

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

RESHA M. WILLIAMS aka Rasha Williams
aka Resha Williams aka Resha M. Davis
aka Resha Williams Davis;
SPOUSE OF RESHA M. DAVIS;
HIGHER ED. ASSISTANCE FOUNDATION;
GILCREASE HILLS HOMEOWNERS ASSOCIATION;
COUNTY TREASURER, Osage County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Osage County, Oklahoma,

Defendants.

ENTERED ON DOCKET

DATE 9-19-97

FILED

SEP 18 1997

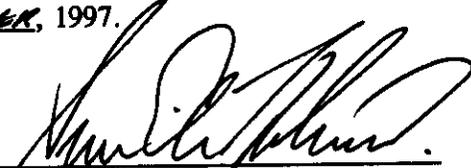
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 97-CV-386-H (M)

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Veterans Affairs, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn D. McClanahan, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 17TH day of SEPTEMBER, 1997.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



CATHRYN D. MCCLANAHAN, OBA #014853
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

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

IMOGENE H. HARRIS,

Plaintiff,

v.

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

Defendants.

ENTERED ON DOCKET

DATE 9-19-97

Case No. 96-C-230-HV

JUDGE

FILED

SEP 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

This matter came on before the Court this 17TH day of ~~August~~ ^{SEPTEMBER}, 1997, upon the Stipulation of Dismissal With Prejudice, filed jointly by Plaintiff and Defendant Tulsa Airport Authority ("TAA") and Defendant The City of Tulsa ("COT"), and for good cause shown, it is therefore ORDERED, ADJUDGED AND DECREED, that Plaintiff's causes of action against Defendants TAA and COT are hereby dismissed with prejudice with each party to bear its own costs and attorneys' fees.


UNITED STATES DISTRICT JUDGE

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

FILED

SEP 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RENARD ELVIS NELSON,)
)
Plaintiff,)
)
vs.)
)
DR. JOHNSON; RON ISAACS,)
)
Defendants.)

No. 95-CV-1145-H ✓

ENTERED ON DOCKET
DATE 9-19-97

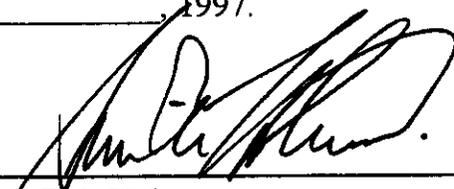
JUDGMENT

This matter came before the Court upon Defendant Johnson's motion for summary judgment. The Court duly considered the issues and rendered a decision herein.

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

IT IS SO ORDERED.

This 17TH day of SEPTEMBER, 1997.



Sven Erik Holmes
United States District Judge

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

RENARD ELVIS NELSON,)
)
Plaintiff,)
)
vs.)
)
STANLEY GLANZ, et al.,)
)
Defendants.)

No. 95-CV-994-H

FILED
SEP 18 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE 9-19-97

JUDGMENT

This matter came before the Court upon Defendants' motion for summary judgment. The Court duly considered the issues and rendered a decision herein.

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

IT IS SO ORDERED.

This 17TH day of SEPTEMBER, 1997.


Sven Erik Holmes
United States District Judge

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

RENARD ELVIS NELSON,)
)
Plaintiff,)
)
vs.)
)
STANLEY GLANZ, Sheriff Tulsa County,)
and TULSA COUNTY JAIL,)
)
Defendants.)

ENTERED ON DOCKET

DATE 9-19-97

Case No. 95-CV-994-H ✓

FILED

SEP 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff, a state prisoner appearing *pro se* and *in forma pauperis*, brings this action pursuant to 42 U.S.C. § 1983, alleging violation of his Eighth Amendment rights. In his original complaint, filed on October 4, 1995, Plaintiff alleged three (3) counts: (I) that he had not been treated as other inmates in the general population with respect to TV and phone use, (II) that Defendants had provided inadequate medical care by failing to insure that he received a bland diet, and (III) that he was constantly threatened with the use of "pepper gas." On October 17, 1995, this Court dismissed Counts I and III as frivolous pursuant to 28 U.S.C. § 1915(d). Defendants¹ have now moved for dismissal, or in the alternative, for summary judgment on the remaining Count II (#10). Plaintiff has objected to the relief

¹The Court takes notice that only Sheriff Stanley Glanz was served with process. Furthermore, Tulsa County Jail is not a proper defendant. Tulsa County Jail is not a "person" within the meaning of the Civil Rights Act and is therefore not a proper defendant in a suit by an individual for damages for allegedly inadequate medical care under 42 U.S.C. § 1983. See Harris v. Champion, 51 F.3d 901, 905-06 (10th Cir. 1995).

requested. For the reasons stated below, the Court concludes Defendants' motion should be granted, and Plaintiff's complaint dismissed.

