amount of \$2,966.55,
plus accrued interest in the amount of \$2,407.84, plus interest
thereafter at the rate of 7% per annum until judgment, plus a
surcharge of 10% of the amount of the debt in connection with the
recovery of the debt to cover the cost of processing and handling
the litigation, plus filing fees in the amount of \$120.00, plus

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the defendant in the principal amount of \$2,966.55, plus accrued interest in the amount of \$2,407.84, plus interest thereafter at the rate of 7% per annum until judgment, plus a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation, plus filing fees in the amount of \$120.00, plus interest thereafter at the current legal rate until paid, plus the costs of this action.

Dated this 3rd day of September, 1997.

[Signature]
UNITED STATES DISTRICT JUDGE
magistrate

APPROVED;

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

[Signature]
LORETTA F. RADFORD
Assistant United States Attorney

[Signature]
MICHAEL D. ZUGELDER

[Signature]
08A #11747

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

FILED

SEP 03 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HAWKINS-SMITH, an Idaho General Partnership,
Plaintiff,

v.

Case No. 95-C-006-H

SSI, INC., UNITED STATES FIDELITY & GUARANTY COMPANY, and INTERNATIONAL ROOFING, INC.,
Defendants,

SSI, Inc.,

Third-Party Plaintiff,

v.

MULE-HIDE PRODUCTS CO., INC., and LARRY KESTER d/b/a ARCHITECTS COLLECTIVE,

Third-Party Defendants.

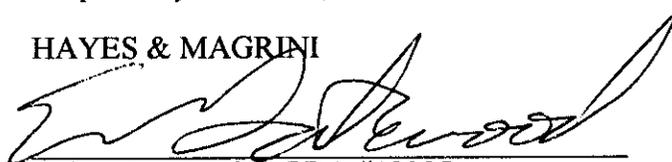
ENTERED ON DOCKET
DATE SEP 04 1997

DISMISSAL WITH PREJUDICE

COMES NOW the Third Party Plaintiff, SSI, Inc., by and through their attorney of record, and dismisses the above cause of action with prejudice to the refileing of same.

Respectfully submitted,

HAYES & MAGRINI



Robert L. Magrini, OBA #12385
Evan Gatewood, OBA #13412
1220 N. Walker
P.O. Box 60140
Oklahoma City, OK 73146-0140

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing was mailed to the following attorneys of record, with sufficient postage thereon, on this 2nd day of September 1997.

Richard D. Wagner
I. Michele Drummond
WAGNER, STUART & CANNON
902 South Boulder
Tulsa, OK 74119-2034

A handwritten signature in black ink, appearing to read "Evan Gatewood", written over a horizontal line.

Robert L. Magrini
Evan Gatewood

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP - 2 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ESTHER MAE PERKINS,
(SSN: 527-72-4346)

Plaintiff,

v.

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

Defendant.

No. 96-C-48-J

ENTERED ON DOCKET

SEP 04 1997

DATE

JUDGMENT

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

It is so ordered this 2 day of September 1997.



Sam A. Joyner
United States Magistrate Judge

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

(17)

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

ESTHER MAE PERKINS,)
(SSN: 527-72-4346))
)
Plaintiff,)
)
v.)
)
JOHN J. CALLAHAN, Acting Commissioner)
of the Social Security Administration,)
)
Defendant.)

SEP - 2 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-CV-48-J ✓

ENTERED ON DOCKET
SEP 04 1997
DATE _____

ORDER^{1/}

Now before the Court is Plaintiff's appeal of the Acting Commissioner's decision denying Plaintiff Supplemental Security Income ("SSI") benefits under the Social Security Act. The Administrative Law Judge ("ALJ"), Glen E. Michael, found (1) that Plaintiff retained the residual functional capacity ("RFC") to perform the full range of light work, (2) that Plaintiff's past relevant work included a job as a retail sales-clerk selling men's clothing, (3) that Plaintiff's sales-clerk job could be performed at the light exertional level, and (4) that Plaintiff could return to her past work.

Plaintiff argues that the ALJ (1) failed to consider the non-exertional limitations she suffers as a result of asthma and eczema on her hands; (2) failed to call a vocational expert ("VE") to assess the impact of Plaintiff's non-exertional impairments on her RFC; (3) failed to give legitimate reasons for rejecting the opinion of Thomas L. Ashcraft, M.D., a non-treating, consulting doctor; and (4) failed to give legitimate

^{1/} This Order is entered pursuant to 28 U.S.C. § 636(c) and the parties' Consent to Proceed Before United States Magistrate Judge.

reasons for discounting Plaintiff's testimony. After reviewing the record as a whole, the Court finds that the ALJ's decision is not supported by substantial evidence. Consequently, the Acting Commissioner's denial of benefits is **REVERSED** and this case is **REMANDED** for further proceedings consistent with this Order.

I. STANDARD OF REVIEW

A disability under the Social Security Act is defined as the

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

42 U.S.C. § 423(d)(1)(A). A claimant will be found disabled

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

42 U.S.C. § 423(d)(2)(A). To make a disability determination in accordance with these provisions, the Commissioner has established a five-step sequential evaluation process.^{2/}

^{2/} Step one requires the claimant to establish that he is not engaged in substantial gainful activity as defined at 20 C.F.R. §§ 416.910 and 416.972. Step two requires the claimant to demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 416.921. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). See 20 C.F.R. § 416.925. If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if he can perform his past work. If a claimant is unable to perform his past work, the Commissioner has the burden of proof at step five to

(continued...)

The standard of review applied by this Court to the Acting Commissioner's disability determinations is set forth in 42 U.S.C. § 405(g). According to § 405(g), "the finding of the [Acting] Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support the ultimate conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

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

^{2/} (...continued)

establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See, 20 C.F.R. § 416.920; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); and Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988).

In addition to determining whether the Acting Commissioner's decision is supported by substantial evidence, it is also this Court's duty to determine whether the Acting Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Acting Commissioner's decision will be reversed when he/she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

II. DISCUSSION

The Court has reviewed the entire record. The record demonstrates beyond doubt that Plaintiff suffers from severe, episodic asthma. The record also demonstrates that when Plaintiff is suffering an asthma attack, she cannot function even at the sedentary exertional level. The record also indicates that Plaintiff's asthma can be substantially controlled with medication.

The ALJ found that Plaintiff retained the RFC to perform the full range of light work. The ALJ found that Plaintiff's asthma did not affect her RFC because he found that Plaintiff's asthma had "been fully accommodated." [*R. at 17*]. Given the record before the Court, the only interpretation that can be given to this finding is that the ALJ was convinced that Plaintiff's asthma was being completely controlled by medication. It is this finding which the Court finds is not supported by substantial evidence.

The record demonstrates that Plaintiff went to the emergency room several times for treatment of her asthma. [*R. at 256-61*]. Plaintiff also continued to see her treating physician, Margaret Stripling, D.O., for treatment of her asthma. [*R. at 266-*

71). Plaintiff was referred by the Social Security Administration ("SSA") to Dr. Ashcraft for a consultative examination. Dr. Ashcraft's report indicates that at the time he saw Plaintiff, her asthma was not under control. [R. at 272-74]. All of these sources indicate, however, that Plaintiff's asthma could be substantially controlled with medication.

What is not clear from the record, however, is whether Plaintiff is able to obtain the medication she needs to keep her asthma under control. This is an SSI claim. Plaintiff is, therefore, financially disadvantaged. Plaintiff is also supporting several children. Plaintiff indicates on some of the forms she filed with the SSA that her children have asthma and that she would take some of her children's asthma medication because she could not afford her own. [R. at 60]. Plaintiff testified that she receives prescriptions for asthma medication, but, despite Medicare, she cannot afford to buy her medicine and the medicine her children need. [R. at 329-31]. In other words, there is nothing in the record which demonstrates Plaintiff's ability to obtain the medication needed to control her asthma.

A social security benefits claimant may not be denied benefits because she is financially unable to obtain treatment or prescribed medications. Teter v. Heckler, 775 F.2d 1104, 1107 (10th Cir. 1985); Thompson v. Sullivan, 987 F.2d 1482, 1490 (10th Cir. 1993); Lovelace v. Bowen, 813 F.2d 55, 59 (5th Cir. 1987). Plaintiff was not represented before the ALJ and she has limited education and a limited ability to read and write. Although a claimant has the general duty to prove she is disabled, a social security disability hearing is a non-adversarial proceeding and the ALJ has a duty

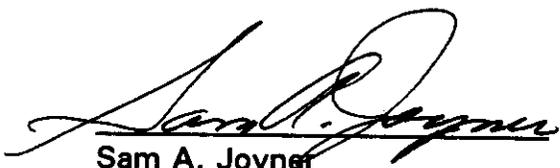
to develop the factual record. See Musgrave v. Sullivan, 996 F.2d 1371, 1374 (10th Cir. 1992); 42 U.S.C. § 423(d)(5)(B). Plaintiff's *pro se* status and limited education heightens this duty. The ALJ in this case had a duty to "scrupulously and conscientiously" develop the record to insure that Plaintiff received a "full and fair" hearing. Dixon v. Heckler, 811 F.2d 506, 510-11 (10th Cir. 1987) (citing several cases); Mimms v. Heckler, 750 F.2d 180, 185 (2d Cir. 1984).

The ALJ in this case conducted no inquiry into Plaintiff's ability to obtain the medication and continued treatment necessary to control her asthma. This case is hereby remanded so that the ALJ may develop the record regarding Plaintiff's ability to obtain the medication and treatment necessary to control her asthma. If the ALJ determines that Plaintiff cannot afford the necessary treatment or medication, then he shall reevaluate Plaintiff's RFC, taking into account the impact of her uncontrolled asthma.

For the reasons discussed above, this case is **REVERSED** and **REMANDED** for further proceedings not inconsistent with this Order.

IT IS SO ORDERED.

Dated this 2 day of September 1997.


Sam A. Joyner
United States Magistrate Judge

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

ERIC DeWAYNE ABERNATHY,)
)
 Petitioner,)
)
 v.)
)
 STEPHEN KAISER, *et al.*,)
)
 Respondent.)

SEP - 2 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 97-CV-77-K(J)

ENTERED ON COURT

DATE SEP 04 1997

REPORT & RECOMMENDATION

Petitioner, Eric DeWayne Abernathy, filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on September 28, 1996, in the Eastern District of Oklahoma. The Petition was transferred to the Northern District of Oklahoma on January 24, 1997. Petitioner is confined in the Davis Correctional Facility, in Holdenville, Oklahoma, and he challenges his prior convictions which occurred in Washington County. By minute order dated January 24, 1997, the District Court referred the case for further proceedings consistent with the Magistrate Judge's jurisdiction.

Respondent filed a Motion to Dismiss on February 26, 1997, asserting that the District Court should dismiss Petitioner's petition because Petitioner had failed to exhaust his state court remedies. For the reasons discussed below, the United States Magistrate Judge recommends that the Motion to Dismiss be **GRANTED**.

①

I. PROCEDURAL BACKGROUND

Petitioner was convicted on June 30, 1994, and sentenced to two five year sentences, to be served concurrently, after entering a nolo contendere plea. Petitioner's Petition for Habeas Corpus, September 20, 1996, [Doc. No. 1-1]. Petitioner did not file a direct appeal, and he did not file a petition for post-conviction relief in state court. None of ^{the} issues which Petitioner requests that this Court address have been presented to the Oklahoma courts. Petitioner notes in his Petition that he did not appeal because "I was advised by the Court that once I entered a guilty plea it [sic] gave up all rights to appeal."

On February 26, 1997, Respondent filed a Motion to Dismiss for Failure to Exhaust State Remedies. [Doc. No. 4-1]. Petitioner did not respond to the Motion to Dismiss. By Order filed July 15, 1997, Petitioner was directed to respond to the Motion to Dismiss by July 28, 1997. Petitioner did not file a response.

II. ANALYSIS

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). "[E]xhaustion of state remedies is not required

where the state's highest court has recently decided the precise legal issue that petitioner seeks to raise on his federal habeas petition." Goodwin v. State of Oklahoma, 923 F.2d 156, 157 (10th Cir. 1991). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

As a preliminary matter, a court must determine whether a Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by establishing that either (a) the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) the petitioner had no available means for pursuing a review of a conviction in state court at the time of the filing of the federal petition. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986).

The Tenth Circuit has stated that a "rigorously enforced" exhaustion policy is necessary to serve the ends of protecting and promoting the state's role in resolving the constitutional issues raised in federal habeas petitions. Naranjo v. Ricketts, 696 F.2d 83, 87 (10th Cir. 1982). The general rule that a federal court must dismiss unexhausted claims has a few exceptions. For example, the "futility exception" provides that a petition should not be dismissed "if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render

futile any effort to obtain relief." Duckworth v. Serrano, 454 U.S. 1, 3 (1981).¹⁷

Petitioner has not attempted to explain how he could meet an exception to the exhaustion rule. And, although Petitioner was directed to file a response to Respondent's Motion to Dismiss, no response was filed.

Under the facts presented in this case, Petitioner has not exhausted the remedies available to him in state court. In Lozoya v. State of Oklahoma, 932 P.2d 22 (Okla. Crim. App. 1997), the petitioner, after entering a plea of guilty, did not properly perfect his appeal or file an application to withdraw his guilty plea. The Oklahoma Court of Criminal Appeals granted an appeal out of time, and addressed the issues presented by the petitioner. Id. at 25. The procedure for filing an "application out of time" was described in Smith v. State of Oklahoma, 611 P.2d 276 (Okla. Crim. App. 1980).

The prior statutory appeal out of time remedy found at 22 O.S. Supp 1965, § 1073 was repealed upon enactment of and has been subsumed within the Post Conviction Procedures Act, 22 O.S. 1971, § 1080 *et seq.*

. . . . [T]he proper procedure to secure the remedy is the filing of a post conviction application in the District Court, where Findings of Fact and Conclusions of Law should be

¹⁷ Utilizing the "futility exception" to excuse exhaustion imposes additional consequences on the Petitioner. The court is required to find that a Petitioner has "procedurally defaulted" his issues in state court. Instead of initially addressing the issues on the merits, a Petitioner is required to show "cause and prejudice" before the issues he presents can be addressed. The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. A petitioner is additionally required to establish prejudice, which requires showing "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). The alternative is proof of a "fundamental miscarriage of justice," which requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

made as to whether applicant was denied a direct appeal through no fault of his own, which issue is the crucial one to appeal out of time, followed by an application, or "appeal", as it were, filed in this Court, with the District Court findings and conclusions.

Id. at 276 (footnotes and citations omitted). The Oklahoma Court additionally footnotes,

In some instances it may be appropriate for the District Court to simply vacate the original judgment and sentence and impose a new judgment and sentence, so that the appeal time will begin to run anew.

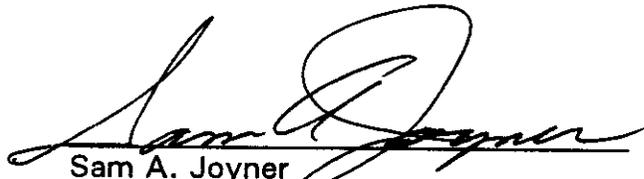
Id. at 276 n.1. See also White v. Meachum, 838 F.2d 1137 (10th Cir. 1988).

RECOMMENDATION

The United States Magistrate Judge recommends that the District Court **GRANT** Respondent's Motion to Dismiss.

Any objection to this Report and Recommendation must be filed with the Clerk of the Courts within ten days after being served with a copy of this notice. **Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's order.** See Moore v. United States, 950 F.2d 656 (10th Cir. 1991).

Dated this 2 day of September 1997.


Sam A. Joyner
United States Magistrate Judge

SAC

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

JAMES A. CHRISTOPHER,
an individual,

Plaintiff,

vs.

KENDAVIS HOLDING COMPANY, a Nevada
corporation; URE CO., a Texas corporation;
and TEREX CORPORATION, a
Delaware corporation,

Defendants.

ENTERED ON DOCKET

SEP 04 1997

No. 96-CV-905H ✓

FILED

SEP - 2 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COMES NOW Defendant, Terex Corporation, and, upon agreement of Defendant, Kendavis Holding Company, and Plaintiff, James A. Christopher, respectfully seeks to dismiss without prejudice its cross-claims against Defendant Kendavis Holding Company. Plaintiff's counsel has represented that Defendant URE Co. has not been served in this action.

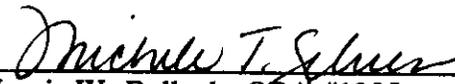
Respectfully submitted,

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

By: 
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Steven A. Broussard, OBA #12582
Kelly S. Kibbie, OBA #16333
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ATTORNEYS FOR DEFENDANT TEREX
CORPORATION

- and -

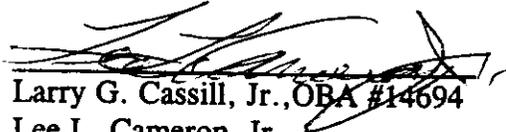

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Michele T. Gehres, OBA #10986
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- and -

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ATTORNEYS FOR PLAINTIFF
JAMES A. CHRISTOPHER

- and -



Larry G. Cassill, Jr., OBA #14694
Lee L. Cameron, Jr.

WILSON, ELSER, MOSKOWITZ,
ELDEMAN & DICKER
500 Renaissance Center
1201 Elm Street
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(214) 698-1101 (facsimile)
ATTORNEYS FOR DEFENDANT
KENDAVIS HOLDING COMPANY

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

CAROL ETAMÉ, individually and as)
Administratrix of the Estate of)
Armand Bangué Etamé,)
)
Plaintiff,)

vs.)

METROPOLITAN LIFE)
INSURANCE COMPANY, a New)
York Corporation; and BANK OF)
OKLAHOMA, N.A., an)
Oklahoma Banking Corporation,)
)
Defendants,)

v.)

S.D. MASSOUMA ETAMÈ,)
)
Third-Party Defendant.)

ENTERED ON DOCKET
DATE 9-3-97

Case No. 96-CV-704-H ✓

FILED
IN OPEN COURT

SEP - 2 1997

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

**ORDER APPROVING SETTLEMENT AGREEMENT,
AND ORDER OF VOLUNTARY DISMISSAL WITH PREJUDICE**

The matter of Plaintiff's motion to approve the parties "Settlement Agreement and Release," and the matter of plaintiff's motion to approve the voluntary dismissal with prejudice, came on for hearing this 2nd day of September, 1997. The court, being fully advised of the premises for the plaintiff's dismissal motion, and being fully advised of the terms of the parties' "Settlement Agreement and Release," does hereby sustain plaintiff's motion. The parties' "Settlement Agreement and Release" is approved. The plaintiff's petition *qua* complaint is dismissed with prejudice.

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The Court will continue to retain jurisdiction over the Armand Etamé Trust, until further order of the Court.

IT IS SO ORDERED.


United States District Court Judge

AGREED AS TO SUBSTANCE AND FORM:

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Richard A. Shallcross, OBA # 10016
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(918) 742-2021

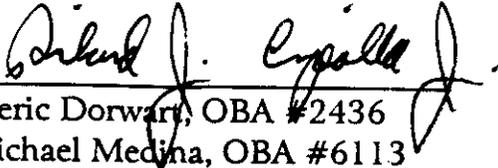
Attorney for Plaintiff
Carol Etamé

GABLE, GOTWALS, MOCK, SCHWABE,
KIHLE, GABERINO

BY: Patricia Ledvina Himes
Elsie Draper, OBA #2482
Patricia Ledvina Himes, OBA #5331
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(918) 582-9201

Attorney for Defendant
Metropolitan Life Insurance Company

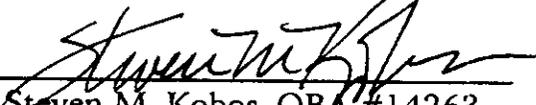
BY:


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J. Michael Medina, OBA #6113
Richard J. Cipolla, OBA # 13674
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Tulsa, Oklahoma 74103
(918) 583-9922

Attorney for Defendant
Bank of Oklahoma, N.A.

NICHOLS, WOLFE, STAMPER, NALLY, FALLIS
& ROBERTSON

BY:


Steven M. Kobos, OBA #14263
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Tulsa, Oklahoma 74103
(918) 584-5182

Guardian *Ad Litem* for
Armand Etamé, Jr. and Brooke Etamé

3:w:\sg\etame\order.vol

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

CAROL ETAMÉ, individually and as)
Administratrix of the Estate of)
Armand Bangué Etamé)

Plaintiffs,)

v.)

METROPOLITAN LIFE INSURANCE)
COMPANY, a New York corporation;)
and BANK OF OKLAHOMA, N.A., an)
Oklahoma banking corporation)

Defendants,)

v.)

S.D. MASSOUMA Etamé,)

Third-Party Defendant)

ENTERED ON DOCKET

DATE 9-3-97

Case No. 96-CV-704-H ✓

FILED
IN OPEN COURT

SEP - 2 1997

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

JOURNAL ENTRY OF JUDGMENT

On this day, the Joint Motion for Default Judgment filed herein by Plaintiff Carol Etamé, individually and as Administratrix of the Estate of Armand Bangué Etamé ("Plaintiff"), and Defendant Bank of Oklahoma, N.A. ("BOK") (collectively hereinafter the "Parties" unless otherwise indicated), against Third-Party Defendant S.D. Massouma Etamé ("S.D. Etamé"), came before, and was granted by, the undersigned Judge of the United States District Court, pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure ("FRCP"), and Rule 55.1(C) of the Local Rules of the United States District Court for the Northern District of Oklahoma ("Local Rules").

The Parties appeared by and through their counsel of record herein. Third-Party Defendant S.D. Etamé appeared not.

The Court, having reviewed the files and pleadings, and being fully informed of the premises, hereby makes the following findings

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and conclusions which constitute its decision and judgment with respect to S.D. Etamé.

The Court finds that this Court has jurisdiction over the subject-matter of this action and over all parties.

The Court further finds that Plaintiff commenced this action with the July 11, 1996 filing of her Petition for Creation of a Constructive Trust and for Reformation of Contract of Insurance in the District Court of Tulsa County, Oklahoma.

The Court further finds that on August 2, 1996, Defendants Metropolitan Life Insurance Company ("MetLife"), and BOK duly removed the case to this Court through the filing of their Notice of Removal, etc. herein.

The Court further finds that on August 23, 1996, MetLife filed its Answer, Counterclaim, and Third-Party Complaint for interpleader ("MetLife's Complaint"), herein.

The Court further finds that in MetLife's Complaint, MetLife, as a disinterested stakeholder, asserted an interpleader claim as a Counterclaim against Plaintiff, a Cross-Claim against BOK, and a Third-Party Complaint against Third-Party Defendant S.D. Etamé, as competing, adverse claimants to the \$76,000.00 stake held by MetLife, and inter alia, prayed that competing claimants Plaintiff, BOK, and S.D. Etamé be required to plead herein and set up their respective claims for determination by this Court. Therefore, Plaintiff, BOK, and S.D. Etamé are the real antagonists in this action, while MetLife is merely a disinterested interpleader stakeholder.

The Court further finds that on January 27, 1997, MetLife filed a valid Waiver of Service of Summons herein, executed by S.D. Etamé on January 22, 1997, pursuant to FRCP 4(d), in which S.D. Etamé acknowledged receipt of MetLife's Complaint and further acknowledged that:

I understand that a judgment may be entered against me if an answer or motion under Rule 12 is not served upon you within 60 days after December 2, 1996 or within 90 days after that date if the request was sent outside the United States.

Thereafter, S.D. Etamé was also warned that:

A defendant who waives service must within the time specified on the waiver form serve on plaintiff's attorney a response to the complaint and must also file a signed copy of the response with the court. If the answer or motion is not served within this time, a default judgment may be taken against that defendant.

(Emphasis in original).

The Court further finds that pursuant to FRCP 4(d)(4):

When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3) [providing for additional time to respond], as if a summons and complaint had been served at the time of filing the waiver, and no proof of service shall be required.

The Court further finds that pursuant to FRCP 4(d)(3) and the express terms of the Waiver itself, S.D. Etamé's response to MetLife's Complaint is long past due, and therefore, S.D. Etamé is in default, having failed to file an appearance, answer, pleading or motion, or make any claim whatsoever to the stake held herein by MetLife. Therefore, the Parties' Joint Motion for Default Judgment should be and is hereby sustained.

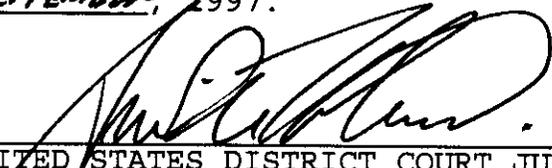
The Court further finds and determines that due to the unique circumstances of this case, as outlined above, there is no just

reason for delay, and that a final default judgment should be entered against S.D. Etamé.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Parties' Joint Motion for Default Judgment is sustained, and that Plaintiff and BOK are awarded a final default judgment in their favor and against S.D. Etamé herein that S.D. Etamé has no claim to, and is not entitled to any part of, the \$76,000.00 stake held by MetLife by reason of his failure to assert any such claim in this action.

IT IS FURTHER ORDERED, ADJUDGED, DECREED and determined that due to the unique circumstances of this case, as outlined above, there is no just reason for delay, and the Court hereby directs that final default judgment be entered against S.D. Etamé forthwith.

DATED this 2ND day of SEPTEMBER, 1997.


UNITED STATES DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHARD M. LABAT aka RICHARD
LABAT aka RICHARD MALCOLM LABAT;
REBECCA J. LABAT aka REBECCA JO
LABAT (Labat) fka REBECCA J. LORELLO;
HOUSEHOLD FINANCE CORPORATION III;
LEADER FEDERAL BANK FOR SAVINGS
formerly LEADER FEDERAL SAVINGS &
LOAN ASSOCIATION;
CITY OF BROKEN ARROW, Oklahoma;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

ENTERED ON DOCKET

DATE 9-3-97 ✓

FILED

SEP 02 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Case No. 96-C-0240-H

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 2nd day of SEPTEMBER,

1997. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, Richard M. LaBat aka Richard Labat aka Richard Malcolm LaBat and Rebecca J. LaBat aka Rebecca Jo LaBat (Labat) fka Rebecca J. Lorello, appear not, summary judgment being granted against them by order of the Court on June 12, 1997; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, Household Finance Corporation III;

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Leader Federal Bank For Savings formerly Leader Federal Savings & Loan Association; and City of Broken Arrow, Oklahoma, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Richard M. LaBat aka Richard Labat aka Richard Malcolm LaBat, was served with Summons and Complaint by a United States Deputy Marshal on June 11, 1996; that the Defendant, Rebecca J. LaBat aka Rebecca Jo LaBat (Labat) fka Rebecca J. Lorello, was served with Summons and Complaint by a United States Deputy Marshal on June 11, 1996; that the Defendant, Household Finance Corporation III, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on March 28, 1996; that the Defendant, Leader Federal Bank For Savings formerly Leader Federal Savings & Loan Association, executed a Waiver of Service of Summons on April 1, 1996; that the Defendant, City of Broken Arrow, Oklahoma, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on March 29, 1996.

It appears that the Defendants, Richard M. LaBat aka Richard Labat aka Richard Malcolm LaBat and Rebecca J. LaBat aka Rebecca Jo LaBat (Labat) fka Rebecca J. Lorello, filed their Answer and Motion For Summary Judgment on July 30, 1996; that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on April 10, 1996; and that the Defendants, Household Finance Corporation III; Leader Federal Bank For Savings formerly Leader Federal Savings & Loan Association; and City of Broken Arrow, Oklahoma, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on January 22, 1993, Richard M. LaBat and Rebecca J. Labat, filed their voluntary petition for Chapter 7 relief in the United States Bankruptcy Court for the Northern District of Oklahoma, Case No. 93-00202-W. The subject property was listed in Schedules A and D of the bankruptcy schedules. Debtors were discharged on May 12, 1993; subsequently, this case was closed on August 23, 1993.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

LOT THREE (3), BLOCK ONE (1), SOUTHBROOK III, AN ADDITION IN THE CITY OF BROKEN ARROW, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that on January 24, 1986, James M. Murphy and Bonnie L. Murphy, executed and delivered to FirsTier Mortgage Co., their mortgage note in the amount of \$80,850.00, payable in monthly installments, with interest thereon at the rate of 10.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, James M. Murphy and Bonnie L. Murphy, husband and wife, executed and delivered to FirsTier Mortgage Co., a real estate mortgage dated January 24, 1986, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on January 28, 1986, in Book 4921, Page 1017, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 30, 1986, FirsTier Mortgage Co. assigned the above-described mortgage note and mortgage to Leader Federal Savings & Loan

Association. This Assignment of Mortgage was recorded on November 26, 1986, in Book 4985, Page 1258, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 14, 1990, Leader Federal Bank For Savings assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410, his successors in office and assigns. This Assignment of Mortgage was recorded on April 9, 1990, in Book 5246, Page 358, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 31, 1988, James M. Murphy and Bonnie L. Murphy, husband and wife, conveyed all their interest in the above-described real property to Richard Labat, a single person and Rebecca J. Lorello, a single person, by executing a General Warranty Deed dated March 31, 1988, and recorded on April 11, 1988 in Book 5092, Page 2156, in the records of Tulsa County, Oklahoma.

The Court further finds that Defendants, Richard M. LaBat aka Richard Labat aka Richard Malcolm LaBat and Rebecca J. LaBat aka Rebecca Jo LaBat (Labat) fka Rebecca J. Lorello, are husband and wife.

The Court further finds that on February 12, 1990, Richard M. LaBat and Rebecca LaBat, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on February 28, 1991, and September 16, 1992.

The Court further finds that Defendants, Richard M. LaBat aka Richard Labat aka Richard Malcolm LaBat and Rebecca J. LaBat aka Rebecca Jo LaBat (Labat) fka Rebecca J. Lorello, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make

the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the note and mortgage, after full credit for all payments made, the principal sum of \$79,273.49, plus administrative charges in the amount of \$467.01, plus penalty charges in the amount of \$603.60, plus accrued interest in the amount of \$42,174.24 as of March 14, 1995, plus interest accruing thereafter at the rate of 10.5 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that on June 12, 1997, summary judgment was granted to the Plaintiff and against the LaBats. Therefore, the Defendants, Richard M. LaBat aka Richard Labat aka Richard Malcolm LaBat and Rebecca J. LaBat aka Rebecca Jo LaBat (Labat) fka Rebecca J. Lorello, have no right, title or interest in the subject real property.

The Court further finds that the Defendants, Household Finance Corporation III; Leader Federal Bank For Savings formerly Leader Federal Savings & Loan Association; and City of Broken Arrow, Oklahoma, are in default and therefore have no right, title or interest in the subject real property.

The Court further finds that the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

The Court further finds that the Internal Revenue Service has a lien upon the property by virtue of a Notice of Federal Tax Lien dated October 17, 1995, and recorded on October 24, 1995, in Book 5755, Page 1099 in the records of the Tulsa County Clerk, Tulsa

County, Oklahoma. Inasmuch as government policy prohibits the joining of another federal agency as party defendant, the Internal Revenue Service is not made a party hereto; however, by agreement of the agencies the lien will be released at the time of sale should the property fail to yield an amount in excess of the debt to the Secretary of Housing and Urban Development.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment **in rem** against Defendants, Richard M. LaBat aka Richard Labat aka Richard Malcolm LaBat and Rebecca J. LaBat aka Rebecca Jo LaBat (Labat) fka Rebecca J. Lorello, in the principal sum of \$79,273.49, plus administrative charges in the amount of \$467.01, plus penalty charges in the amount of \$603.60, plus accrued interest in the amount of \$42,174.24 as of March 14, 1995, plus interest accruing thereafter at the rate of 10.5 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.58 percent per annum until fully paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Richard M. LaBat aka Richard Labat aka Richard Malcolm LaBat; Rebecca J. LaBat aka Rebecca Jo LaBat (Labat) fka Rebecca J. Lorello; Household Finance Corporation III; Leader Federal Bank For Savings formerly Leader Federal Savings & Loan Association; City of Broken Arrow, Oklahoma; and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

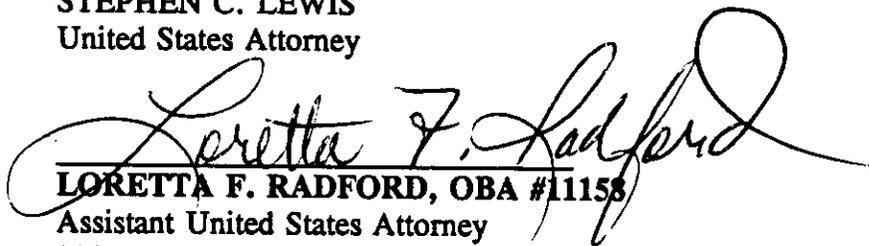
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.


UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Case No. 96-C-0240-H (LaBat)

LFR:ces

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

F I L E D

SEP - 2 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DECISION DYNAMICS, INC.,)

Plaintiff,)

vs.)

CITGO PETROLEUM CORPORATION,)

RANDY EDGERTON, and T.A.K.)

INDUSTRIAL, INC.,)

Defendants.)

No. 97-CV-462-B (M)

ENTERED ON DOCKET
DATE SEP 03 1997

ORDER ON DEFENDANT CITGO PETROLEUM
CORPORATION'S APPLICATION FOR
PRELIMINARY INJUNCTION

In accordance with the Findings of Fact and Conclusions of Law entered contemporaneous herewith, the application for preliminary injunction pursuant to Fed.R.Civ.P. 65 of CITGO Petroleum Corporation ("CITGO"), is hereby granted:

IT IS THEREFORE ORDERED AND ADJUDGED THAT:

1. DDI shall immediately deliver or cause to be delivered to CITGO the CITGOsoft 2000 program source code and related materials in usable form, whether in electronic or written format. This shall not be construed to require delivery of, or to interfere with DDI's sole rights concerning DynaStar 2000, its source code and other materials concerning DynaStar 2000;

2. CITGO is authorized to distribute copies of CITGOsoft 2000, i.e., the "compiled," "executable" program, but not the source code to that program, to CITGO's

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distributors and customers under license;

3. CITGO is authorized to reveal such source code and compiled version of the source code and manuals and other materials relating to CITGOSoft 2000 to third parties for the sole purpose of enabling such third parties to provide technical support and maintenance for the CITGOSoft 2000 program (including correcting program errors or gaps in programming logic). CITGO shall require such third parties to execute suitable confidentiality agreements with respect to such information and CITGO shall provide such third parties with copies of this order. The confidentiality agreement shall provide that both CITGO and the third party shall use the CITGOSoft 2000 source code information only as expressed herein and acknowledge that otherwise all rights therein are the property of DDI;

4. CITGO and third parties' use of CITGOSoft 2000 and its source code, manuals, and other proprietary materials relating to CITGOSoft 2000 shall be limited to the purpose of CITGO's providing CITGOSoft 2000 to its distributors and customers and for all necessary customer support and maintenance for CITGOSoft 2000 for CITGO's distributors and customers. CITGO may also copy and utilize demonstrator disks and other marketing materials concerning CITGOSoft 2000 in the same manner it has done heretofore;

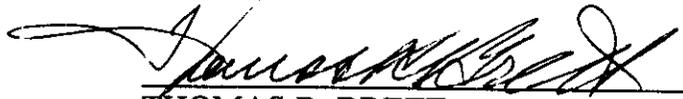
5. CITGO shall not, nor shall it cause or permit any other company or individual to, utilize the source code or related materials for any other purpose than stated herein. CITGO shall not furnish, publish, or communicate the CITGOSoft 2000 source code or related information to any person or entity for the purpose of utilizing the source code to accomplish creation or marketing of a different software program based upon CITGOSoft

2000; or for any other purpose than that which is expressly provided herein;

6. References to CITGO herein are to CITGO Petroleum Corporation as well as its successors, transferees, and assigns;

7. CITGO is granted until Monday, September 22, 1997, to post a \$100,000.00 cash or approved corporate surety bond in keeping with Fed.R.Civ.P. 65.

DATED this 2nd day of Sept, 1997.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

F I L E D

SEP - 2 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DECISION DYNAMICS, INC.,)
)
 Plaintiff,)
)
 vs.)
)
 CITGO PETROLEUM CORPORATION,)
 RANDY A. EDGERTON, and T.A.K.)
 INDUSTRIAL, INC.,)
)
 Defendants.)

No. 97-CV-462-B (M)

ENTERED ON DOCKET

DATE SEP 03 1997

FINDINGS OF FACT AND CONCLUSIONS OF LAW
CONCERNING APPLICATIONS OF CITGO PETROLEUM
CORPORATION AND DECISION DYNAMICS, INC.,
FOR PRELIMINARY INJUNCTION

The application for preliminary injunction, pursuant to Fed.R.Civ.P. 65 of Defendant, CITGO Petroleum Corporation ("CITGO") against Plaintiff, Decision Dynamics, Inc. ("DDI"), and DDI's application for preliminary injunction against the Defendant, Randy A. Edgerton ("Edgerton"), were presented to the Court at an evidentiary hearing on July 15, 16, 17 and 18, 1997. After considering the evidence, the applicable legal authority and arguments, the Court enters the following Findings of Fact and Conclusions of Law:¹

FINDINGS OF FACT

1. DDI is an Oregon corporation headquartered in Lake Oswego, Oregon, that

¹DDI's objection to CITGO's Proposed Findings of Fact and Conclusions of Law is denied. While CITGO is in probable violation of Local Rule 10.1, type size, its filing was 27 pages instead of the agreed 35 pages.

develops computer software and provides management consulting to businesses in the area of organization. Dr. Gene Bryan ("Bryan") has been at all material times the President of DDI.

2. CITGO is a Delaware corporation headquartered in Tulsa, Oklahoma. CITGO manufactures and sells various lubricant products throughout the United States and has developed relationships with companies that distribute CITGO's products throughout the country ("distributors"). CITGO provides support and incentives to the distributors and end-users ("customers") to sell CITGO products. CITGO uses a "value-added" approach to selling its lubricants in that it also provides various support and services. In its "value-added" approach, CITGO offers computer software designed to assist the distributor and customer in selecting and using CITGO lubricants and in the maintaining of their facilities.

3. Edgerton is an individual resident of the State of Washington. He currently is employed as president of Defendant T.A.K. Industrial, Inc. ("TAK"), and at relevant times herein until June 24, 1996, was a vice-president in charge of marketing for DDI. Edgerton is not trained as a computer technician and he has no expertise or technical experience in software production, computer programming or preparation of software specifications.

4. TAK is an Oregon corporation that has since mid-1996, when Edgerton left DDI's employment and joined TAK, been developing and marketing computer software, potentially in competition with DDI.

5. In the late 1970s, DDI created and developed a computer software program called DynaStarII ("DynaStar") for the maintenance management of equipment used in

various industries and businesses. DDI also developed a version of DynaStar that runs in the Windows operating system environment called DynaStar 2000. DDI also created a smaller version of the DynaStar Program called Microstar that runs in the DOS operating system environment. Microstar had fewer functionalities and features than DynaStar. DDI owns all right, title and interest to DynaStar, Microstar, and DynaStar 2000.

6. In about 1989, CITGO decided to add to its "value-added" program by offering a management software package concerning equipment maintenance history, preventive maintenance scheduling, work order creation, and parts inventory management. CITGO contacted DDI concerning the maintenance software program DDI had developed by the name of Microstar that operated in a DOS environment.

7. On September 1, 1992, DDI and CITGO entered into a written agreement for DDI to produce a private label version of Microstar to be named "CITGOSoft" for distribution to CITGO customers. [CITGOSoft Agreement, Exhibit "A" to Kress Aff.] CITGO paid DDI \$12,000.00 for the development of CITGOSoft and \$7,500.00 for each license. The agreement stated that DDI would retain ownership rights and CITGO would purchase individual licenses with each license authorizing CITGO to use one copy of the program or to sublicense use of the program to a customer. DDI was to offer program technical support services at an additional fee directly to CITGO customers.

8. DDI completed development of CITGOSoft and about 80 licenses were purchased by CITGO and sublicensed to CITGO's customers. DDI entered into contracts with many of CITGO's customers to provide technical program support.

9. In 1992 through 1994, CITGO hired DDI to work on additional specialized software programs to be added to CITGO's "value-added" program offerings. These agreements provided that CITGO was given all ownership rights in the developed programs.

10. In reference to software program development, a two-phase approach was developed by DDI and CITGO. In Phase I, program specifications would be developed and, generally, paid for by CITGO. DDI would then prepare a written proposal based on the specification to develop the software program. The proposal would address program details, price, delivery, representations, warranties and program ownership. CITGO could then either accept or reject DDI's proposal.

11. CITGO and DDI had discussions and determined that CITGOSoft should be upgraded from DOS to a Windows environment, as well as possible integration of an upgraded CITGOSoft with other existing and potential future CITGO programs. As a result, in January 1995, DDI provided CITGO a proposal for DDI to develop a specification document for five specific program modules, including: (a) conversion of the DOS-based CITGOSoft to a Windows environment (this module eventually was named "CITGOSoft 2000"); (b) a programming link between CITGOSoft 2000 and CITGO's Customer Information Network program; (c) a module to provide optional bar code support for CITGOSoft 2000; (d) an optional module to provide laboratory oil analysis features to CITGOSoft 2000; and (e) an optional module to provide vehicle management features to CITGOSoft 2000. The integration project proposal offered that, in Phase I of the "integration project," DDI would provide a design and specification document for these

modules and a proposal to CITGO for their development and implementation. The proposal referred to the possibility of a Phase II which would include the potential development and implementation of one or more of the modules described above as part of the integration project. The proposal expressly provided, however, "approval of this Phase I proposal in no way obligates CITGO for a Phase II project." [Exhibit "B" to Kress Aff. at p. 11; Smith Testimony; Bryan Testimony.]

The proposal did not contain any pricing for the modules nor any schedule for their implementation because Phase I of the project required DDI provide this information "in a manner that provides a clear mutual understanding of the deliverables, costs and schedules." [Exhibit "B" to Kress Aff. at p. 2; Kress Aff. ¶9; Smith Testimony; Bryan Testimony.]

12. CITGO drafted an Addendum to the integration contract proposal which provided that all aspects of the integration project were to remain the sole and exclusive property of CITGO. The proposal was signed by DDI on January 27, 1995. CITGO signed the proposal and Addendum on February 7, 1995, and mailed them to DDI. The Addendum was signed by Randy Edgerton as Vice-President of DDI on February 20, 1995. [Exhibit "B" to Kress Aff.]

13. The integration contract proposal and addendum are referred to as the "Integration Contract." [Exhibit "B" to Kress Aff.] The Integration Contract did not provide for any pricing or other specific terms concerning deliverables for any of the Phase II modules, and did not obligate CITGO to anything beyond Phase I.