BACKGROUND

At the time Plaintiff filed this action² on October 4, 1995, he was a pretrial detainee in the Tulsa City-County Jail ("TCCJ"), having been transferred from the federal correctional facility at El Reno, Oklahoma. Customary booking procedure included completion of health maintenance record, problem list, medical systems screening and history; review of en route progress notes as well as a physical examination by medical care personnel. Plaintiff's medical screening and history specifically noted high blood pressure, gastric problems, situational depression, back problems, and colon surgery performed in 1989 to repair injuries resulting from a stab wound. He had no known drug allergies but was allergic to milk and fruit. Plaintiff's previously-prescribed medications were delivered to the TCCJ medical staff.

² As a preliminary matter, although *pro se* pleadings are construed liberally, a litigant such as Nelson still must follow basic rules of civil procedure governing all litigations. Brown v. Zavaras, 63 F.3d 967, 971-72 (10th Cir. 1995). Nelson did not present his facts in opposition to Defendants' motion for summary judgment "by affidavit, declaration under penalty of perjury, and/or relevant portions of pleadings, depositions, answers to interrogatories and responses to requests for admissions." Fed. R. Civ. P. 56. It is possible to treat a complaint "as an affidavit" if the complaint "alleges facts based on the plaintiff's personal knowledge and has been sworn under penalty of perjury." Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991); see Green v. Branson, 108 F.3d 1296, 1301, n. 1 (10th Cir. 1997). Nelson, however, did not attest to the complaint. Because the complaint is dismissed on other grounds, the Court, for purposes of summary judgment, will not address the obvious defect in Plaintiff's failure to attest under penalty of perjury. See Fed. R. Civ. P. 56; see also N.D. LR 56B.

His treatment record revealed he was taking Procardia,³ 10 mg, one capsule 3x daily; Indomethacin,⁴ 25 mg, ½ capsule 3x daily with food; Hyoscyamine sulfate,⁵ 0.125 mg, one in A.M. and one in P.M.; Dicyclomine,⁶ 20 mg, ½ tab twice daily, in addition to a prescribed bland diet.

In Count II of his complaint, Plaintiff alleges Defendants have failed to provide adequate medical care in violation of his constitutional rights. Specifically, Plaintiff alleges Defendants have "refuse[d] to acknowledge" that pepper, vegetables like cabbage, corn, beans, are not acceptable for bland diets, are harmful to his digestive processes restricted by the surgical repair of a stab wound in 1989, and continue to serve him unacceptable food trays.

ANALYSIS

As an initial matter, because Plaintiff was a pretrial detainee during the events at issue, he is not entitled to relief under the Eighth Amendment. The Fourteenth Amendment Due Process Clause, not the Eighth Amendment's protections against cruel and unusual punishment, protects a pretrial detainee such as Plaintiff. See Bell v. Wolfish, 441 U.S. 520 (1979). Consequently, the Court liberally construes Plaintiff's Eighth Amendment claim as a claim for relief under the Fourteenth Amendment.

³Calcium ion influx inhibitor for treatment of high blood pressure.

⁴Non-steroid anti-inflammatory agent for treatment of arthritic conditions.

⁵Reduces spasms of digestive system.

⁶Reduces spasms of digestive system.

A. Dismissal for Failure to State a Claim

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade v. Grubbs, 841 F.2d 1512, 1526 (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, *pro se* complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110. Plaintiff has raised a claim of inadequate medical care, alleging "policys [sic] and medical standards set by the defendants" violated his constitutional rights. Therefore, because the Court can "reasonably read the pleadings to state a valid claim on which the plaintiff could prevail," dismissal for failure to state a claim is inappropriate. Id.