In April, 1995, DDI submitted to CITGO a document entitled "Specification Document, CITGOSoft Integration Project." [Exhibit "C" to Kress Aff.] This document, submitted as a portion of what was described in the Integration Contract as Phase I, contained basic specifications for CITGOSoft 2000. This document contained some general information referring to the other modules, but did not specify design specifications for the other three modules. At pages 64-66, there is a brief description of a potential "oil analysis module" ("OAM") to be an option for use with CITGOSoft 2000.

14. In September, 1995, DDI issued to CITGO a proposal to develop and implement the conversion of CITGOSoft from DOS to Windows. DDI attached to this proposal a portion of the April, 1995 specifications, only that portion which pertained to the conversion of CITGOSoft to CITGOSoft 2000. A representative of CITGO agreed to the proposal by signing it on December 15, 1995, and a contract was thereby entered ("CITGOSoft 2000 Contract"). [Exhibit "D" to Kress Aff.]

The CITGOSoft 2000 Contract stated that DDI would make the bar code module available as an upgrade to CITGOSoft 2000. The other three modules, including the OAM, were not mentioned in the contract, nor were any specifications for such modules attached to it. The CITGOSoft 2000 Contract does not deal with the subject matter of the other potential modules described in the Integration Contract.

The CITGOSoft 2000 Contract, at Exhibit B thereof, provided CITGO would pay \$30,000.00 for development of CITGOSoft 2000 and \$50,000.00 for licenses and software to convert the existing 80 CITGO software users to CITGOSoft 2000 that were part of the

installed base. Additionally, the CITGOSoft 2000 Contract provided that CITGO would purchase CITGOSoft 2000 licenses and software for new users at \$320.00 per user. There was no termination date for these prices. The CITGOSoft 2000 Contract obligated DDI to provide technical program support to CITGOSoft 2000 users for an additional cost.

15. The CITGOSoft 2000 Contract obligated DDI to complete and test every part of the program logic. Upon completion of programming and system testing there was to be an acceptance test at DDI's facility. Thereafter, an on-site test would be conducted at CITGO customers' facilities for 30 days. The CITGOSoft 2000 Contract stated that at the end of such 30-day period, there would be no known or unresolved or uncorrected program errors affecting program functions, and only after any such errors were fixed, would there be considered Final Acceptance of the Program. The CITGOSoft 2000 Contract obligated DDI to fix the errors within one week.

16. The CITGOSoft 2000 Contract provided that prior proposals or agreements with respect to the conversion of CITGOSoft to CITGOSoft 2000 were merged into the September 1995 proposal. The merger did not refer to any potential modules yet to be developed. The CITGOSoft 2000 Contract did not terminate or affect the right of CITGO, established by the Addendum to the Integration Contract, to ownership of the specifications for which CITGO had previously paid. [Exhibit "C" to Kress Aff.]

The CITGOSoft 2000 Contract provided that the CITGOSoft 2000 Software was to be the property of DDI. However, upon a material failure of DDI to perform, which was not cured by DDI within 30 days of being provided notice, DDI was required to forward all

relevant source code program materials to CITGO within 5 days. [Kress Aff. ¶13.]

17. DDI did not provide CITGO a proposal or design specifications for any modules except the conversion module from DOS to Windows. CITGO did not enter into a contract with DDI to develop or implement any of the modules under the Project Integration Contract, other than the conversion from DOS to Windows module.

18. As a result of the Addendum to the CITGOSoft 2000 Integration Project, the Integration Project document was to remain the sole and exclusive property of CITGO. [Exhibit "B" to Kress Aff.] The Addendum prohibited DDI from disclosing information concerning the Integration project to third parties.

19. All of the written contractual documents between CITGO and DDI resulted from arm's length good faith negotiations supported by adequate consideration.

20. On June 4, 1996, CITGO representatives, Kress and Skiba, attended a meeting at Cleveland Technical Center ("CTC") in Cleveland, Ohio. Randy Edgerton attended the meeting as Vice-President of Marketing of DDI. CITGO paid DDI for Edgerton's attendance. Also present were representatives from International Mills Services ("IMS") and a representative of CTC. The purpose of the meeting from CITGO's standpoint was to interest its customer IMS in purchasing CITGOSoft 2000 when it became available. CTC laboratory tests the lubricants utilized by IMS. At the meeting on June 4, 1996, IMS explained it had no interest in purchasing CITGOSoft 2000 because it had recently purchased a program which it believed served its purposes. However, IMS stated that it had an interest in purchasing a software program for receiving and electronically filing lubricant testing data

generated for it by CTC. The purpose and function of such a program described by IMS was to be specialized to IMS' particular needs. The purpose of the program IMS described was dissimilar from CITGOSoft 2000 and the OAM specifications. CITGO saw a potential business opportunity for CITGO in acquiring such a program for its customer IMS' use.

21. IMS wanted the subject software program prior to year end 1996. CITGO contacted both DDI and TAK, after Edgerton had ceased working for DDI on June 24, 1996, to bid on the subject IMS software project. TAK submitted a timely bid and DDI failed to do so, so TAK was awarded the bid by CITGO. After learning it would not receive the project, DDI sent CITGO an e-mail message [CITGO Ex. 24] which apologized for not diligently bidding on the IMS project in response to CITGO's invitation. In the summer and fall of 1996, DDI was experiencing financial problems, as well as, some loss of technical program specialists and did not have the capacity to timely provide the requested bid. IMS oil analysis software project was limited in nature and not a violation of any proprietary interest or trade secret of DDI in the CITGOSoft 2000 or the potential CITGO OAM. No partnership agreement or "de facto" partnership agreement, or agreement of any kind, was reached at the June 4, 1996 meeting.

22. CITGO had an oil analysis software program in place as part of its "value-added" marketing approach previous to CITGO's relationship with DDI. That program, named CITGO Performance Monitoring ("CPM") was an oil testing program by which CITGO's customers can send used oil to one of a network of laboratories which contract with CITGO. The laboratory samples the used oil and generates laboratory data on contaminants

in the sample, which may indicate the presence of mechanical problems. The laboratory data is then provided to the customer to identify potential equipment problems for preventive maintenance purposes. CTC, one of the laboratories, offered a software program named "SAMTRACK," which was provided to CITGO customers, that could reside on a customer's computer, receive electronic data from the laboratory via modem, and display the data at the customer's location. As part of CTC's service it checked to see if any oil contaminant, which may be indicative of mechanical problems, was out of the recommended range for the contaminant, and this was electronically transmitted to the customer.

23. The Integration Project Contract [Exhibit B to Kress Aff. at 5] and the "Specifications" [Exhibit C to Kress Aff. at 64] reveals that the OAM concept was to make CITGOSoft 2000 work in conjunction with CITGO's CPM and SAMTRACK. The Oil Analysis Module was envisioned to take the laboratory data from SAMTRACK and, with a logic package to be built into the OAM, automatically identify problems from the laboratory data, and create work orders for repair or servicing of equipment or preventive maintenance schedule, using the features of CITGOSoft 2000. Also, laboratory data would be stored in CITGOSoft 2000 in a history file for a given piece of equipment. The OAM was to print the lab results but it was not conceived to display the laboratory data because that was already done by SAMTRACK.

24. The IMS Program is significantly different from the OAM concept. The IMS Program is a stand-alone program and not related to CITGOSoft 2000 or any other program. The primary function of the IMS Program is to display the laboratory data. It does not have

logic to identify problems in the equipment from the laboratory data and is not capable of generating work orders or preventive maintenance schedules. The IMS Program generates a bar code sticker to be placed upon the used oil sample container, to identify the equipment from which the sample came. This was not a feature of the OAM specification.

25. While there were some similarities between the IMS Program and the OAM concept in that they involved some oil analysis and were designed to receive laboratory data electronically via modem, the functionality of the two programs was not sufficiently similar to constitute a violation of any proprietary interest of DDI. The technical aspects of the IMS oil analysis software program were designed and prepared by John Hughes, on behalf of TAK, who was formerly employed as a programmer of DDI and had been active in the development of CITGOSoft 2000 on behalf of DDI. (Testimony: J. Hughes, J. Mischel).

26. The ideas developed jointly by CITGO and DDI and written down in the Integration Contract and repeated in the specifications concerning the OAM concept were not sufficiently complete, and were too lacking in detail and analytical content to qualify as trade secrets. Neither was there what could be characterized as original expression to be copyrightable. As previously noted herein, the OAM specifications were, by written contractual agreement, the property of CITGO.

27. At the referenced June 4, 1996 meeting, Edgerton informed CITGO representatives that he was leaving DDI effective August 1, 1996 (his departure ultimately occurred on June 24, 1996) to form his own software marketing company. As had been tentatively agreed with Mr. Bryan of DDI, Edgerton informed CITGO that he would be

providing marketing for DDI as well as other companies. This was the first time CITGO personnel learned that Mr. Edgerton was planning to leave DDI. CITGO was not involved in encouraging Mr. Edgerton's departure as an employee of DDI.

28. On July 2, 1996, at a meeting between CITGO's Kress and Hand and DDI's Bryan, Roberge and McAdoo, CITGO communicated their concern to DDI that CITGOSoft 2000 had been delayed in its completion. At that meeting Bryan expressed concern on behalf of DDI that the \$320.00 per copy price in the contract [Exhibit "B" to Exhibit "D" to Kress Aff.] was too low for DDI to make a profit and had to be changed. CITGO took a firm stand that "a deal's a deal" but agreed that once CITGOSoft 2000 had been completed and available, the parties could attempt to negotiate an upward per copy price change. Thereafter no new price was negotiated because DDI demanded \$1600.00 per unit and CITGO stated it would pay no more than \$500.00 per unit, or permit a 25% annual increase. At one point, to get delivery of the CITGOSoft 2000 program, CITGO offered \$1600.00 for each of ten units only, but DDI refused this and each of CITGO's per unit counter proposals. The counter proposals were made by CITGO after CITGOSoft 2000 was rolled out in October 1996. At the July 2, 1996 meeting, CITGO did agree to a modification that DDI would provide two hours of technical support for an additional \$200.00 per user for new users of CITGOSoft 2000, and two hours at no extra cost to current installed users of DOS CITGOSoft.

29. At the July 2, 1996 meeting, CITGO stated it had no interest in pursuing design and completion of any other modules, including the OAM, until CITGOSoft 2000 was

successfully completed. No agreement was reached that DDI would design and complete the OAM. However, CITGO did make it clear that soon after CITGOSoft 2000 was rolled out, it wanted to get started on the design of the OAM.

30. After January 1, 1997, DDI refused to supply CITGO additional CITGOSoft 2000 systems due to CITGO's refusal to agree to the price change, despite CITGO's many requests to do so.

31. Randy Edgerton ceased employment with DDI on June 24, 1996. On June 26, 1996, Edgerton came to Tulsa, Oklahoma, and had dinner with Messrs. Skiba and Kress of CITGO. They informed Edgerton at that time that although CITGO might potentially consider TAK for future software projects, CITGO intended that CITGOSoft 2000 programming, maintenance, and support would remain with DDI.

32. CITGO did not receive any confidential or proprietary information of DDI from either Edgerton or TAK. The only CITGOSoft 2000 materials furnished by CITGO to TAK or Edgerton were marketing demonstration materials and brochures which did not expose proprietary or confidential information of DDI. The purpose of these materials was to encourage distributors and customers of CITGO to purchase CITGOSoft 2000, following a demonstration of them by Edgerton after he had left the employment of DDI.

33. When CITGOSoft 2000 was released by DDI to CITGO in October 1996, it had many unresolved program errors and defects. Some of such errors and defects were not remedied as required by the CITGOSoft 2000 Contract. This was, in part, because from the period of June until October 1996, most of the DDI programmers had left the employment

of DDI because of DDI's financial problems and internal instability. After the release of CITGOSoft 2000 in October 1996, DDI had considerable difficulty in providing technical support due to the departure of key DDI technical personnel. Without CITGO's approval, DDI assigned to third party companies the function of providing support and maintenance to CITGO concerning CITGOSoft 2000. [Exhibit "D" to Kress Aff.] In February of 1997, CITGO complained to DDI about the maintenance and support it was receiving to CITGOSoft 2000.

34. In accordance with the contract, on April 1, 1997, CITGO sent its "thirty day cure" letter stating DDI was in default under the contract in reference to failure to provide maintenance and support, the per unit pricing, and refusal to deliver the CITGOSoft 2000 systems. [Plaintiff's Ex. 16.] When DDI had not cured the defaults by May 29, 1997, CITGO sent a demand letter that it be furnished with the CITGOSoft 2000 source code and appropriate relevant manuals and documents as required by the contract. [Defendant's Ex. 6.] DDI has neither cured the defaults nor provided the relevant CITGOSoft 2000 source code information. Access to the CITGOSoft 2000 source code is necessary to properly provide technical support for the program, including defects that require modifications.

CITGO's customers that have installed CITGOSoft 2000 rely on it in maintaining their facilities and their equipment.

35. The evidence did not establish material breaches of the CITGOSoft 2000 contract by CITGO.

36. The lack of CITGOSoft 2000 software and technical support has damaged

CITGO's relationships with its distributors and customers, and continues to do so. CITGO heavily marketed CITGOSoft 2000 to its many distributors and customers. This marketing effort created distributor, customer, and market expectations for the program.

37. Distributor and consumer confidence in CITGO's reputation has been negatively impacted because CITGO cannot now provide either CITGOSoft 2000 to those to whom it was promised or adequate maintenance and support to those on-line.

38. The damages that CITGO will incur as a result of the CITGOSoft 2000 problems cannot be calculated. CITGO is now vulnerable to losing business and resulting profits to competitors because CITGO cannot offer the program or support previously promised, without the source code.

39. If CITGO had the CITGOSoft 2000 source code it could mitigate its damages to the customer/distributor relationships and its reputation, by hiring appropriate technical support and programmers to support the system and remedy program errors. Without the source code, this is not possible.

40. DDI is in a precarious financial condition and, therefore, could not respond to CITGO's claim for damages if such were calculable. Thus, without the source code CITGO will suffer irreparable injury. Because of DDI's material breaches of the CITGOSoft 2000 Contract, CITGO is entitled to receive the CITGOSoft 2000 source code from DDI.

ADDITIONAL FINDINGS SPECIFIC
TO DEFENDANT, RANDY EDGERTON

41. As an employee of DDI Edgerton signed a nondisclosure agreement [Plaintiff's

Ex. 18] which is binding in accordance with its terms. Edgerton did not sign a noncompetition agreement.

42. On June 2, 1996, Edgerton delivered his resignation to Bryan of DDI to be effective August 1, 1996. [Plaintiff's Ex. 33.] Edgerton advised Bryan he was going to start a new sales and marketing company, and suggested DDI might want to use the new company's products and services. At first, Bryan was receptive to the idea of a cooperative relationship and encouraged Edgerton. There was even discussion Edgerton and his new company might buy the rights to DynaStar, but these negotiations did not materialize. On June 24, 1996, Bryan stated Edgerton's employment with DDI as Vice-President of Marketing should, and did, terminate immediately. DDI and Bryan no longer wanted any association or dealings with Edgerton.

43. TAK is a company owned by Edgerton's father-in-law, for many years a manufacturer's representative. Edgerton, with his father-in-law's approval, started a software sales and marketing division of TAK. On August 1, 1996, Edgerton was elected President of TAK effective August 15, 1996.

44. In August 1996, CITGO asked Edgerton to speak at the CITGO annual President's meeting to numerous distributors/customers about CITGOSoft 2000 and other CITGO software products. The information disclosed at that meeting was in the public domain, none qualifying as trade secrets or confidential information of DDI.

45. TAK bid and was awarded the CITGO/IMS oil analysis program in the latter part of September, 1996 that has been previously discussed.

46. The evidence has not established that Edgerton has violated the nondisclosure agreement or wrongfully used confidential, proprietary, or trade secret-type information owned by DDI.

CONCLUSIONS OF LAW

1. As has been previously stated in the Court's Order of July 28, 1997, the Court has both venue and jurisdiction of the parties and the subject matter herein.

2. Any Finding of Fact above which might be properly characterized a Conclusion of Law is incorporated herein.

3. CITGO and DDI's rights and duties arising from their relationship herein is governed by Oklahoma law. Edgerton's "Nondisclosure of Trade Secrets Agreement," alleged breach of fiduciary duty, corporate opportunity usurpation, or misappropriation of trade secrets are governed by Oregon law.

4. DDI's copyright claims are governed by the federal Copyright Act. 17 U.S.C. § 101 *et seq.*

5. The criteria for granting an application for preliminary injunction are set out in Country Kids 'N City Slicks, Inc. v. Sheen, 77 F.3d 1280 (10th Cir. 1996), and require the movant to establish: (1) it has a substantial likelihood of prevailing on the merits; (2) it will suffer irreparable injury if it is denied the injunction; (3) its threatened injury outweighs the injury that the opposing party will suffer under the injunction; and (4) an injunction would not be adverse to the public interest.

CITGO'S MOTION FOR PRELIMINARY
INJUNCTION AGAINST DDI

6. The evidence has established CITGO has a likelihood of succeeding on the merits. CITGO established that DDI was in material breach of the CITGOSoft 2000 Contract in reference to price, the failure to provide support and maintenance, and failure to provide the CITGOSoft 2000 individual programs. Telex Corp. v. Hamilton, 576 P.2d 767 (Okla. 1978); Okla. Stat. tit. 12A, §§ 2-313, 2-314, 2-315; Okla. Stat. tit. 12A, § 2-607(2) and (4); Okla. Stat. tit. 12A, § 2-309.

7. The evidence has established CITGO's customers heavily rely upon CITGOSoft 2000 to maintain their facilities. CITGO's present inability to assure software support to its customers has caused, and is likely to continue to cause, damage to CITGO's relationship with its customers and to its reputation in the industry. Damage to a company's relationship with its customers, loss of good will, and the loss of potential customers to competitors can establish irreparable damage. Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 552 (4th Cir. 1994). DDI's present financial instability and inability to respond in money damages also supports a conclusion of irreparable harm. See Borey v. Nat'l Union Fire Ins. Co., 934 F.2d 30 (2d Cir. 1991); Schwartz v. Interfaith Medical Center, 715 F.Supp. 1190 (E.D.N.Y. 1989).

8. The evidence has established that in reference to the balancing of the harm test that potential harm to CITGO outweighs the harm to DDI. Autoskill, Inc. v. Nat'l Ed. Support Systems, Inc., 994 F.2d 1476 (10th Cir. 1993). While CITGO seeks rights to the

source code for CITGOSoft 2000, it limits its request only to the extent necessary for CITGO to maintain support for its existing customers and to the extent necessary for future customers. CITGO invites the Court to limit and restrict the use of CITGOSoft 2000 by CITGO, or by a third-party provider of support, only to providing customer support and necessary program maintenance. In view of DDI's ownership and proprietary interests in CITGOSoft 2000, CITGO and any third-party support providers will be enjoined from using the CITGOSoft 2000 source code for any other purposes.

9. The requested injunction is not in violation of public interest.

10. Concerning the \$320.00 per unit contract price, there has been no oral modification of the written contract because the contract provides it can only be modified or altered by written instrument executed by both parties which was not done. Okla. Stat. tit. 12A, § 2-209(2).

11. The parties to a contract are free to provide remedies that are in addition to those found in the Uniform Commercial Code ("UCC"). Okla. Stat. tit. 12A, § 2-719. At page 12, the CITGOSoft 2000 Contract expressly provides:

All rights and remedies specified in this Agreement are in addition to CITGO's other rights and remedies under the law whether in contract or tort including without limitation all Uniform Commercial Code provisions.

Stated at pages 11 and 12 of the CITGOSoft 2000 Contract is the provision that if DDI does not cure a default under the agreement within thirty days of CITGO providing notice, CITGO has the right to cancel, whereupon DDI has the obligation to turn over the source code of

CITGOSoft 2000. CITGO has shown that it followed the default procedures and is entitled to receive the CITGOSoft 2000 source code in a usable form and the materials relevant thereto.

12. Pursuant to Fed.R.Civ.P. 65, CITGO is to post a bond in the amount of \$100,000.00, with the Clerk of the Court on or before September 22, 1997, relative to the entry of this preliminary injunction.

DDI'S REQUESTED PRELIMINARY INJUNCTION
AGAINST DEFENDANT, RANDY EDGERTON

13. In reference to DDI's alleged copyright infringement claims, it has not established a likelihood of success on the merits. To prove copyright infringement DDI must establish: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. Autoskill, 994 F.2d at 1487; Gates Rubber Co. v. Bando Chemical Industries, Ltd., 9 F.3d 823 (10th Cir. 1993).

14. The Copyright Act provides that a certificate of registration of a copyright "shall constitute *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate." 17 U.S.C. § 410(c). Presentation of a registration certificate establishes *prima facie* the validity of the copyright and the burden shifts to the party challenging it. Autoskill, 994 F.2d at 1487. DDI has presented no copyright registration certificate in this litigation so the burden of establishing ownership of a valid copyright rests with DDI. As provided in Findings of Fact 12 and 18, ownership of the subject specification resides in CITGO.

15. DDI has not established as a factual matter that Edgerton has copied DDI's copyrighted specifications and, second, as a mixed issue of fact and law that any elements that were copied were protected. Country Kids 'N City Slicks, 77 F.3d at 1284. The evidence has not established that the subject specifications were used to develop the IMS Program. A review of the subject specifications establishes that the specifications are not protectable under the Copyright Act. 17 U.S.C. § 102(b). Comparison of the computer software program created by TAK for IMS with the subject specification demonstrates there is not substantial similarity between them. Autoskill, 994 F.2d at 1490. DDI has not ever designed an oil analysis module software program.

16. DDI has not established it will suffer irreparable injury if the requested injunction is denied.

17. DDI seeks a preliminary injunction against Edgerton only, not against TAK or CITGO. However, a broad application of DDI's requested injunction against Edgerton would have potential negative impact on third parties. Such a preliminary injunction could prohibit Edgerton and/or TAK from further implementing the IMS laboratory oil analysis program in IMS' facilities and interfere with program support. The evidence has not established that DDI's threatened injury outweighs the injury to Edgerton and other third parties if the injunction is issued.

18. The issuance of the requested injunction, if justified, would not be in violation of public interest.

19. DDI has not shown a likelihood of success on its violation of trade secrets

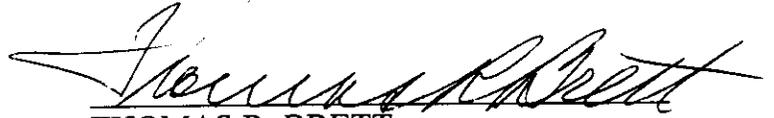
claim against Edgerton. O.R.S. §§ 646.461 to 646.475; Citizens' Util. Bd. v. Public Util. Comm'n, 877 P.2d 116 (Or.App. 1994). The evidence has not established that DDI's trade secret information was used in development of the IMS Program by TAK. Neither has the evidence established that Edgerton misappropriated customer lists of DDI. It was common knowledge that CITGO was a customer of DDI, and Edgerton had a right after leaving his employment with DDI to generally compete with DDI in reference to CITGO's computer software business. The IMS software opportunity could not be considered a trade secret. O.R.S. § 646.461(4); see Citizens' Util. Bd., 877 P.2d at 123. CITGO contacted both TAK and DDI concerning the IMS Program and, although afforded the opportunity, DDI chose not to bid thereon. The IMS Program was a corporate opportunity in which DDI simply chose not to participate, thus, Edgerton did not usurp a corporate opportunity of DDI. Klinicki v. Lundgren, 695 P.2d 906 (Or. 1985). The IMS Program opportunity arose after Edgerton had left employment with DDI.

20. DDI is not entitled to its requested preliminary injunction against Edgerton.

21. Edgerton is fully bound to comply with all of the provisions of the non-disclosure agreement with DDI (Plaintiff's Exhibit 18), but is otherwise free to compete with DDI in the software business so long as he is not in violation of the nondisclosure agreement or DDI's rights that otherwise exist under the law.

22. A separate Order on Defendant CITGO Petroleum Corporation's application for preliminary injunction is entered contemporaneous herewith.

DATED this 7th day of Sept., 1997.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

Sept 2
~~AUG 1997~~ 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES DAVID KIEHN,
Plaintiff,

vs.

STACEY LOBAUGH, *et al.*,
Defendants.

Case No. 97-CV-676-B

ENTERED ON DOCKET
SEP 03 1997
DATE _____

ORDER

The Court has for consideration Defendants' Motion To Dismiss (Docket # 3). Defendants, an attorney and members of the attorney's law firm, move the Court to dismiss the negligence, misrepresentation, and fraud claims of Plaintiff which apparently arose from Lobaugh's representation of Plaintiff in a Worker's Compensation matter. Defendants move for dismissal pursuant to Fed.R.Civ.P. 12(b)(1), 12(b)(4), 12(b)(5), and 12(b)(6). Based on a review of the record and applicable legal authorities, the Court hereby GRANTS Defendants' Motion To Dismiss.

Pro se Plaintiff seeks compensation of not more than one million dollars (\$1,000,000.00) for alleged mishandling of his Worker's Compensation matter. Plaintiff lists his address as Post Office Box 581013, Tulsa, Oklahoma. See Docket # 1, p. 4. Individual Defendant Lobaugh and all principals of the named law firm are residents of the State of Oklahoma. See Docket # 3, Lobaugh Affidavit, ¶ 4. Although the amount in controversy is sufficient to satisfy the required amount under 28 U.S.C. § 1332, the parties are not of diverse citizenship. Thus, the Court is without subject matter jurisdiction under 28 U.S.C. § 1332.

The Court lacks subject matter jurisdiction under 28 U.S.C. § 1331 as Plaintiff has not alleged a claim arising under the Constitution, laws, or treaties of the United States. Plaintiff's claims sound

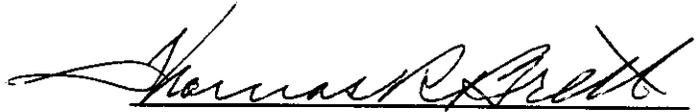
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in tort under state law.

As the Court lacks subject matter jurisdiction, the Complaint is **DISMISSED WITHOUT PREJUDICE**.¹

The issue of whether Plaintiff can proceed *in forma pauperis* is **MOOT**.

IT IS SO ORDERED this 2nd day of Sept. ~~August~~, 1997.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

¹It appears from the record Plaintiff has failed to abide by Fed.R.Civ.P. 4(c)(1). See Docket # 3, Lobaugh Affidavit, ¶ 6. However, as the Court is without subject matter jurisdiction, the Court will forego discussion of this point.

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

FILED

AUG 31 1997

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

WILLIAM R. WENDT

389-62-7461

Plaintiff,

vs.

JOHN J. CALLAHAN¹,
Acting Commissioner Social Security
Administration,

Defendant,

Case No. 96-CV-600-BU (M)

ENTERED ON DOCKET

DATE SEP 03 1997

REPORT AND RECOMMENDATION

Plaintiff, William R. Wendt, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.² The matter has been referred to the undersigned United States 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 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

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

² Plaintiff's February 10, 1994 application for disability benefits was denied initially and on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held March 14, 1995. By decision dated June 7, 1995 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on June 10, 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.

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

The record of the proceedings has been meticulously reviewed by the Court. The undersigned United States Magistrate Judge finds that the Administrative Law Judge ("ALJ") has properly outlined the required sequential analysis. The Court incorporates that information into this order as the duplication of effort would serve no purpose.

Plaintiff was born April 24, 1954 and was almost 41 years old at the time of the hearing. He has completed 12th grade in special education. He claims to be unable to work as a result of back problems, arthritis in his left foot, high blood pressure and headaches. The ALJ determined that although Plaintiff had worked in the past as a mechanic, welder, parts man and salesman at a pet shop, he had no past relevant work. However, he determined that Plaintiff had a residual functional capacity (RFC) for the full range of light work reduced by an inability to perform work that requires more than occasional bending, twisting, stooping, and crouching, repetitive overhead reaching or the performance of detailed or complex job tasks. Considering Plaintiff's age, education and work experience, and using the Medical-Vocational Guidelines ("Grids"), 20 C.F.R., Pt. 404, Subpt. P, App. 2, as a framework

for analysis, and based on the testimony of a vocational expert, the ALJ determined that there are a significant number of jobs in the national economy that Plaintiff can perform. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) chose only the evidence provided by Plaintiff's treating and consultative physicians that would support his denial; (2) applied an incorrect legal standard in evaluating non-exertional impairments; (3) submitted an improper hypothetical question to the vocational expert; and (4) ignored favorable vocational expert testimony supporting a finding of disability.

The various physicians examining Plaintiff have recorded contradictory observations.³ In November 1989, Plaintiff's chiropractor referred him to H.L. Battenfield, D.O. who examined him and reported that although Plaintiff had positive straight leg raising on the right and left to 70 degrees, his deep tendon reflexes in the upper and lower extremities were within normal limits with no pathology noted, and there were no muscle spasms. Dr Battenfield was unable to take Plaintiff through any of the neck range of motion studies, as he was unable to move his neck. Dr. Battenfield concluded that Plaintiff's complaints are of a subjective nature with no

³ Plaintiff had a prior application for benefits of September 12, 1990 which was denied initially on March 4, 1991 and which was not pursued.

objective findings noted. He also commented that there appears to be a strong emotional overlay and that the complaints voiced were inconsistent with the nature of the injury and the clinical findings. [R. 189-92].

In February 1991, he was examined by Beau Jennings, D.O. in connection with a previous application for benefits. Dr. Jennings reported range of motion for the lumbar and cervical spine was full, no muscle spasm was present, and straight leg raising was negative. [R. 213-14]. He also noted that Plaintiff was very dramatic in describing his symptoms and during physical examination, making exaggerated facial grimaces and moaning when asked to perform range of motion maneuvers and during peripheral palpation. [R. 214].

Plaintiff saw Kache Ashok, M.D. twice; January 1993, and November, 1993. Both times Dr. Ashok reported severe limitations in Plaintiff's range of motion for his lumbar and cervical spine, positive straight leg raising and muscle tenderness in the cervical area. He concluded that Plaintiff had "significant myofascial pain syndrome, i.e. soft tissue dysfunction, involving primarily the lower back, lower thoracic spine, as well as the entire cervical spine area with trigger points. His mobility is severely restricted even for simple movements." [R. 221-22]. Dr. Ashok recommended physical therapy modalities, stretching exercises and a conditioning program. *Id.* There is no evidence that Dr. Ashok actually treated Plaintiff or that he undertook Dr. Ashok's recommendations.

Plaintiff was examined consultatively by Angelo Dalessandro, D.O. who reported paravertebral tenderness bilaterally to palpation, "movement of the cervical

area was zero, however, he was noted to move his neck without problems," movement of the lumbo dorsal area was limited to flexion 25 degrees and extension at zero, leg raising was positive on the left at 45 degrees. There was no evidence of muscle atrophy or paralysis, however, a 3 cm difference in measurement of his right forearm and his left forearm was noted, with the right being larger. Dr. Dalessandro specifically noted: "It is difficult to determine joint dysfunction since he stiffens up when an attempt is made to move the joint. There is no swelling, or tenderness of the joints. There is tenderness in the vertebral area bilaterally. . . . Somatization⁴ of symptoms must be considered in this patient." [R. 228-29].

The results of an MRI taken October 25, 1990, revealed minimal bulging disc, L5-S1, without stenosis, and early degenerative facet changes. [R. 193]. Dr. Karl N. Detwiler, M.D. reviewed cervical and thoracic spine x-rays performed August 26, 1994, and found no evidence of abnormality for the thoracic spine. The cervical spine x-rays revealed evidence of slight narrowing between the C3-C4 vertebral bodies and evidence of some arthritic changes at C5-C6 level. There was no evidence of fracture or of slippage and nothing that would warrant surgical intervention. [R. 249].

Twice Plaintiff was examined by psychologist, Minor Gordon, Ph.D. On January 19, 1991, based on psychological testing he found Plaintiff to have functional mental retardation with a Full Scale I.Q. in the borderline range of mental

⁴ Somatization is defined as: "The process of expressing a mental condition as a disturbed bodily function." *Tabors Cyclopedic Medical Dictionary*, 17th Edition.

retardation, although Plaintiff is "quite capable of performing a routine or repetitive task on a regular basis and even using judgment in a work situation when it comes to a performance of his skills." [R. 217]. In March 1994, Dr. Gordon found Plaintiff to be in the low average range of intelligence, with test scores indicative of an individual with learning disabilities. He noted that Plaintiff's memory, immediate retention on recall, short and long term memory all appear to be adequate. [R. 224-25]. In addition, Dr. Minor noted that Plaintiff's problems appear to be orthopedic in nature and not psychological as he impressed Dr. Minor as being in pain. *Id.* at 225.

Plaintiff argues that statements made by Drs. Battenfield, Jennings, and Dalessandro concerning emotional overlay, exaggerated responses and somatization were not findings at all, but were "mere suggestions of a nebulous condition." [Dkt. 5, p. 3]. He points to the psychologist, Dr. Gordon's, reports which note his impression that Plaintiff had a legitimate problem with pain to support his assertion that the ALJ improperly weighed the medical evidence. It is within the province of the ALJ to resolve conflicting medical evidence. *Eggleston v. Bowen*, 851 F.2d 1244, 1247 (10th Cir. 1994). The Court notes that Dr. Gordon is a consultative psychologist, not a medical doctor, nor a treating physician. His opinion about the extent of Plaintiff's orthopedic problems are not entitled to greater weight than any of the other physicians rendering opinions. The Court finds that the ALJ appropriately evaluated the medical opinions contained in the record and appropriately resolved the conflicts appearing therein.

Plaintiff has not provided any specifics in support of his assertion that the ALJ "clearly applied an incorrect legal standard" in evaluating his non-exertional impairments. [Dkt. 5, p. 2]. The Court has thoroughly reviewed the record and the ALJ's credibility and pain analysis and finds it to have been conducted in accordance with the appropriate legal standard⁵ and to be supported by substantial evidence in the record.

The ALJ posed a hypothetical question to the vocational expert which asked him to assume, *inter alia*, that the hypothetical individual would be "moderately limited in the ability to maintain attention and concentration for extended periods of time." [R. 63]. Plaintiff argues that the ALJ erred because he did not quantify this restriction to the vocational expert. According to Plaintiff, this violates the precept that vocational testimony elicited by hypothetical questions that do not relate with precision the Plaintiff's impairments cannot constitute substantial evidence to support a decision. It is true that testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision. *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991). However, Plaintiff has cited the Court to no authority which

⁵ The framework for the proper analysis of the evidence of allegedly disabling pain was set out in *Luna v. Bowen*, 834 F.2d 161 (10th Cir.1987). The Court "must consider (1) whether Claimant established a pain-producing impairment by objective medical evidence; (2) if so, whether there is a "loose nexus" between the proven impairment and the Claimant's subjective allegations of pain; and (3) if so, whether considering all the evidence, both objective and subjective, Claimant's pain is in fact disabling." *Glass v. Shalala*, 43 F.3d 1392, 1395 (10th Cir.1994) (quoting *Musgrave v. Sullivan*, 966 F.2d 1371, 1375-76 (10th Cir.1992) (citing *Luna*, 834 F.2d at 163-64)); *see also Thompson v. Sullivan*, 987 F.2d 1482, 1488 (10th Cir.1993).

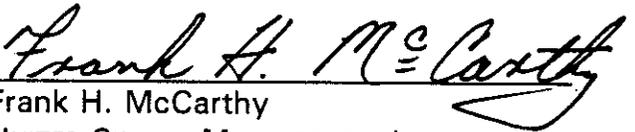
requires the ALJ to specifically define every term used, nor has the Court's own search yielded any such authority. The Court finds that the limitations included in the hypothetical posed to the vocational expert appropriately related the limitations the ALJ found to exist and those limitations were supported by substantial evidence.

The ALJ posed a hypothetical question to the vocational expert which asked him to assume that the Plaintiff's testimony was fully credible and verified by medical evidence. The vocational expert's response included his own "observation of [Plaintiff's] situation today, realizing I'm not a doctor, but I just noticed the way he moved around in his seat and seemed to be in constant pain, I would think he'd have a hard time competing." [R. 66]. Plaintiff argues that the ALJ erred by failing to adopt the vocational expert's answer. It is for the ALJ to weigh the evidence and assess Plaintiff's credibility. Subjective complaints must be evaluated with due consideration for credibility, motivation, and medical evidence. *Frey v. Bowen*, 816 F.2d 508, 516 (10th Cir. 1987). The vocational expert clearly overstepped his expertise to include his own assessment of Plaintiff's subjective complaints within his answer to the question. These gratuitous extraneous comments which are based on conclusions for which the vocational expert has no demonstrated expertise are irrelevant and therefore do not provide any basis for reversal of the ALJ's decision.

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

DATED this 31st day of August, 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

AUG 29 1997

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

TERI L. SMITH,

Plaintiff,

v.

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

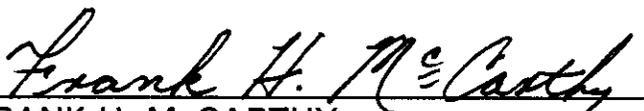
Defendant.

CASE NO. 96-C-599-M

ENTERED ON DOCKET
DATE SEP 03 1997

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 29th day of AUG., 1997.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

AUG 29 1997

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

TERRI L. SMITH

446-74-8254

Plaintiff,

vs.

JOHN J. CALLAHAN¹,
Acting Commissioner Social Security
Administration,

Defendant,

Case No. 96-CV-599-M ✓

ENTERED ON DOCKET
DATE SEP 03 1997

ORDER

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

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

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

² Plaintiff's June 30, 1993 application for disability benefits was denied October 14, 1993 and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held December 20, 1994. By decision dated January 26, 1995 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on April 26, 1996. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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

The medical records submitted span the time from before 1988 through 1994. However, not all of that information is strictly relevant to Plaintiff's claim. An earlier application for benefits was denied on July 29, 1992, based on records dated through June 5, 1992. That decision was not appealed and the ALJ did not reopen the previous denial. The determination that Plaintiff was not disabled up to July 29, 1992, is *res judicata* and is not reviewable by this court. *Brown v. Sullivan*, 912 F.2d 1194, 1196 (10th Cir. 1990). Accordingly, the time frame under review begins at the point of the earlier denial, July 30, 1992. Further, Plaintiff's insured status expired March 31, 1993. 42 U.S.C. § 423(d)(1)(A) provides that consideration of a claimant's case may be undertaken only during the period when claimant is insured for benefits. Therefore, Plaintiff's eligibility for benefits must be demonstrated within the time frame from July 30, 1992 to March 31, 1993. The Court's review of this case necessarily focuses primarily on the records generated between these dates.

Plaintiff was born September 10, 1962, and was 32 years old at the time of the hearing. She has a 12th grade education and two years of college work. She has

formerly worked as a waitress, cook, police records clerk, office clerk, bar attendant, and receptionist. She claims to be unable to work as a result of severe headaches and seizures. The ALJ determined that Plaintiff is capable of performing her past relevant work as an office clerk and receptionist. Further, the ALJ stated that even assuming that she could not perform her past work, she had acquired skills that would transfer to other jobs in the economy which she could perform. [R. 27].

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) improperly evaluated her headache complaints; (2) failed to prepare a psychiatric review technique form (PRT) as required by the relevant regulations, 20 C.F.R. § 404.1520a; (3) failed to properly evaluate the demands of her former work; and (4) impermissibly delegated fact finding responsibilities to the vocational expert at step four of the five step evaluative process.

EVALUATION OF HEADACHE COMPLAINTS

The medical records reflect that during the relevant time frame, Plaintiff was repeatedly treated for what her physician, Dr. Karathanos, described as "tension type headache with significant migraine component." [R. 296-301]. Plaintiff asserts that the ALJ failed to appropriately evaluate her headache complaints which she claims resulted in a residual functional capacity (RFC) determination which is unsupported by substantial evidence. Plaintiff acknowledges that evaluation of the existence and degree of headache pain is subjective: "[t]here are no laboratory tests that can

confirm the existence and severity of migraine headaches." [Dkt. 4, p. 3]. Because of this fact, evaluation of Plaintiff's credibility is of primary importance.

The ALJ found that Plaintiff's complaints of disabling pain were not credible. He found "troubling inconsistencies in claimant's testimony and statements when compared to the medical evidence of record and other factors of evaluation." [R. 25]. Plaintiff argues that some of the reasons advanced by the ALJ's credibility analysis are based on speculation and mischaracterization of the medical record. [R. 4, p. 3-4]. Plaintiff characterizes the ALJ as having overstepped his bounds into the field of medicine when he noted the following in his credibility analysis: failure to follow-up on x-ray evidence of right maxillary sinusitis; failure to reduce caffeine intake; misuse of prescription drugs; and failure to investigate the possibility of changing birth control pills.

The Court finds that the ALJ commented on the aforementioned areas to illustrate that Plaintiff's actions were inconsistent with one who is truly unable to function due to headache pain. Although it could have been stated more clearly, the ALJ was apparently trying to say that someone disabled with pain would likely make every attempt to alleviate the pain. The fact that Plaintiff has not taken what little effort it would require to pursue these avenues casts doubt on her claims of disabling pain.

Citing *Saleem v. Chater*, 86 F.3d 176 (10th Cir. 1996), Plaintiff argues that the ALJ improperly relied on her excessive use of narcotic medications to discredit her complaints of severe pain. *Saleem* is inapposite. In *Saleem* the Court found that the

ALJ failed to properly evaluate pain and addiction to, and side effects of, prescription drugs. The ALJ found that although the plaintiff was addicted to pain-killers, her addiction and medication side effects did not prevent her from performing work activity. In so doing, the ALJ ignored the statements of several doctors about the plaintiff's pain, certain addiction and need for psychiatric treatment. The court found that the net effect of the ALJ's decision was that plaintiff "is to return to work, addicted, because her drug abuse will keep her from feeling severe pain." *Id.* at 179. The Court found that the medical evidence did not support a finding that plaintiff's pain was "effectively controlled by medicines because addiction is not "effective control." *Id.* at 180. The Court held:

the ALJ cannot discredit a claimant's assertions of disabling pain by relying on her use of medicines to which the medical evidence clearly indicates she is addicted, and which she should have long ago stopped taking, but which presently provide adequate pain relief.

Id. 179-80.

Unlike *Saleem*, in this case there is no finding by the ALJ that Plaintiff's pain is adequately controlled by medication. Rather, the ALJ accurately noted her doctor's comment to the effect that overuse of medications may be perpetuating her problem through "rebound headaches." [R. 300]. This is clearly distinguishable from *Saleem* where the plaintiff was essentially required to remain addicted to enable her to work.

The Court finds that the ALJ's credibility determination is supported by substantial evidence.

STEP FOUR ANALYSIS

Relying on *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996), Plaintiff argues that the ALJ failed to develop the record with respect to the requirements of Plaintiff's past work and improperly delegated his fact-finding responsibilities to a vocational expert. In addition to determining the RFC for a claimant, at step four the ALJ is required to make findings about the mental and physical demands of Plaintiff's past relevant work and compare those demands to Plaintiff's abilities to determine whether Plaintiff can perform that job. *See* SSR 82-62. In *Winfrey*, the Court ruled that the ALJ may not rely on the testimony of a vocational expert to avoid making specific findings about the demands of Plaintiff's past work and the ability to meet those demands. However, the Court stressed that a vocational expert may supply information to the ALJ at step four concerning the demands of past work. *Id.* at 1025.

In this case the ALJ found that Plaintiff has the ability to perform work activities "except for work involving lifting more than 50 pounds occasionally and 25 pounds frequently, no climbing or balancing; no work around unprotected heights, open flames, or dangerous machinery, and a fair ability to maintain attention, and concentration but could perform simple tasks." [R. 28]. In his hypothetical to the vocational expert, he defined fair ability to maintain attention as being "seriously limited, but not precluded." [R. 60]. He asked the vocational expert whether, considering the limitations he described, "could the individual return to any past relevant work, either as the individual performed it or as that work is customarily

performed in the national economy?" [R. 60]. The vocational expert answered that she could return to her former job as a routine office clerk. He elaborated that the clerk job at the police department would be excluded by the "seriously limited attention." [R. 61]. The entirety of the ALJ's analysis comparing Plaintiff's abilities to the demands of her past work is: "the vocational expert testified that the work as office clerk was not precluded" by her limitations. [R. 27].

In *Winfrey*, the Court held that it is inappropriate for the ALJ to make findings only about the limitations and leave the remainder of the step four analysis to take place in the vocational expert's head, as the Court is left nothing to review. *Winfrey*, 92 F.3d at 1025. The Court finds that the ALJ engaged in the same type of analysis the *Winfrey* court found to be inappropriate. However, remand is not required on this basis. The ALJ also found that even if Plaintiff could not return to her past relevant work, "there were skills obtained in her previous work that would transfer to other jobs." [R. 27]. This conclusion, which precludes a finding of disability, is supported by substantial evidence.

FAILURE TO PREPARE PRT

In the denial decision, the ALJ concluded: "there is no medical evidence of a significant mental disorder." [R. 24]. Plaintiff seeks remand based upon the ALJ's failure to "evaluate the severity of her mental impairment according to the special procedure set forth in law." [Dkt. 4, p. 5]. The Commissioner's own regulations require that special procedures be followed and a Psychiatric Review Technique (PRT) form be prepared *at each level of administrative review* when evaluating a mental

impairment which allegedly prevents a claimant from working. 20 C.F.R. § 404.1520a; *Cruse v. United States Dep't of Health & Human Servs.*, 49 F.3d 614, 617 (10th Cir.1995).

The ALJ inexplicably failed to follow the requisite procedure. The record contains a PRT form completed 10/14/93 in conjunction with Plaintiff's request for reconsideration. [R. 106-07]. The records generated by Plaintiff's treating physician, Dr. Karathanos, indicate she was suffering from depression. [R. 296-302]. His records also document concern about her overuse of prescription medication and his concern that he suspected significant functional overlay³ in connection with her headache complaints. [R. 300]. In addition, the ALJ included restrictions in Plaintiff's mental abilities in his RFC determination: "fair ability to maintain concentration and perform tasks." [R. 27]. The ALJ clearly failed to adhere to the prescribed regulations. The Court must remand for the ALJ to follow the special procedures and prepare the PRT form. *See Dean v. Chater*, 94 F.3d 655 (Table), 1996 WL 459948 (10th Cir. (Okla.)).

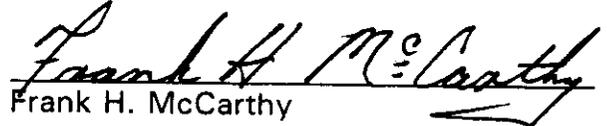
In remanding this case, the Court does not dictate the result. Remand is ordered to assure that a proper analysis is performed and the correct legal standards are invoked in reaching a decision based on the facts of the case. *Kepler v. Chater*, 68 F.3d 387, 391 (10th Cir. 1995).

³ Functional overlay is defined as: "The emotional response to physical illness. It may take the form of a conversion of hysterical response, affective overreaction, prolonged symptoms of physical illness after the signs of the illness have subsided, or combinations of these reactions." *Tabors Cyclopedic Medical Dictionary*, 17th Edition.

CONCLUSION

This case is REMANDED to the Commissioner for further proceedings in accordance with this Order.

DATED this 29th day of August, 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

FILED

SEP - 2 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

MICHAEL J. SWAN, Successor to)
BUCHBINDER & ELEGANT, P.A.,)
Receiver of Aikendale Associates,)
a California Limited Partnership,)
ROBERT MARLIN and JACK D.)
BURSTEIN,)

Plaintiffs,)

No. 89 C-843 E

vs.)

SOONER FEDERAL SAVINGS AND)
LOAN ASSOCIATION, W.R. HAGSTROM,)
EDWARD L. JACOBY, DELOITTE,)
HASKINS & SELLS, PAINWEBBER)
INCORPORATED and STEPHEN ALLEN,)

Defendants)

ENTERED ON DOCKET
DATE SEP 03 1997

STIPULATION AND ORDER OF DISMISSAL WITH PREJUDICE

IT IS HEREBY STIPULATED AND AGREED by and among the undersigned, the attorneys of record for Plaintiffs and Deloitte & Touche USA LLP, formerly known as Deloitte Haskins & Sells ("Deloitte"), as follows:

1. That no party hereto is an infant or incompetent person for whom a committee has been appointed and no person not a party has an interest in the subject matter of the above-captioned action.

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2. That all pending motions by the parties are hereby withdrawn.

3. That the above-captioned action be, and the same hereby is, discontinued with prejudice as to Deloitte, without costs to any party as against the others.

4. Neither this Stipulation and Order, nor the fact of its execution, nor the settlement agreement nor any of the negotiations or proceedings related thereto, nor any action taken to carry out or enforce this Stipulation and Order, shall be construed as, or be deemed to be evidence of, an admission or concession on the part of Deloitte of any fault, liability, or any wrongdoing whatsoever, or of any damages having been incurred by Plaintiffs. Deloitte has denied each and all of the claims and allegations asserted by Plaintiffs in the above-captioned action, and expressly denies any liability, fault or wrongdoing arising out of or relating to any of the conduct alleged in the above-captioned action.

5. This Stipulation and Order shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, successors and assigns, and any corporation, partnership or other entity into or with which any party hereto may merge, consolidate or reorganize.

6. This stipulation may be filed without further notice with the Clerk of the Court.

Dated: Tulsa, Oklahoma
August 29, 19, 1997

John Mozola
Counsel for Plaintiffs

Marc J. Schulte
Counsel for Deloitte

~~SO ORDERED:~~

This 29th day of August, 1997

James D. Allison
U.S.D.J.

6. This stipulation may be filed without further notice with the Clerk of the Court.

Dated: Tulsa, Oklahoma
June 4, 1997

Counsel for Plaintiffs



Counsel for Deloitte

SO ORDERED:

This ____ day of _____ 1997

U.S.D.J.

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

FILED

SEP - 2 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES R. ROBINSON,)
)
Plaintiff,)
)
vs.)
)
PRIVATE BUSINESS, INC.,)
)
Defendant.)

Case No. 96-C-640-E

ENTERED ON DOCKET

DATE SEP 2 1997

ORDER

Now before the Court is the Motion for Summary Judgment (Docket #16) of the defendant, Private Business, Inc. (PBI).

Plaintiff James Robinson (Robinson) worked as a "business development manager" for PBI from February 1, 1993 until his termination in July of 1995. His task was to market a system to third party businesses that would allow banks to advance funds to businesses on its accounts receivables, manage the receivables, and collect the money due from customers of the business on an ongoing basis. The result was an ongoing commission that formed the basis of Robinson's compensation. At the time Robinson became employed by PBI, a "compensation memo" was negotiated that set forth the terms of his compensation. The memo did not in any way address whether Robinson would continue to receive commissions after his employment with PBI was terminated. In February 1994, Robinson, and all other business development managers, were required to execute an employment agreement which, among other things, limited the Incentive Commission to ongoing revenue actually received prior to Robinson's discharge.

It is this failure to pay Robinson for commissions that were earned prior to his discharge, but

rd

received after the discharge that forms the basis for this lawsuit. Plaintiff asserts that this failure constitutes a violation of Oklahoma's Protection of Labor Act, Okla.Stat. tit. 40, §165.1, *et seq.*, and wrongful discharge in violation of public policy. Defendant seeks summary judgment arguing that its compensation scheme is pursuant to a valid contract and does not violate the Protection of Labor Act, and that plaintiff has no evidence to support his conclusory assertion that the true purpose for his termination was to avoid paying him commissions.

Legal Analysis

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Widon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

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

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

Wage Claim

The Protection of Labor Act (the Act) provides as follows:

Whenever an employee's employment terminates, the employer shall pay the employee's wages in full, less offsets, at the next regular designated pay day

established for the pay period in which the work was performed either through the regular pay channels or by certified mail postmarked within the deadlines herein specified if requested by the employee, unless provided otherwise by a collective bargaining agreement that covers the employee.

Okla. Stat.tit.40, §165.3. Thus, under the Act, the employer has an obligation to pay a terminated employee “the employee’s wages in full.” “Wages” defined under the Act as:

compensation owed by an employer to an employee for labor or services rendered, including salaries, commissions, holiday and vacation pay, overtime pay, severance or dismissal pay, bonuses and other similar advantages agreed upon between the employer and the employee, which are earned and due, or provided by the employer to his employees in an established policy, whether the amount is determined on a time, task, piece, commission or other basis of calculation.

Okla.Stat.tit. 40, §165.1(4). PBS argues that summary judgment is appropriate on this claim because PBS has no obligation to pay Robinson for commissions received after his termination, even under the terms of the Act. This is so, PBS argues, because commissions agreed upon by the employer and the employee, in the 1994 employment agreement do not include commissions received after an employee’s termination.

Plaintiff counters the motion with the argument that the 1994 employment agreement is “an unenforceable adhesion contract,” and the assertion that defendant “misreads” the definition of wages contained in §165.1. By the terms of the 1994 agreement, it must be construed by Tennessee law. Under Tennessee law, an adhesion contract is a standardized contract, offered to consumers of goods and services. Wallace v. National Bank of Commerce, 938 S.W.2d 684 (Tenn. 1996). Moreover, under Tennessee law, an opportunity for continued employment is sufficient consideration for an employment contract, even if the contract is entered into after employment has begun. Central Adjustment Bureau, Inc. V. Ingram, 678 S.W.2d 28 (Tenn. 1984). Plaintiff has failed to present facts or law to support his claim that the 1994 agreement is unreasonable to the extent it should be held

unenforceable.

Moreover, the Court finds the construction of §165.1(4) by the defendant to be correct. Wages are “. . . commissions. . . agreed upon between the employer and employee, which are earned and due” Under the terms of the employment contract, which is the agreement between Robinson and PBI, commissions are only earned and due if the employee is still employed at the time they are received. There is nothing in this construction which violates §165.5 which provides that “no provision of this act shall in any way be contravened or set aside by private agreement.” See, e.g., Simpson v. City of Blanchard, 797 P.2d 346 (Okla. App. 1990). Summary judgment in favor of defendant is appropriate on plaintiff’s statutory wage claim.

Wrongful Discharge Claim

Robinson asserts that he was terminated in violation of Oklahoma public policy, because his termination was motivated by PBI’s desire to avoid payment of commissions already earned by Robinson. PBI claims that Robinson was terminated due to poor job performance, and that summary judgment is appropriate because Robinson has no admissible evidence to support his claim that he was terminated so PBI could avoid payment of commissions.

Robinson contends that his tort claim, to which Oklahoma law applies, requires proof that: a) he was discharged; b) the substantial motivating factor in the discharge was Defendant’s refusal to pay Incentive Commissions earned prior to his discharge; and c) Robinson suffered damages. OUJI-Civ. (2d) No. 21.2. He further claims, relying on Hall v. Farmers Ins. Exchange, 713 P.2d 1027, 1030 (Okla. 1986) that defendant’s intent in discharging him is a fact question for a jury, and that his affidavit raises a question of fact. Robinson states in his affidavit:

18. I believe the significant or underlying reason for my discharge was to avoid paying me the Incentive Commissions which I’d earned prior to my discharge. I also

believe that poor performance is a pretext for the real reason that Defendant discharged me. After all, Defendant had rated my job performance as satisfactory in the April 1995 Employment Performance Appraisal, just two months prior to my discharge.

Robinson's conclusory statement is his sole defense to summary judgment on this claim. Robinson points out his "satisfactory" performance review as an attempt to cast doubt on PBI's contention that poor job performance was the reason for his discharge, but Robinson admits in his deposition that he had problems with some of the banks he was dealing with, and that his performance review reflects some dissatisfaction with his efforts. Moreover, a showing of cost savings alone is not sufficient to establish Robinson's claim of wrongful discharge. Bolton v. Scrivner, 36 F.3d 939, 944-45 (10th Cir. 1994). Summary Judgment is also appropriate on Robinson's claim for wrongful discharge in violation of public policy.

In conclusion, the Court finds that the facts of this case do not support a statutory wage claim or a claim for wrongful discharge in violation of public policy. Defendant's Motion for Summary Judgment (Docket # 16) is granted.

IT IS SO ORDERED THIS 29th DAY OF AUGUST, 1997.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP - 2 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 ERIC R. CARSON;)
 CHRISTI LEE CARSON)
 fka Christi L. Temme;)
 THE COMMONS HOMEOWNERS)
 ASSOCIATION, INC aka The Commons)
 Homeowners Association;)
 CITY OF BROKEN ARROW, Oklahoma;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

ENTERED ON DOCKET
DATE SEP 03 1997

Civil Case No. 95-CV-1193-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 2nd day of Sept,

1997. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, Eric R. Carson and Christi Lee Carson fka Christi L. Temme, appear by their attorney Matthew J. Browne; the Defendant, The Commons Homeowners Association, Inc. aka The Commons Homeowners Association, appears by its attorney Bart C. James; the Defendant, City of Broken Arrow, Oklahoma, appears by Michael R. Vanderburg, City Attorney; and the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma.

The Court being fully advised and having examined the court file finds that the Defendant, Eric R. Carson, executed a Waiver of Service of Summons on January 20, 1996; that the Defendant, Christi Lee Carson fka Christi L. Temme, executed a Waiver of Service of Summons on January 20, 1996; that the Defendant, The Commons Homeowners Association, Inc. aka The Commons Homeowners Association, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on March 28, 1996.

It appears that the Defendants, Eric R. Carson and Christi Lee Carson fka Christi L. Temme, filed their Answer and Cross-claim on July 24, 1996; that the Defendant, The Commons Homeowners Association, Inc. aka The Commons Homeowners Association, filed its Answer and Cross-Claim on April 29, 1996; that the Defendant, City of Broken Arrow, Oklahoma, filed its Answer on October 16, 1996; and that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on December 12, 1995.

The Court further finds that the Defendant, Christi Lee Carson, is one and the same person formerly known as Christi L. Temme. The Defendant, The Commons Homeowners Association, Inc., is one and the same as The Commons Homeowners Association.

The Court further finds that on July 22, 1991, Eric R. Carson and Christi Lee Carson filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 91-B-2550 W. On November 13, 1991, the United States Bankruptcy Court for the Northern District of

Oklahoma filed its Discharge of Debtor, and the case was subsequently closed on December 19, 1991.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

LOT TWENTY-SIX (26), BLOCK TWO (2), "THE COMMONS", PLANNED UNIT DEVELOPMENT NUMBER 26, AN ADDITION TO THE CITY OF BROKEN ARROW, TULSA COUNTY, STATE OF OKLAHOMA, A RESUBDIVISION OF LOTS 1 THRU 13, BLOCK 2, AND ALL OF BLOCK 7, "CANTERBURY AMENDED" AN ADDITION TO THE CITY OF BROKEN ARROW, TULSA COUNTY, OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that on February 18, 1988, Eric R. Carson and Christi L. Temme, executed and delivered to Commonwealth Mortgage Company of America L.P. Limited Partnership, their mortgage note in the amount of \$37,938.00, payable in monthly installments, with interest thereon at the rate of 9.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Eric R. Carson, a single person and Christi L. Temme, a single person, executed and delivered to Commonwealth Mortgage Company of America L.P. Limited Partnership, a mortgage dated February 18, 1988, covering the above-described property. Said mortgage was recorded on February 23, 1988, in Book 5082, Page 1025, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 22, 1990, Commonwealth Mortgage Company of America, L.P., Limited Partnership, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington,

D.C., his successors and assigns. This Assignment was recorded on June 4, 1990, in Book 5256, Page 1995, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 1, 1990, the Defendant, Eric R. Carson, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on March 1, 1991.

The Court further finds that the Defendants, Eric R. Carson and Christi Lee Carson fka Christi L. Temme, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Eric R. Carson and Christi Lee Carson fka Christi L. Temme, are indebted to the Plaintiff in the principal sum of \$37,513.33, plus administrative charges in the amount of \$2,856.38, plus accrued interest in the amount of \$19,016.62 as of April 1, 1995, plus interest accruing thereafter at the rate of 9.5 percent per annum until judgment, and interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the 1995 and 1996 ad valorem taxes on the subject real property have been paid.

The Court further finds that the Defendants, Eric R. Carson and Christi Lee Carson fka Christi L. Temme, disclaim all right, title or interest to the subject real property.

The Defendant, The Commons Homeowners Association, Inc. aka The Commons Homeowners Association, has reached a settlement agreement with the Plaintiff and therefore claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, City of Broken Arrow, Oklahoma, claims no right, title or interest in the subject real property, except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has liens on the property which is the subject matter of this action by virtue of the following personal property taxes:

Number	Tax Year	Amount	Date--Lien Docket
93-03-2975090	1993	\$31.00	06/23/94
92-03-2970710	1992	31.00	06/25/93
91-03-2965070	1991	40.00	06/26/92

Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, Eric R. Carson and Christi Lee Carson fka Christi L. Temme, in the principal sum of \$37,513.33, plus administrative charges in the amount of \$2,856.38, plus accrued interest in the amount of \$19,016.62 as of April 1, 1995, plus interest accruing thereafter at the rate of 9.5 percent per annum until judgment, and interest thereafter at the current legal rate of 5.58 percent per annum until paid, and the costs of this action, and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the total amount of \$102.00, plus costs and interest, for personal property taxes for the years 1991, 1992, and 1993 as shown in the table above.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, City of Broken Arrow, Oklahoma, has no right, title or interest in the subject real property, except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Eric R. Carson, Christi Lee Carson fka Christi L. Temme, The Commons Homeowners Association, Inc. aka The Commons Homeowners Association, and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, Eric R. Carson and Christi Lee Carson fka Christi L. Temme, to satisfy the judgment in rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

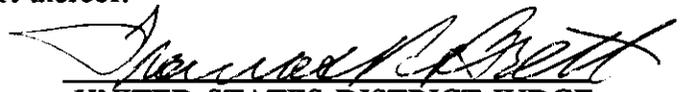
Third:

In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Tulsa County, Oklahoma.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

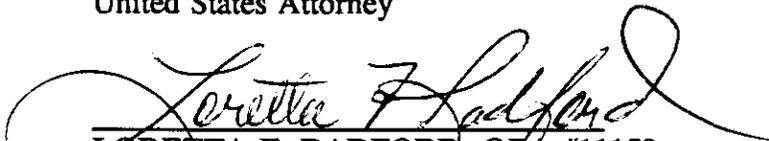
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.


UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


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



MATTHEW J. BROWNE, OBA #14682

2021 South Lewis Avenue, Suite 350

Tulsa, Oklahoma 74104

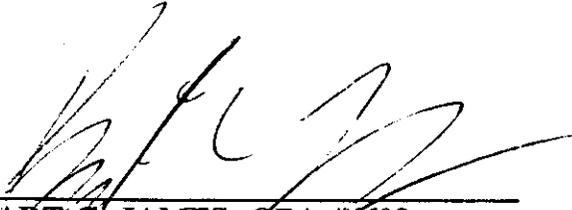
(918) 749-2730

Attorney for Defendants,

Eric R. Carson and Christi Lee Carson fka Christi L. Temme

Judgment of Foreclosure

Civil Action No. 95-CV-1193-B (Carson)



BART C. JAMES, OBA #4608

Southern Woods, Suite 200

8908 South Yale Avenue

Tulsa, Oklahoma 74137

(918) 495-1550

Attorney for Defendant,

The Commons Homeowners Association, Inc.

aka The Commons Homeowners Association

Judgment of Foreclosure

Civil Action No. 95-CV-1193-B (Carson)



MICHAEL R. VANDERBURG, OBA #9180

City Attorney, Broken Arrow, Oklahoma

220 South First Street

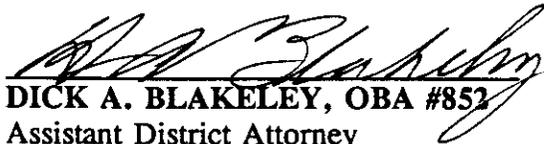
Broken Arrow, Oklahoma 74012

Attorney for Defendant,

City of Broken Arrow, Oklahoma

Judgment of Foreclosure

Civil Action No. 95-CV-1193-B (Carson)



DICK A. BLAKELEY, OBA #852

Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842

Attorney for Defendants,
County Treasurer and Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-CV-1193-B (Carson)

LFR:cas

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

F I L E D

AUG 29 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENERGY DYNAMICS, INC., a)
Kansas Corporation,)

Plaintiff,)

v.)

Case No. 96CV 706-C

MIDWEST GAS STORAGE, INC.,)
an Indiana Corporation, d/b/a:)
MIDWEST GAS SERVICES, INC.,)
MIDWEST GAS SERVICES, CO.,)

MIDWEST GAS SERVICES)
COMPANY, an Illinois Corporation,)
d/b/a:)

MIDWEST GAS SERVICES, INC.)
MIDWEST GAS SERVICES, CO.,)

DANIEL L. O'MALLEY, and)
GREGORY J. FRIEDRICH,)

Defendants.)

ENTERED ON DOCKET

DATE SEP 02 1997

DISMISSAL ORDER

This matter coming to be heard on the parties' Joint Motion for Dismissal with Prejudice; the Defendants having complied with the Court's Judgment of November 20, 1996 and the Court's Judgment Enforcing Settlement Agreement, dated August 5, 1997 and the Court's Judgment Against Defendant Midwest Gas Storage, Inc. and Midwest Energy Holding Corp., dated August 5, 1997; and the Court having been presented with the Satisfaction and Release of Judgment executed by Plaintiff and filed with the Court.

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IT IS ORDERED that this action is hereby dismissed with prejudice.

DATED: Aug 29, 1997


UNITED STATES DISTRICT JUDGE

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

AUG 29 1997

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

RODNEY KEITH DICK,)

Plaintiff,)

vs.)

LARRY FIELDS, DAVID MILLER, JOHN)
MIDDLETON, HOWARD RAY, TROY)
ALEXANDER, and One Unknown Defendant)
referred to as JOHN DOE, all sued in their)
official and individual capacities,)

Defendants.)

Case No. 96-CV-1178-K (J)

ENTERED ON DOCKET

DATE SEP 02 1997

ORDER

Before the Court is the Report and Recommendation ("the Report") of the United States Magistrate Judge filed on July 23, 1997 (Docket #8) in this prisoner civil rights action brought pursuant to 42 U.S.C. § 1983. The Report addresses the motion to quash service and to dismiss complaint (Docket #6) filed by Defendant Larry Fields, sued by Plaintiff in both his official and individual capacities.

In the Report, the Magistrate Judge concluded that (1) any action by Plaintiff against Defendant Fields in his official capacity¹ is barred by the Eleventh Amendment; and (2) Plaintiff's claims against Defendant Fields in his individual capacity must be dismissed due to Plaintiff's failure to comply with service requirements of Fed.R.Civ.P. 4. Based on these conclusions, the Magistrate Judge recommended that this Court grant the motion to dismiss filed by Defendant Fields.

¹At the time of the events giving rise to this lawsuit, Larry Fields was the Director of the Oklahoma Department of Corrections.

On August 1, 1997, Plaintiff filed his objection to the Report only as it pertained to the issue of service of process. There being no timely objection to the Report's conclusion that Plaintiff's claims against Defendant Fields in his official capacity are barred by the Eleventh Amendment, the Court, after careful review of the file and applicable law, hereby adopts and affirms that conclusion.

The Court now turns to the Magistrate's recommendation that the Court grant the motion to dismiss due to improper service of process on Defendant Fields in his individual capacity. Based on Plaintiff's objection to the recommendation and in accordance with Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed de novo that portion of the Report addressing Defendant's argument that Plaintiff's claims against him in his individual capacity must be dismissed for improper service of process.

Rule 4 of the Federal Rules of Civil Procedure dictates the procedure for service of process. Subsection (e) governs service upon individuals within a judicial district of the United States and provides that

...service upon an individual from whom a waiver has not been obtained and filed, other than an infant or incompetent person, may be effected in any judicial district of the United States:

(1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or

(2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

Pursuant to this rule, Plaintiff, a state prisoner appearing *pro se*, could effect service on Defendant Fields in his individual capacity in a manner authorized by Oklahoma law, or by serving Defendant Fields personally, or by delivering a copy of the summons and complaint to Defendant Fields'

house, or by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process. Pursuant to Oklahoma law, service of process on individuals may be accomplished by personal delivery, by mail, or by publication.² See 12 Okla. Stat. § 2004(C). According to 12 Okla. Stat. § 2004(C)(2)(b), "[s]ervice by mail shall be accomplished by mailing a copy of the summons and petition by certified mail, return receipt requested and delivery restricted to the addressee." (emphases supplied).

In the instant case, Plaintiff attempted to serve Defendant Fields by mailing a copy of the summons and complaint to Fields via certified mail, return receipt requested. However, because Plaintiff did not restrict delivery to the addressee, Fields did not personally sign the "green card" acknowledging receipt. Instead, the "green card" was signed by a part-time clerk in the closed records department who allegedly was not designated to receive service for Defendant Fields. In the Report, the Magistrate Judge concluded that Defendant Fields was never served personally or by mail with Plaintiff's summons or complaint and that Plaintiff's attempt to serve him in his individual capacity failed to meet the requirements of Fed.R.Civ.P. 4. Therefore, the Magistrate Judge recommended that Defendant Fields, in his individual capacity, should be dismissed from this action.

In his objection to the Report, Plaintiff argues that since he is an inmate incarcerated in an Oklahoma Department of Corrections facility, it would be an unreasonable burden to expect him to serve Defendant Fields personally or at his home address. Plaintiff argues that the only logical means of serving Defendant Fields "considering the position of the Plaintiff in relation to

²Service by publication is allowed only if it is stated in the petition, verified by the plaintiff or his attorney, or in a separate affidavit by the plaintiff or his attorney filed with the court, that with due diligence service cannot be made upon the defendant by any other method. 12 Okla. Stat. § 2004(C)(3)(a). In the instant case, Plaintiff has the option of serving Defendant Fields by mail and, therefore, service by publication is not an available option.

Defendant Fields" was via mail. Plaintiff further argues that since Defendant Fields clearly received actual notice of the pendency of this lawsuit against him in his individual capacity, this Court should "broadly construe" the requirements of Fed.R.Civ.P. 4 and find that he has effected proper service on Defendant Fields.

The Court agrees with Plaintiff that given his status as an inmate within DOC, it is unreasonable to expect him to accomplish personal service on Defendant Fields or to accomplish delivery of the summons and complaint to Defendant Fields' home. However, Plaintiff can effect proper service of process on Defendant Fields by mail as prescribed by Oklahoma law. The Court finds that, to date, Plaintiff has not effected proper service within the confines of Fed.R.Civ.P. 4 since his effort to serve Fields via certified mail did not substantially comply with the requirements specified by Oklahoma statute. *See* Fed.R.Civ.P. 4(e); 12 Okla. Stat. § 2004(C)(2)(b). Furthermore, although Defendant Fields may have actual knowledge of this lawsuit, it is well-settled that actual notice of the existence of a lawsuit is not a sufficient substitute for proper service. Graff v. Kelly, 814 P.2d 489 (Okla. 1991); *see also* Despain v. Salt Lake Area Metro Gang Unit, 13 F.3d 1436 (10th Cir. 1994).

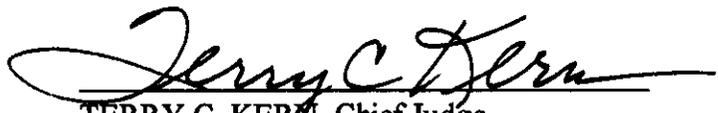
Subsection (m) of Fed.R.Civ.P. 4 provides that "[i]f service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court ... shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time...." However, the 120-day period for service is tolled when a defendant contests adequacy of attempted service by way of a motion to quash. Bruley v. Lincoln Property Company, N.C., Inc., 140 F.R.D. 452 (D. Colo. 1991). In the instant case, although more than 120 days has passed since Plaintiff filed his complaint on December 23, 1996, Defendant Fields filed a motion to quash on January 29, 1997. Therefore, although the Court concurs with the

Magistrate Judge's conclusion that Plaintiff has not effected proper service as to Defendant Fields in his individual capacity, the Court declines to adopt the recommendation that Defendant Fields be dismissed at this time. The Court finds that Defendant Fields' motion to quash service should be granted and his motion to dismiss should be denied. Plaintiff has 83 days from the entry of this order to perfect service of process on Defendant Fields in his individual capacity by complying with the requirements of Oklahoma law concerning service by mail.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The Report and Recommendation of the Magistrate Judge (Docket #8) is **adopted and affirmed in part and overruled in part.**
2. The motion to dismiss filed by Defendant Fields (Docket #6) is **granted** as to Defendant Fields in his official capacity, and Defendant Fields in his official capacity is **dismissed** from this action.
3. The motion to dismiss filed by Defendant Fields (Docket #6) is **denied** as to Defendant Fields in his individual capacity.
4. The motion to quash service filed by Defendant Fields (Docket #6) is **granted.**
5. Plaintiff has 83 days from the entry of this Order to perfect service of process on Defendant Fields in his individual capacity.

SO ORDERED THIS 24 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

RODNEY KEITH DICK,)
)
Plaintiff,)
)
vs.)
)
LARRY FIELDS, DAVID MILLER, JOHN)
MIDDLETON, HOWARD RAY, TROY)
ALEXANDER, and One Unknown Defendant)
referred to as JOHN DOE, all sued in their)
official and individual capacities,)
)
Defendants.)

ENTERED ON DOCKET
DATE SEP 02 1997

Case No. 96-CV-1178-K (J)

FILED
IN OPEN COURT
AUG 29 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Before the Court is the Report and Recommendation ("the Report") of the United States Magistrate Judge filed on July 23, 1997 (Docket #9) in this prisoner civil rights action brought pursuant to 42 U.S.C. § 1983. The Report addresses the motion to dismiss (Docket #4) filed by Defendants David Miller, John Middleton, Howard Ray, Troy Alexander and James Crafton, all sued by Plaintiff in both their official and individual capacities.

In the Report, the Magistrate Judge concluded that the motion to dismiss should be denied in part and granted in part. With respect to Defendants' requests for dismissal based on failure to exhaust administrative remedies, the statute of limitations, and qualified immunity, the Magistrate Judge recommended that Defendants' motion be denied. With respect to Defendants' request for dismissal based on Eleventh Amendment immunity, the Magistrate Judge recommended that Defendants' motion be granted, and that all claims against Defendants in their "official capacities" be dismissed.

On August 1, 1997, Plaintiff filed his response¹ to the Report only to advise the Court of an apparent typographical error found on page 7 of the Report. The Court finds that Plaintiff is correct and hereby orders that the last sentence of the last full paragraph on page 7 of the Report is corrected to read as follows:

The magistrate judge recommends that the District Court deny Defendants' Motion to Dismiss based on qualified immunity.

On August 4, 1997, Defendants filed an objection only to that portion of the Report recommending Defendants' motion to dismiss based on Plaintiff's failure to exhaust administrative remedies be denied. Plaintiff filed a response to Defendants' objection on August 11, 1997. There being no timely objection to the Report's conclusion that Plaintiff's claims against Defendants in their official capacities are barred by the Eleventh Amendment, the Court, after careful review of the file and applicable law, hereby adopts and affirms that conclusion. Similarly, after careful review of the file and the applicable law and in the absence of objections by the parties, the Court hereby adopts and affirms the Magistrate Judge's recommendations that Defendants' motion to dismiss based on the statute of limitations and qualified immunity of these defendants be denied.

The Court now turns to the Magistrate's recommendation that the Court deny the motion to dismiss due to Plaintiff's failure to exhaust administrative remedies. Based on Defendants' objection to the recommendation and in accordance with Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed de novo that portion of the Report addressing Defendant's argument that Plaintiff's failure to exhaust available administrative

¹In his August 1, 1997 response, Plaintiff also objected to the Magistrate Judge's recommendations contained in a separate Report & Recommendation (Docket #8) which addressed the motion to quash service and to dismiss complaint (Docket #6) filed by Defendant Larry Fields.

remedies as required by 42 U.S.C. § 1997e, as amended by the Prison Litigation Reform Act (PLRA), mandates dismissal of Plaintiff's claims against these Defendants.

Prior to the enactment of the PLRA on April 26, 1996, prisoners challenging the conditions of their confinement under 42 U.S.C. § 1983 were not, as a rule, required to exhaust administrative remedies before filing suit. See Patsy v. Board of Regents, 457 U.S. 496 (1982). However, the PLRA amended 42 U.S.C. § 1997e to require that prisoners seeking to bring such claims first exhaust any available administrative remedies. 42 U.S.C. § 1997e(a). If a prisoner brings a complaint without first exhausting available administrative remedies, the Court should dismiss the complaint for lack of subject matter jurisdiction. This Court must determine, therefore, whether, under the facts of this case, the new exhaustion of administrative remedies requirement of the PLRA applies to this case where the events giving rise to the cause of action occurred before enactment of the Act.

In Landgraf v. USI Film Products, 511 U.S. 244 (1994), the Supreme Court provided guidance for determining whether a new law should be applied retroactively. Justice Stevens delivered the opinion for the Court and stated,

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id., at 280. A court should consider whether the new law "attaches new legal consequences to events completed before its enactment" as well as "familiar considerations of fair notice,

reasonable reliance, and settled expectations...." Id., at 270. Because the PLRA contains no effective date provision, this Court must apply those Landgraf standards to determine whether the Act would have impermissible retroactive effect if the exhaustion of administrative remedies requirement were applied to this case.

In his complaint, Plaintiff alleges that "there are no Administrative Remedies that will address this issue" and "the nature of this complaint is so sensitive, there are no available remedies." (Docket #1, at 4). In addition, Plaintiff alleges in his "motion to deny defendant Fields' motion to quash service and dismiss complaint" that since the facility where the alleged asbestos exposure occurred was undergoing renovation, it did not have a law library and the Operations Manuals were not available to inmates (Docket #7, at 3-4). Plaintiff further alleges that he could not timely comply with the requirements of the grievance procedure since DOC officials failed to make the Operations Manual containing the forms and procedures available to inmates. As evidence supporting his allegations, Plaintiff attached the affidavit of a fellow inmate, Bobby Lewis, to his responsive pleading. In his response to Defendants' objection, Plaintiff also argues that as a result of the timing of the incident, the enactment of the PLRA, and the filing of this action, he has no "available" administrative remedies. (Docket #12).

Defendants urge that the PLRA applies to this case and that it mandates dismissal of Plaintiff's complaint for lack of subject matter jurisdiction. Defendants attach two unpublished opinions to their objection to the Magistrate's Report in support of their argument that the new exhaustion requirement of the PLRA should be applied to cases where a plaintiff's claims arose prior to the enactment of the PLRA. Salahuddin v. Mead, 1997 WL 357980, No. 95 CIV. 8581(MBM) (S.D. N.Y. June 26, 1997); Braun v. Stotts, 1997 WL 383034, No. CIV. A. 93-3118-GTV (D. Kan. June 19, 1997).

In Salahuddin, the court declined to follow decisions by other courts, see, e.g., Wright v. Morris, 111 F.3d 414 (6th Cir. 1997), which had found that the exhaustion of remedies clause of the PLRA should not apply to cases pending at the time the Act was enacted since Congress had not explicitly provided for retroactive application. Salahuddin, at *2. Instead the Salahuddin court relied on Covino v. Reopel, 89 F.3d 105 (2d Cir. 1996), a case where the Second Circuit decided that the provision of the PLRA requiring prisoners proceeding in forma pauperis pay the filing fee should be applied retroactively. Id., at *3. The Covino court explicitly premised that conclusion on the fact that applying new fee requirements would not "impair [the plaintiff's] rights" or "impose new legal consequences" to events that occurred before the enactment of the statute. Covino, 89 F.3d at 107 (citing Landgraf, 511 U.S. at 270, 280). In the words of the court, "[appellant] may well be surprised to learn that he must now choose between becoming obligated for filing fees or withdrawing his appeal, but that choice creates at most disappointment, not impairment of protectable interests." Id., at 108. However, in a case analyzing the propriety of retroactive application of the PLRA's exhaustion requirement, it is clearly conceivable that plaintiff's rights could be impaired and new legal consequences imposed on events that occurred before the enactment of the statute. This Court respectfully disagrees, therefore, with the Salahuddin court's reliance on Covino and, as a result, declines to follow Salahuddin.

Similarly, this Court is not persuaded by the Braun decision. In Braun, plaintiff filed his original complaint in 1993 but filed an amended complaint on February 4, 1997, adding forty-two defendants and dozens of new claims. The court found that the filing of an amended complaint subjected plaintiff to the administrative exhaustion requirement of the PLRA. Id., at *2. However, the court did not analyze the effect of the retroactive application of the PLRA's exhaustion requirement on plaintiff's claims which apparently arose prior to enactment of the Act

finding instead that because plaintiff failed to inform the court what administrative procedures were available and what administrative procedures, if any, he utilized, dismissal of the complaint was justified. In addition, the Braun court determined that dismissal pursuant to 28 U.S.C. § 1915A(b)(1) was appropriate since plaintiff failed to alleged a requisite element of his Eighth Amendment claim, deliberate indifference by prison officials, and therefore had failed to state a claim.

In the instant case, Plaintiff's cause of action arose in December, 1994, when he was allegedly forced by prison officials to help clean dust and debris in a prison building which had been condemned due to asbestos contamination. Plaintiff's alleged exposure to asbestos occurred nearly sixteen (16) months before the PLRA was enacted. The 60-day maximum time period allowed for instituting a grievance procedure had also expired long before the enactment of the PLRA.² Therefore, pursuant to DOC policy in effect at the time, prison officials would accept a late grievance only pursuant to court order.³ In other words, after February, 1995, to comply with an exhaustion requirement, Plaintiff would have been required to file a lawsuit in order to obtain a court order directing prison officials to accept his grievance. However, if the new exhaustion requirement of the PLRA were applied to this case, this Court would not have subject matter jurisdiction of Plaintiff's claims since he did not exhaust his administrative remedies and he would be precluded from bringing a lawsuit.

In Hitchcock v. Nelson, 1997 WL 433668, No. 96 C 4766 (N.D. Ill. July 28, 1997), the new exhaustion requirement of the PLRA was not applied to a case where the incident forming

²See OP--090124, Part II, subsection A(2)(a), effective date 01/22/94. (Attached to Defendants' Objection to Report and Recommendation).

³See OP--090124, Part II, subsection A(2)(b), effective date 01/22/94. (Attached to Defendants' Objection to Report and Recommendation).

the basis of the complaint occurred nearly a year before passage of the Act but the lawsuit was filed after enactment of the Act. As in the instant case, at the time of the incidents forming the basis of his lawsuit, the plaintiff had no reason to foresee a change in the law, the imposition of an exhaustion requirement, with which he would be required to conform prior to filing a civil rights complaint in federal court. The court stated that, "[t]o apply the exhaustion requirement here would 'mousetrap' Plaintiff and effectively extinguish his claim ... It is this type of impairment of rights that militates against retroactive application of a statutory provision." *Id.*, at *2 (citations and footnote omitted).

Although Plaintiff filed the instant action on December 23, 1996, almost eight (8) months after the enactment of the PLRA, the Court finds that in order to prevent impermissible impairment of Plaintiff's rights, the complaint must be treated under the law in effect at the time of the alleged exposure to asbestos. See Hitchcock, at *2. The Court concludes, therefore, that the administrative exhaustion requirement enacted by the PLRA at 42 U.S.C. § 1997e(a) should not be applied to this case. The Report and Recommendation of the Magistrate Judge should be adopted and affirmed and Defendants' motion to dismiss denied.

In light of this ruling, the Court finds that an investigation and special report are necessary to develop a record sufficient to ascertain whether there are any factual or legal bases for Plaintiff's claims. See Hall v. Bellmon, 935 F.2d 1106 (10th Cir. 1991); Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978).

Officials responsible for the institution involved in the alleged civil rights violation shall undertake a review of the subject matter of the complaint:

- (a) to ascertain the facts and circumstances;
- (b) to consider whether any action can and should be taken by the institution or other

appropriate officials to resolve the subject matter of the complaint; and

- (c) to determine whether other like complaints, whether pending in this Court or elsewhere, are related to this complaint and should be taken up and considered together.

In the conduct of the review, a written report shall be compiled and filed with the Court. Authorization is granted to interview all witnesses including Plaintiff and appropriate officers of the institution. Wherever appropriate, medical or psychiatric examinations shall be made and included in the written report. Any rules and regulations pertinent to the subject matter of the complaint shall be included in the written report.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The Report and Recommendation of the Magistrate Judge (Docket #9) is **adopted and affirmed.**
2. Defendants' motion to dismiss (Docket #4) is **granted in part and denied in part.**
3. Defendants' motion to dismiss based on eleventh Amendment immunity is **granted.** All claims against Defendants in their official capacities are **dismissed** from this action.
4. Defendants' motion to dismiss based on exhaustion of administrative remedies, the statute of limitations, and qualified immunity is **denied.**
5. **The special report, and Defendants' answer and/or dispositive motion, shall be filed no later than sixty days from the date of filing of this order.** It is desired that the report made in the course of this investigation be attached to and filed with Defendants' answer and/or dispositive motion.
6. No applications, motions, or discovery should be filed or considered until the steps

set forth in this order have been completed, and an order entered, except as the Court further orders.

7. Plaintiff shall file a **response** within fifteen (15) days after the filing of Defendants' special report, answer and/or motion.

SO ORDERED THIS 28 day of August, 1997.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

Jimmy HITCHCOCK, Plaintiff,
v.
NELSON, et al., Defendants.

No. 96 C 4766.

United States District Court, N.D. Illinois.

July 28, 1997.

MEMORANDUM OPINION AND ORDER

KEYS, United States Magistrate Judge.

*1 Before the Court is Defendants' Motion to Dismiss the Complaint herein pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Defendants assert that Plaintiff has failed to exhaust his administrative remedies and that, therefore, the Court does not have subject matter jurisdiction over this cause of action. For the reasons set forth below, the Court denies Defendants' motion to dismiss.

Background

The Complaint herein alleges that, on June 14, 1995, Jimmy Hitchcock ("Plaintiff"), was a state prisoner incarcerated at the Stateville Correctional Center ("Stateville"). (Compl. at 1.) Plaintiff had requested, and was granted, permission to be held in Stateville's Protective Custody Unit for protection against members of the Northsider gang. (Answer at 2.) On that date, Plaintiff was in the prison commissary on a regularly-scheduled shopping day. (Answer at 2.) No general population inmates were to be allowed near the commissary at that time. (Answer at 3.) While Plaintiff was in the commissary, he was attacked. (Answer at 3.) According to the Inmate Injury Report, Plaintiff suffered a lacerated scalp. Plaintiff alleges that he was ambushed by members of the Northsider gang, who hit him in the head with cans of chili or soup in "tripped up" socks. (Compl. at 2.) As a result of the attack, Plaintiff alleges, he has suffered permanent injuries, including deafness in his left ear, constant headaches, blackout spells, loss of balance, and scar tissue on his head that has not yet healed properly and continues to seep puss. (Compl. at 2.)

Plaintiff alleges that Defendants [FN1] allowed members of the Northsider gang entry into the Protective Custody Unit, and stood by while members of the Northsider gang ambushed him in the commissary. (Compl. at 2, 3.) For this alleged

"deliberate indifference" to his plight and his resultant injuries, Plaintiff has brought this Complaint pursuant to 42 U.S.C. § 1983 et seq. (hereinafter "§ 1983") against Defendants. He seeks money damages from the individual Defendants. Defendants now move to dismiss the Complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for Plaintiff's failure to exhaust available administrative remedies.

FN1. Plaintiff brings this Complaint against four prison officials in their individual capacities.

Dismissal Based upon Lack of Subject Matter
Jurisdiction

A motion to dismiss for lack of subject matter jurisdiction is properly brought under Rule 12(b)(1) of the Federal Rules of Civil Procedure. FED. R. CIV. P.12. When ruling on a motion to dismiss for lack of subject matter jurisdiction, the court accepts as true, all well-pleaded factual allegations and draws reasonable inferences in favor of plaintiff. *Ezekiel v. Michel*, 66 F.3d 894, 897 (7th Cir.1995). However, the Court, "is not bound to accept as true the allegations of the complaint which tend to establish jurisdiction where a party properly raises a factual question concerning the jurisdiction of the district court to proceed with the action." *First Nat'l Bank of Chicago v. Steinbrink*, 812 F.Supp. 849, 852 (N.D. Ill.1993 (quoting *Grafon Corp. v. Hauserman*, 602 F.2d 781, 783 (7th Cir.1979))). When presented with a factual challenge to jurisdiction, the court may review the evidence submitted to determine whether subject matter jurisdiction exists. *Ezekiel*, 66 F.3d at 897.

Discussion

*2 The Prison Litigation Reform Act of 1995 ("PLRA") bars a suit brought by a prisoner with respect to prison conditions [FN2] under § 1983 or any other Federal law until such administrative remedies as are available are exhausted. 42 U.S.C. § 1997e(a). Failure to exhaust all available remedies will result in the dismissal of a prisoner's complaint regarding prison conditions brought under § 1983. *Gary v. Illinois Department of Corrections*, No. 96 C 4367, 1996 WL 417549, at *5 (N.D.Ill. July 23, 1996). Thus, if a prisoner has not exhausted all available administrative remedies, [FN3] the court must dismiss the complaint for lack of subject matter jurisdiction.

FN2. Although not argued otherwise by Defendants,

"prison conditions" includes the alleged failure of prison officials to protect inmates from physical violence from other inmates. *Farmer v. Brennan*, 511 U.S. 825, 832 <progadd>, 114 S.Ct. 1970, 128 L.Ed.2d 811 </progadd> (1994).

FN3. In order to exhaust all available administrative remedies, an inmate would need to adhere to the process set forth in *Grievance Procedures for Committed Persons*, 20 Ill. Admin. Code § 504.810 et seq. If this avenue is not successful, an inmate may file a grievance to be reviewed by a Grievance Officer. However, if an inmate can show that a grievance was not timely filed for good cause, an untimely grievance must be considered. If an inmate is dissatisfied with the Grievance Officer's assessment, he or she may appeal to the Director and the Administrative Review Board.

The Complaint alleges that Plaintiff has, "sought every available institutional avenue or remedy." (Compl. at 3.) However, he has not proffered any evidence, such as a copy of a grievance filed or an affidavit, that would support his assertion. Instead, Plaintiff argues that he is not required to exhaust his administrative remedies because the PLRA's administrative exhaustion requirement cannot be applied retroactively to apply to his Complaint. (Pl.'s Resp. to Motion to Dismiss at 5.) [FN4]

FN4. Plaintiff also argues that there are no administrative remedies that he could have exhausted and that § 1997e(a) unconstitutionally discriminates against inmates' right to access to the courts. In view of the Court's finding on the retroactivity issue, consideration of Plaintiff's other arguments is unnecessary.

1994
In determining whether a statute will be applied retroactively, the court must utilize the two-tiered test set forth in *Landgraf v. USI Film Products*, 511 U.S. 244. First, the court must determine whether Congress has, "expressly prescribed the statute's proper reach." *Id.* at 280. If the statute contains no such express instruction, the court must determine whether the statute would, if applied, have a retroactive effect. *Id.* For example, a statute would have a retroactive effect if it impaired rights a party had when he or she acted, or imposed new duties on parties with respect to transactions already completed. *Landgraf*, 511 U.S. at 280. If examination of the import of the terms of the statute shows that the statute would operate retroactively, the traditional presumption is that it will not be applied to past actions without explicit Congressional authorization.

Id.

The Court finds no explicit Congressional instruction to apply the exhaustion requirement of the PLRA to cases involving actions completed prior to the enactment of the statute. Therefore, the Court must resort to judicial default rules to determine whether the PLRA's exhaustion requirement would operate retroactively to impair Plaintiff's rights or impose new duties on him.

On June 14, 1995, the date of the alleged assault, Plaintiff was under no legal obligation to exhaust his administrative remedies prior to seeking judicial relief. Prior to April 26, 1996, the effective date of the PLRA, exhaustion of administrative remedies was not a requirement for bringing a § 1983 claim. *Mitchell v. Shomig*, No. 95 C 7595, 1997 WL 158355 at *4 (N.D.Ill. March 31, 1997). The incident forming the basis of Plaintiff's Complaint occurred on June 14, 1995, nearly a year before the PLRA was enacted. Plaintiff could not have been expected to foresee the imposition of an exhaustion requirement with which to conform. Plaintiff was already time-barred from exhausting the Department of Corrections' grievance procedures when the PLRA was enacted, as more than six months had passed since the alleged assault. Even though he filed this Complaint after the enactment of the PLRA, Plaintiff's Complaint must be treated under the law in effect at the time of the alleged assault. *Landgraf*, 511 U.S. at 275, n. 29. To apply the exhaustion requirement here would "mousetrap" Plaintiff and effectively extinguish his claim. [FN5] *Mitchell*, 1997 WL 158355 at *4. It is this type of impairment of rights that militates against retroactive application of a statutory provision. *Landgraf*, 511 U.S. at 280. *Lindh v. Murphy*, < progadd > --- U.S. - - - - , </progadd > --- S.Ct. --- < progadd > , --- L.Ed.2d - - - - , </progadd > 1997 WL 338568 (U.S.) (June 23, 1997). See also *Wright v. Morris*, 111 F.3d 414 (6th Cir.1997); *Mitchell v. Shomig*, No. 95 C 7595, 1997 WL 158355 at *4 (N.D.Ill. March 31, 1997); *Williams v. Washington*, No. 96 C 0704, 1997 WL 201579 *2 (N.D.Ill. April 16, 1997); *Malone v. Godinez*, No. 96 C 2394, 1997 WL 222945 at *4 (N.D.Ill. April 30, 1997). Accordingly, the administrative exhaustion requirement enacted by the PLRA at 42 U.S.C. § 1997e(a) will not be applied to the Complaint in the instant case.

FN5. In their reply to Plaintiff's assertion that he is barred from filing a grievance because of the six-

month limitation period, Defendants represent that the Illinois Department of Corrections—which is not a party to these proceedings—has agreed to waive the six-month limitations period so that Plaintiff may file a grievance. The Court notes, however, that the grievance procedure does not provide for money damage awards to prisoners, which is the only relief that Plaintiff seeks herein. Therefore, the retroactive application of the PLRA to Plaintiff certainly would impair rights which he had prior to its enactment, within the meaning of Landgraf. Although invited to do so, Defendants' counsel has failed to present the Court with evidence that money damages are available to Plaintiff under the grievance procedure. He argues only that such damages are not specifically

precluded, but cites no authority for his assertion that they are available. A careful reading of Sections 504.810-504.850 of Title 20 convinces the Court that such relief was not contemplated.

Conclusion

*3 The Court holds that Plaintiff is not obligated to exhaust his administrative remedies before bringing this § 1983 action. Therefore, Defendants' Motion to Dismiss for lack of subject matter jurisdiction due to failure to exhaust administrative remedies is denied.

END OF DOCUMENT

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

F I L E D

AUG 29 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MELVIN L. BOYCE, JR.,

Plaintiff,

vs.

CHATWINS GROUP, INC. a
Delaware Corporation, d/b/a
STEELCRAFT, INC., a
Corporation

Defendant.

Civil Action No. 97-CV-653-K(M)

ENTERED ON BOOKET
DATE SEP 02 1997

PLAINTIFF'S NOTICE OF DISMISSAL WITHOUT PREJUDICE

Plaintiff, MELVIN L. BOYCE, JR., files his notice of dismissal under Fed. R. Civ. P. 41(a)(1)(i). Plaintiff sued Defendant, CHATWINS GROUP, INC. a Delaware Corporation, d/b/a STEELCRAFT, INC., a Corporation on July 15, 1997. Defendant has been served with process but has not filed an answer or a motion for summary judgment.

This matter is not a class action, and a receiver has not been appointed. The action is not governed by any statute of the United States that requires an order of the court for dismissal of the case.

Plaintiff has not dismissed an action based on or including the same claim or claims as those presented in this suit, and therefore dismisses this lawsuit without prejudice.

(6)

CIS

April D. Parnell

**APRIL D. PARNELL, OBA# 14440
HERROLD, HERROLD & DAVIS, INC.
525 South Main, Ste. 210
Tulsa, Oklahoma 74103-4503
(918) 592-4050
(918) 591-7887 (fax)
ATTORNEY FOR PLAINTIFF**

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 28th day of August, 1997 a true and correct copy of the above and foregoing instrument was deposited in the United States Mails, with all proper postage fully prepaid thereon, and addressed to:

**Stephen L. Andrew, Esq.
125 West Third Street
Tulsa, Oklahoma 74103
Attorney for Defendant**

April D. Parnell

APRIL D. PARNELL

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 29 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS S. PORTER,

Defendant.

Civil Action No. 97CV692 K

ENTERED ON DOCKET

DATE SEP 02 1997

NOTICE OF DISMISSAL

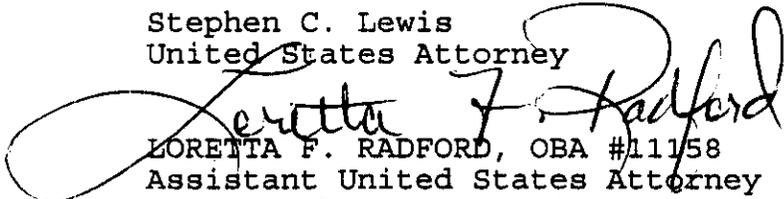
COMES NOW the United States of America by Stephen C.

Lewis, United States Attorney for the Northern District of
Oklahoma, Plaintiff herein, through Loretta F. Radford, Assistant
United States Attorney, and hereby gives notice of its dismissal,
pursuant to Rule 41, Federal Rules of Civil Procedure, of this
action without prejudice.

Dated this 29th day of August, 1997.

UNITED STATES OF AMERICA

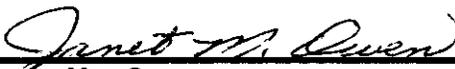
Stephen C. Lewis
United States Attorney



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

CERTIFICATE OF SERVICE

This is to certify that on the 29th day of August,
1997, a true and correct copy of the foregoing was mailed,
postage prepaid thereon, to: Thomas S. Porter, 3318 E. 3rd
Street, Tulsa, OK 74112


Janet M. Owen
Financial Litigation Agent

(2)

ct

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, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991).

Plaintiff was born May 11, 1963 and left school in the 10th grade. [R. 37]. He claims disability due to Systemic Lupus Erythematosus, a chronic, remitting, relapsing inflammatory disease and often febrile multisystemic disorder of connective tissue, acute or insidious in onset, characterized principally by involvement of the skin, joints, kidneys and serosal membranes. *Dorlands Illustrated Medical Dictionary*, 964 (28th ed. 1994). The ALJ determined that Plaintiff has a severe impairment consisting of systemic lupus erythematosus (SLE), but that his condition does not meet or equal the SLE listing.³ The ALJ decided that Plaintiff is unable to return to his past relevant

³ 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 14.00 Immune System. 1. Systemic lupus erythematosus (14.02) - This disease is characterized clinically by constitutional symptoms and signs (e.g., fever, fatigability, malaise, weight loss), multisystem involvement and, frequently, anemia, leukopenia, or thrombocytopenia. Immunologically, an array of circulating serum auto-antibodies can occur, but are highly variable in pattern. Generally the medical evidence will show that patients with this disease will fulfill The 1982 Revised Criteria for the Classification of Systemic Lupus Erythematosus of the American College of Rheumatology. (Tan, E.M., et al., *Arthritis Rheum.* 25: 11271-1277, 1982).

work (PRW) as a chicken hanger, laborer, assembler or clerk/stocker but that he retains the residual functional capacity (RFC) to perform the full range of medium work reduced by his inability to perform work requiring full bilateral grip strength. The ALJ cited construction laborer, janitorial, delivery driver, and production laborer as jobs identified by the Vocational Expert at the hearing that Plaintiff can perform and available in significant numbers in the economy. [R. 26-27]. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ erred in not finding that his condition meets or equals the listing for disseminated lupus erythematosus as set forth in §14.02(B), 20 C.F.R. Pt. 404, Subpart P, App. 1. He asserts that his condition involves two of the organs/systems cited in 14.02: joints and respiratory.⁴ The Commissioner responds that the ALJ's decision that, although Plaintiff has been diagnosed with SLE, his condition does not meet or equal the listings for disability, is correct and based upon substantial evidence.

⁴ §14.02 is titled: *Systemic lupus erythematosus*. Documented as described in 14.00B1, with:

A. One of the following:

1. Joint involvement, as described under the criteria in 1.00; or

* * *

4. Respiratory involvement, as described under the criteria in 3.00ff; or

* * *

B. Lesser involvement of two or more organs/body systems listed in paragraph A, with significant, documented, constitutional symptoms and signs of severe fatigue, fever, malaise, and weight loss. At least one of the organs/body systems must be involved to at least a moderate level of severity.

Medical evidence

Plaintiff was first diagnosed with SLE with pulmonary involvement during his hospitalization from September 19, 1991 to October 14, 1991 at the PHS Indian Hospital in Claremore, Oklahoma. [R. 189-191]. The diagnosis was confirmed by ANA titer of 1:2560 and a lung biopsy. [R. 190, 197-198, 207]. His weight was recorded to be 188 pounds. He is 6'4" tall. [R. 225]. Plaintiff was prescribed Prednisone 60 mg. per day,⁵ to be taken with Maalox or the equivalent, Demerol 50 mg. every 6 hrs. as needed and was discharged to the care of Roger Prock, M.D. [R. 189-191].

At his follow-up examination on October 21, 1991, Plaintiff reported that he felt good and had a good appetite. The doctor lowered the prescribed dosage of Prednisone to 40 mg. [R. 306]. Dr. Prock referred Plaintiff to James D. McKay, M.D., a rheumatologist. *Id.*

Dr. McKay examined Plaintiff on October 29, 1991. [R. 224-226]. His letter to Dr. Prock that date stated: "Kent Whiteagle [sic] has historical findings which meet the American College of Rheumatology criteria for systemic lupus erythematosus. Presently, his disease is well-controlled on his current dose of corticosteroids." [R. 224]. Dr. McKay planned to "taper" the corticosteroids dosages, noting that Plaintiff most likely would require an NSAID and perhaps hydroxychloroquine. [R. 226]. The doctor's handwritten notes on October 29, 1991 reported that Plaintiff had an aunt

⁵ Prednisone is a glucocorticoid, adrenocortical steroid; used as adjunctive therapy for short-term administration (to tide the patient over an acute episode or exacerbation) in collagen diseases including SLE. *Physicians Desk Reference*, p. 2536, 2537 (49th ed. 1995).

with SLE, that he had lost 65 pounds and that Plaintiff's response to Prednisone had been "dramatic". [R. 227].

Clinical records of November 3, 1991, note Plaintiff's ten pound weight gain and "doing well." On November 8, 1991, Plaintiff's condition was "improved." [R. 243]. Prednisone was to be continued at 40 mg. per day for 30 days then decreased to 30 mg. per day. [R. 305]. In December 1991, Dr. McKay noted that Plaintiff had had left knee pain "since Oct.", some chest pain, but negative shortness of breath (SOB), arthritis or rash. [R. 223]. He continued to decrease the dosage of Prednisone, prescribing 20 mg., and advised Plaintiff to return in six weeks. *Id.* On December 31, 1991, Plaintiff received a 2 month supply of Prednisone 30 mg. [R. 345]. On February 4, 1992, Plaintiff reported to the Miami, Oklahoma, PHS Indian Health Center for follow-up and refill of his medications. [R. 305]. His recorded weight on that date was 240 pounds. *Id.*

Dr. McKay reported to Dr. Prock on February 11, 1992, that Plaintiff was currently on Prednisone 25 mg per day and Ibuprofen, as needed. [R. 221-222]. His weight was 237 pounds. He was complaining of knee pain, occasional mid epigastric pain and some SOB with exertion. He did not report red, warm or swollen joints, skin rash or other symptoms commonly associated with SLE. Articular examination revealed no evidence of inflamed joints. Dr. McKay recommended further reducing the prescribed dosage of Prednisone to 20 mg. per day for two weeks, then 15 mg.

per day for two weeks, to 10 mg. per day thereafter and consideration of substituting Hydroxychloroquine⁶ after gradual reduction of the corticosteroids. [R. 222].

On February 23, 1992, Plaintiff reported to the PHS Indian Hospital Emergency Room in Claremore, Oklahoma, complaining of mid sternal chest pain for three days. [R. 255-257]. An EKG was done which was normal. [R. 257]. He was given Darvocet 100 mg. and released with the diagnosis of Costochondritis and Pleurisy. Two days later, Plaintiff reported to the Miami Center that he had chest pain, sharp in nature "since last Wednesday." [R. 303]. This time he reported that he had noticed the onset of this pain after playing basketball. His prescription for Prednisone 20 mg. was refilled. *Id.* Chest X-ray and EKG revealed no significant abnormalities. [R. 302]. His weight, on that date, was 243 pounds. *Id.*

On March 12, 1992, Plaintiff was seen at the Claremore Indian Hospital where his weight was recorded at 243 pounds. He had "no complaints" and his prescriptions were refilled. An appointment was made for him to see Dr. McKay on March 24, 1992 with the note: "SLE - in remission but on high dose Prednisone." [R. 302]. He did not keep that appointment. [R. 301]. On April 10, 1992, Plaintiff's wife called the Indian Center in Miami, Oklahoma, for a refill of Prednisone, stating that Plaintiff was out of the medication and that he had been on 30 mg. for the past 6 months. The medication was dispensed and Plaintiff was urged to see the doctor at Claremore Indian Hospital or there, at the Miami Center. [R. 343]. Plaintiff was

⁶ Hydroxychloroquine/Plaquenil: ethanol sulfate, possesses antimalarial actions and also exerts a beneficial effect in lupus erythematosus (chronic discoid or systemic) and acute or chronic rheumatoid arthritis. *Physicians Desk Reference*, p. 2226 (49th ed. 1995).

examined at the Miami Center on April 20, 1992. [R. 301]. His weight was recorded at 249 pounds. He was noted to be on Prednisone 20 mg. per day, and "has a few pleuritic chest pains which are manageable with Ibuprofen." His prescriptions for Prednisone and Plaquenil were refilled and his condition recorded as "stable." *Id.*

On May 12, 1992, Dr. McKay wrote Dr. Prock complaining that Plaintiff had failed to comply with appointments and/or medical recommendations. He expressed concern regarding Plaintiff's marked reliance on corticosteroids as the sole treatment of his SLE and increasing his doses on his own decision. Dr. McKay notified Dr. Prock that he was "releasing all further care of this gentleman" back to him. [R. 220].

Plaintiff continued to report to the Miami Center for medication refills and, in June 1992, discontinued Plaquenil, apparently believing that it was the cause of his nausea, vomiting, insomnia and chest pain. [R. 300]. After observing decreased breath sounds for the left lung, the examiner ordered a chest x-ray which revealed "left lower lobe plate atelectasis and left subpulmonic pleural effusion." [R. 300, 342]. Plaquenil was restarted and, after discussion with Dr. McKay, indocin was given. [R. 299]. In July 1992, Plaintiff's condition was recorded as "much better", "improved" and his medications were refilled, including Prednisone 25 mg. [R. 298].

On August 10, 1992, Dr. McKay again wrote Dr. Prock. [R. 218-219]. He advised that Plaintiff had had difficulty with pleurisy over the last several months, had noted arthralgias about the left knee and left wrist and that he continues to take significant doses of steroids. His weight was recorded at 244 pounds. Articular examination revealed normal range of motion and there was no evidence of synovitis,

effusion, warmth or erythema. Dr. McKay again expressed concern about Plaintiff's continued reliance on significant doses of corticosteroids. He adjusted Plaintiff's other medications for weight control and to alleviate GI upset. *id.*

Plaintiff was examined and evaluated by Dr. McKay on September 30, 1992. [R. 215-216]. He had noted less pain and swelling, except in the left knee, since June and reported that he remained physically active, mowing yards and trimming. He had no shortness of breath, pleuritis, fever, abdominal pain, nausea, vomiting or chills. Dr. McKay reported that he had counseled Plaintiff on the importance of compliance with medications. He asked Plaintiff to reduce Prednisone dosages to 12.5 mg from 15 mg. as he continued to improve over the next few weeks. He planned to re-evaluate him in two months and asked Dr. Prock to see him in one month. *id.*

On November 17, 1992, Plaintiff reported to the Miami Center that he had "flare of disease" on 12.5 mg. Prednisone and advised that he had gone back to 20 mg. which got his symptoms under control except for persistent left knee pain. He was treated for sinusitis, given a flu shot and given an appointment to see Dr. McKay. [R. 296].

Dr. McKay wrote Dr. Prock on December 8, 1992, that he had "injected" Plaintiff's left knee resulting in resolution of swelling and pain. [R. 213-214]. Plaintiff had advised resolution of his joint pains and myalgias. He felt the medication was "kicking in." Dr. McKay assessed Plaintiff's SLE as "responding to therapy" and again recommended reduction of Prednisone from 12.5 mg. to 10 mg. He said Plaintiff "will

continue to improve with time" and the prescribed medications. He planned a follow-up examination in three months. *Id.*

Plaintiff continued under this treatment regimen for the next 8 months, getting prescriptions refilled at the Miami Center regularly, [R. 295, 320, 331, 335, 336, 338], with a complaint of knee joint pain only once, this time the right knee. [R. 334]. His recorded weight during this time period fluctuated between 231 and 240 pounds. *Id.*

On August 23, 1993, Plaintiff reported to the Miami Center that he had chest pains when lifting things at work, that his left knee hurt and swelled and that he couldn't sleep. [R. 330]. Lab work was ordered. [R. 331]. Pulmonary scarring was diagnosed, along with Leukocytosis due to Prednisone.

Plaintiff reported to the Emergency Room at Grove, Oklahoma, on September 17, 1993, complaining of joint pain. [R. 238]. He was observed to be obviously uncomfortable, moving about the room, and to have "myalgias in shoulders, back & knee joints." He was assessed with lupus exacerbated with myalgias. He was given Toradol and Ibuprofen and told to follow-up with Dr. Nader the next morning. *Id.*

A record bearing the same date, September 17, 1993, from the Miami Center, contains the same complaints along with a complaint of an acid burn to his left great toe that had happened the previous week at work. [R. 329]. It was thought that the stress of the burn had caused exacerbation of SLE. He was treated for the burn and his medications were refilled with Prednisone being increased to 15 mg. *Id.*

On October 1, 1993, Plaintiff reported to the Miami Center for follow-up on his burned toe and the Plaquenil was put on "hold", with a note that he was "not worse off of it." [R. 327]. On October 15, 1993, he was seen again at Miami Center for follow-up treatment on his toe, and his medications were refilled; Prednisone at 20. mg. Plaintiff's weight was recorded at 229 pounds. [R. 326].

One month later, Plaintiff's Prednisone prescription was refilled for 10 mg. per day. [R. 325]. On November 24, 1993, Plaintiff went to the Grove Emergency room, still complaining of the burn on his left great toe. He was diagnosed with cellulitis and given an antibiotic. [R. 239]. Plaintiff's medications were refilled at the Miami Center during November and December 1993 and weight gain to 235 pounds was recorded. [R. 321, 322, 323].

On January 5, 1994, Plaintiff reported to the PHS Indian Hospital Emergency Room that he had pain in his joints. [R. 242]. Physical examination revealed no erythema of joints and questionable swelling of the wrists. He was given Tylenol No. 3 and diagnosed with SLE with arthralgias. *Id.*

On February 22, 1994, Plaintiff advised the Miami Center that he felt his joints swelling up and that he was hurting in all joints with his fingers worse for the past two weeks. [R. 317]. He had last taken Prednisone 2 days prior and the swelling had started the night before. Puffy wrists and fingers were observed. He was diagnosed with exacerbation of SLE, given Prednisone 20 mg. for that day and told to take 10 mg. for two weeks, then to alternate 10 mg. with 7.5 mg. He was also given Naprosyn. His weight was recorded at 229 pounds. *Id.* His medications were refilled

in March without comment and he was seen for right eye pain on March 22, 1994. [R. 313, 314].

On April 16, 1994, Plaintiff was treated at the PHS Indian Hospital Emergency Room in Claremore, Oklahoma, for a dislocated right shoulder incurred while playing softball. [R. 241]. At his regular appointment at the Miami Center on April 20, 1994, the right shoulder injury was noted and it was also recorded that his hands were "better" and not swelling. *Id.* He advised that he was taking Prednisone 10 mg., that he had tried to alternate the 10 mg. with 7.5 mg. but it was "too painful." *Id.*

At the Claremore Clinic, on May 9, 1994, the examiner noted that Plaintiff's right shoulder had been immobilized until May 6, 1994, that he had good range of motion and that he was doing okay. He was told to resume his usual activity in one week, that he could do limited duty until then. [R. 294].

Kathleen A. Dahlmann, M.D. examined Plaintiff for the Disability Determination Unit on May 31, 1994. [R. 275-281]. Plaintiff's Prednisone dosage at that time was recorded to be 10 mg. daily and his weight was 230 pounds. Dr. Dahlmann wrote that Plaintiff was noted to have chills in the waiting room requiring being wrapped up in a blanket and, at the time of the exam, he was experiencing fever. Physical examination revealed no swelling or erythema of any joint in either upper or lower extremity; full ROM both hands and wrists; grip only about 50% of normal; however, "can affectively [sic] oppose the thumb to the fingertips and can manipulate small objects." Dr. Dahlmann noted that Plaintiff had obvious pain on examination of the

joints on range of motion without limitation of range of motion to passive movement. Her diagnosis was SLE, manifest by recurrent febrile episodes and arthralgia.

On June 2, 1994, Plaintiff reported to the Miami Center that he had had high night fevers for about a week with shakes, coughing, sternal pain with cough or deep breath and shortness of breath. [R. 290, 293]. He had increased his dosage of Prednisone to 25 mg. per day for five days, but he wasn't sure if it had helped. He was diagnosed with exacerbation of SLE with pulmonary involvement. Prednisone was increased to 60 mg. per day for one week. He was given Keflex 500 mg. and his prescription for Ibuprofen 800 mg. was refilled.

Plaintiff's medications were refilled in late June and early July 1994; Prednisone restarted at 10 mg. [R. 289]. The last medical treatment notes in the record, July 18, 1994 and August 2, 1994, record an increase of Prednisone to 20 mg. for only a limited time, five days. A note made during one of those appointments states that Plaintiff "needs to stay on 20 mg. in order to work. Was denied disability." [R. 285].

Discussion

Plaintiff admits that he has worked since the date of onset, even as late as the date of the hearing, May 1, 1995.⁷ [R. 38-39]. He contends, however, that he is only able to hold a job because of his sacrifice to his future health by increasing "his consumption of prescription drugs (prednisone) to such a level that, according to his

⁷Plaintiff's application for benefits states that he became unable to work on August 1, 1991 because of SLE. [R. 95].

testimony, one doctor told him he would be dead in ten years if he maintained that level, while another told him that maintaining his current level of consumption would soon lead to a heart attack." [Plf's Brief, p. 9]. He claims that "the prescribed treatment will not restore [his] ability to work but will, in fact, prevent him from working." [Plf's Brief, p. 7][emphasis in original]. Plaintiff asserts that he is "being punished for trying to support his family until another source of income, such as Social Security Disability and Supplemental Security Income, will allow him to cut back on medication to prescribed levels." [Plf's Brief, p. 9].

At the outset, the Court notes that this claim was denied because the ALJ determined that Plaintiff's condition did not meet the listing. Plaintiff's failure to follow the prescribed treatment, while noted by the ALJ in the recitation of Plaintiff's medical history and obviously considered by the ALJ in his credibility analysis, was not the sole basis for denial of benefits. Nonetheless, Plaintiff has asserted that his non-compliance with medical instruction and treatment was criticized by the ALJ which somehow resulted in error of law on the part of the ALJ. Focusing on Plaintiff's admitted refusal to "taper" the dosage of Prednisone to a less dangerous amount, the Court reviews the record for substantial evidence in support of the ALJ's determination that Plaintiff's claim that complying with the prescribed treatment and medication would prevent him from working, is not credible.

The regulations provide that a claimant will not be found disabled if he or she, without good reason, fails to follow prescribed treatment that can restore the ability to work. 20 C.F.R. 416.930(a), (b). The Tenth Circuit has explained that four

elements must be met before denying benefits for failure to follow prescribed treatment: "(1) the treatment at issue should be expected to restore the claimant's ability to work; (2) the treatment must have been prescribed; (3) the treatment must have been refused; (4) the refusal must have been without justifiable excuse." *Teter v. Heckler*, 775 F.2d 1104, 1107 (10th Cir. 1985). Substantial evidence must support each element. *Id.*

At the hearing, Plaintiff admitted that he was taking 80 mg. of Prednisone per day against medical advice. [R. 48]. The amount last prescribed by a physician, according to Plaintiff's testimony, was 15 mg. *Id.* The record indicates that the last prescribed dosage in August 1994 was 20 mg. [R. 284]. In discussing this aspect of the claim, the ALJ stated:

The claimant testified at the hearing that he had increased his Prednisone and pain medication in order to work. He stated that he was supposed to take 10 to 15 mg of Prednisone, and was taking 80 mg. so he could work. The claimant also submitted pictures of the swelling in his hands (Exhibit 47). Although the claimant has stated that he increased his Prednisone so he could work, the record reveals that the claimant has never been compliant in taking his Prednisone and pain medication, regardless if he was working.

[R. 24]. The ALJ referred to several instances in the record when Plaintiff's treating physician, Dr. McKay, attempted to "taper" Plaintiff's dosage of Prednisone without success. The ALJ determined that there was no evidence in the record that indicated Plaintiff could work only when taking the increased amount of Prednisone. He stated: "There is no record of functional restrictions by the claimant's treating physicians that

would preclude medium work activity so long as it did not require full bilateral grip strength." *Id.*

The record shows that Plaintiff was initially treated with high doses of Prednisone during his 1991 hospitalization when SLE was first diagnosed. [R. 189-191]. Plaintiff's dosage was gradually reduced in accordance with Dr. McKay's plan during the following three years. During this time, Plaintiff worked [R. 329, 330], played basketball [R. 303], played softball [R. 241], and remained physically active, mowing yards and trimming [R. 215]. Plaintiff infrequently experienced some episodes of exacerbation of SLE which were treated and resolved by adjustment in medication. [R. 213-214, 218-219, 242, 257, 301, 298, 329, 334]. From time to time, Plaintiff's dosage of Prednisone was adjusted upward but always for a limited period of time and with a plan for lowering the dosage back down to 10 mg. or 7.5 mg. [R. 213-216, 285, 293, 317]. Plaintiff claims that he cannot work because his hands swell when he is on dosages of Prednisone less than 80 mg. However, on April 20, 1994, it was noted that Plaintiff's hands were not swelling even though he had been on 10 mg. of Prednisone for some time. [R. 241]. There is no indication in the record that any of Plaintiff's treating physicians considered Plaintiff unable to work after his condition stabilized. In fact, the examiner at the Claremore Clinic on May 9, 1994 remarked that Plaintiff was doing okay and could resume "his usual activity" after one week of limited duty. [R. 294]. Dr. Dahlmann, who examined Plaintiff on May 31, 1994, noted no physical abnormalities other than Plaintiff's reduced grip strength and "obvious pain on examination of the joints on range of

motion." [R. 275-281]. At no time was Plaintiff ever prescribed 80 mg. of Prednisone, even when exacerbation of his condition was at its worst. Furthermore, there is no indication in the record that any of Plaintiff's physicians anticipated that reduction of the dosage of Prednisone was expected to result in Plaintiff's inability to work or engage in any of the activities he had previously done. The record contains sufficient evidence to support the conclusion that the prescribed treatment and medication was expected to restore Plaintiff's ability to work, that the treatment was prescribed, that Plaintiff refused the treatment as prescribed and that he did so without justifiable excuse. The Court finds no error of law committed by the ALJ in "criticizing" Plaintiff's noncompliance with prescribed medical treatment.

As previously stated, the ALJ determined that Plaintiff's condition does not meet or equal the listings. 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). This Court's limited scope of review precludes the reweighing of the evidence or substituting its judgment for that of the Commissioner. *Hargis v. Sullivan*, 945 F.2d 1482, 1486 (10th Cir. 1991). 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 treating and examining physicians. The only evidence offered by Plaintiff that SLE prevents him from engaging in substantial gainful activity is his testimony. The ALJ stated that he did not discount all of Plaintiff's complaints and concluded that his physical condition could reasonably produce pain. The ALJ determined that Plaintiff could not return to his previous relevant work because of his inability to perform work that requires full bilateral grip strength. This determination is consistent with the medical evidence and the portions of Plaintiff's testimony deemed credible by the ALJ. The Secretary is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10 Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ listed the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20 C.F.R. 404.1529(c)(3), 20 C.F.R. 416.929(c)(3), and Social Security Ruling 88-13 and appropriately applied the evidence to those guidelines. The Court finds that the ALJ evaluated the record and Plaintiff's credibility and allegations of pain in accordance with the correct legal standards established by the Secretary and the courts.

Plaintiff's final complaint is that the four examples of jobs that the VE testified Plaintiff is capable of doing and listed by the ALJ in his "Findings" [R. 26-27], require a significant amount of grip strength and are, therefore, not realistic evidence of jobs

available to Plaintiff in the economy. The Commissioner need only show that Plaintiff can perform one or more occupations with significant number of available positions. *Evans v. Chater*, 55 F.3d 530, 532 (10th Cir. 1995). In evaluating what constitutes a "significant number" several factors should be considered: the level of claimant's disability; the reliability of the vocational expert's testimony; the distance claimant is capable of traveling to engage in the assigned work; the isolated nature of the jobs; the types and availability of such work. *Trimiar v. Sullivan*, 966 F.2d 1326, 1330 & n.10 (10th Cir. 1992). The decision should ultimately be left to the ALJ's common sense in weighing the statutory language as applied to a particular claimant's factual situation. *Trimiar*, p. 1330; *Jenkins v. Bowen*, 861 F.2d 1083, 1087 (8th Cir. 1988) (quoting *Hall v. Bowen*, 837 F.2d 272, 275 (6th Cir. 1988)). In this case, the VE testified that there were jobs available in the economy in the medium range that would require some grip strength but not to the extent that it was required in Plaintiff's past work. [R. 63]. The VE identified those jobs as construction laborer, 46,000 in Oklahoma, 389,000 nationally and janitorial, 230,000 in Oklahoma and 1,900,000 nationally. The VE also testified that two examples of sedentary jobs available to Plaintiff were delivery driver, 17,000 in Oklahoma and 131,000 nationally; and production laborer, 13,000 in Oklahoma and 109,000 nationally. In responding to questions by Plaintiff's counsel, the VE also testified that these jobs would require less grip strength than his previous jobs.

In light of Plaintiff's testimony that he could drive an automobile, [R. 54], lift 50 pounds frequently, [R. 55], stand, squat, reach and pull, [R. 55] and the evidence

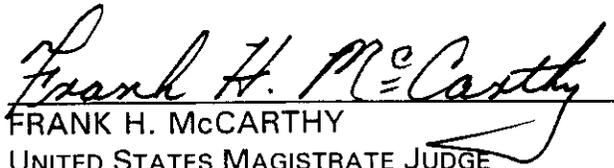
from the medical record that Plaintiff could engage in activities such as playing softball and basketball [R. 241, 303] and do yard work [R. 215], the decision of the ALJ that Plaintiff could perform medium and sedentary work reduced by his inability to perform work requiring full bilateral grip strength and that significant numbers of medium and sedentary jobs exist in the economy which Plaintiff could perform, is supported by substantial evidence.

Conclusion

The Court finds that the ALJ evaluated the record and Plaintiff's credibility and allegations of nonexertional impairments in accordance with the correct legal standards established by the Secretary and the courts. The Court finds that the decision of the Commissioner to deny benefits is supported by substantial evidence. Accordingly, the Court 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).

Submitted this 29th day of AUG., 1997.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
A TRACT OF LAND IN SECTION)
34, TOWNSHIP 18 NORTH, RANGE)
7 EAST, CREEK COUNTY,)
OKLAHOMA, CONTAINING)
APPROXIMATELY 20.0 ACRES,)
MORE OR LESS,)
(Located at Route 1, Box 200,)
Drumright, Oklahoma),)
AND ALL BUILDINGS,)
APPURTENANCES, AND)
IMPROVEMENTS THEREON,)
Defendant.)

CIVIL ACTION NO. 97-C-109-K

ENTERED ON DOCKET
DATE SEP 02 1997

JUDGMENT OF FORFEITURE

This cause having come before this Court upon the plaintiff's Motion for Judgment of Forfeiture by Default as to the defendant real property and all entities and/or persons interested in the defendant real property, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 4th day of February, 1997, alleging that the defendant real property was subject to forfeiture pursuant to 21 U.S.C. § 881(a)(7), because it was furnished or intended to be furnished in exchange for a controlled substance, or is proceeds traceable to such an exchange, or is money used, or intended to be used, to facilitate a violation of Title 21 of the United States Code and subject to seizure and forfeiture to the United States of America.

Warrant of Arrest and Notice In Rem was issued on the 21 day of February 1997, by the Clerk of this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant real property and for publication in the Northern District of Oklahoma.

The United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrant of Arrest and Notice In Rem on the defendant real property on May 13, 1997.

Thomas Ray Fisher and the County Treasurer of Creek County, Oklahoma were determined to be the only individuals with possible standing to file a claim to the defendant real property, and, therefore the only individuals to be served with process in this action.

Plaintiff's Complaint for Forfeiture In Rem was filed in this Court on February 4, 1997. Service of Complaint and Summons was made on Thomas Ray Fisher on March 4, 1997. Service of Complaint and Summons was made on the County Treasurer of Creek County, Oklahoma on May 13, 1997.

All persons and/or entities interested in the defendant real property were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No claims or answers have been filed of record in this action with the Clerk of the Court, in respect to the defendant real property, and no persons or entities have plead or otherwise defended in this suit as to said defendant real property, and the time for presenting claims and

answers, or other pleadings, has expired; and, therefore, default exists as to the defendant real property and all persons and/or entities interested therein.

The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending and in which the defendant real property was located, on May 29, June 5, and 12, 1997, and in The Sapulpa Legal News, a newspaper of general circulation in the district in which this action is pending and in the county which the defendant real property is located, on May 15, 22 and 29, 1997. Proof of Publication was filed August 7, 1997.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-described defendant real property:

The North Half of the Southwest Quarter of the Southwest Quarter (N/2 SW/4 SW/4) of Section 34, Township 18 North, Range 7 East, Creek County, Oklahoma, containing approximately 20.0 acres, more or less (Located at Route 1, Box 200, Drumright, Oklahoma), and all buildings, appurtenances and improvements thereon;

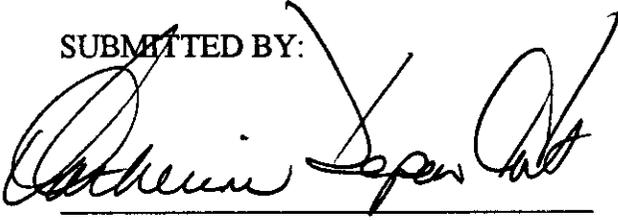
be, and it hereby is, forfeited to the United States of America for disposition according to law.

Entered this 29 day of August, 1997.

of TERRY C. KERN

TERRY C. KERN
Chief Judge of the Northern District of Oklahoma

SUBMITTED BY:

A handwritten signature in black ink, appearing to read "Catherine DePew Hart", written over a horizontal line.

CATHERINE DEPEW HART
Assistant United States Attorney

N:\UDD\LEADEN\FC\FISHER\JUDGMENT.DEF

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

FILED
OPEN COURT

AUG 29 1997

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

HERMAN WHITELEY,)
)
Plaintiff,)
)
vs.)
)
JOHN J. CALLAHAN,)
Acting Commissioner of the)
Social Security Administration,)
)
Defendant.)

Case No. 97-CV-373K (M)

ENTERED ON DOCKET
SEP 02 1997
DATE _____

ORDER

This case was remanded to the Commissioner of Social Security (Commissioner) under sentence six of 42 U.S.C. § 405(g). In accordance with N.D. Local Rule 41,

IT IS HEREBY ORDERED that the Clerk administratively close this action. This case may be reopened for final determination upon application of either party once the proceedings before the Commissioner are complete.

SO ORDERED this 28 day of August, 1997.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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