B. Dismissal as a Matter of Law (Summary Judgment)

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue regarding any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law if the nonmoving party fails to make a sufficient showing of an essential element of the case

for which the nonmoving party has the burden of proof. Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986). One of the principal purposes of summary judgment is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows this purpose to be accomplished. Id. At 323-24. The moving party must prove entitlement to summary judgment beyond a reasonable doubt. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

In order for a prisoner's Eighth Amendment claim to rise to the level of a constitutional violation, he must demonstrate that prison officials have shown deliberate indifference to his serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285 (1976). As previously stated, Plaintiff was a pretrial detainee and the Court liberally construes his Eighth Amendment claim as one brought under the Fourteenth Amendment. Significantly, however, the same level of constitutional violation is required -- "deliberate indifference to serious medical needs." Meade v. Grubbs, 841 F.2d 1512, 1530 (10th Cir. 1988); see also Garcia v. Salt Lake County, 768 F.2d 303, 307 (10th Cir. 1985). "Deliberate indifference" is defined as knowing and disregarding an excessive risk to an inmate's health or safety. Farmer v. Brennan, 511 U.S. 825, 827, 114 S.Ct. 1970 (1994). In Wilson v. Seiter, 501 U.S. 294, 111 S.Ct. 2321 (1991), the Supreme Court clarified that the deliberate indifference standard under Estelle has two components: (1) an objective requirement that the pain or deprivation be sufficiently serious; and (2) a subjective requirement that the offending officials act with a sufficiently culpable state of mind. Id. At 298-99.

Allegations of negligence, medical malpractice or claims based on a difference of opinion over matters of medical judgment do not give rise to a [Fourteenth] Amendment violation. Farmer, 511 U.S. at 835 (stating that "negligen[ce] in diagnosing or treating a medical condition" is not a constitutional violation); Estelle v. Gamble, 429 U.S. at 106 (explaining that negligence and medical malpractice are not [Fourteenth] Amendment claims); Hathaway v. Coughlin, 37 F.3d 63, 68 (2d Cir. 1994) (holding that "mere medical malpractice does not constitute a [Fourteenth] Amendment violation").

Defendants contend Plaintiff's inadequate medical treatment "clearly does not fall under the Eight Amendment prohibitions" and, at best, alleges a "minor case of medical malpractice" for those "instances where food that was incompatible with his medical diet was served to him." (#11, pg. 7). The Court agrees with Defendants and finds that Plaintiff's claims do not rise to the level of a constitutional violation and fail as a matter of law.

In addition, there is no evidence before the Court to demonstrate any deliberate indifference resulting in substantial harm. Instead, it appears that Plaintiff merely disagrees with the dietary treatment of his medical condition. Plaintiff has agreed that "perhaps maybe [he] shouldn't be on a bland diet but more on a special diet." (#18, taped interview with Plaintiff, dated March 15, 1996, p. 88). The investigator for the Special Report indicated that "the kitchen was informed to provide a bland diet at the request of the inmate. And then the bland diet is noted by the doctor, Dr. Johnson." (#18, p. 91). As to the frequency of the dietary problems, the Plaintiff admitted "at least two days [a week] there is at least one to two meals" in which something unacceptable was served. However, Plaintiff has not alleged

any serious medical injury as a result of these "one or two meals," perhaps two days a week.

As has been shown by the Special Report, TCCJ personnel have met with Plaintiff on at least 4 occasions in an attempt to resolve the situation and to satisfy Plaintiff's dietary needs. On the basis of the taped statement of Harry Walker, Food Services Supervisor, taken March 19, 1996, the kitchen personnel had been informed of Plaintiff's need for a bland diet. In addition, Plaintiff provided a specific list of foods that he felt he could not eat. This list was brought to the kitchen personnel and posted in the kitchen to aid in the preparation of Plaintiff's food tray (#18, p.96). Mr. Walker affirmed by affidavit that he personally met with Plaintiff, advising him of the proper method to correct the problems with his diet, as did Mr. Masek (Special Report investigator). Mr. Masek met with Plaintiff and Mr. Walker, discussed the correct process in addressing Plaintiff's diet problems and assured Plaintiff of the kitchen personnel's efforts to provide Plaintiff with the appropriate diet (#18, p. 99). Based on the evidence, it can hardly be said that Defendants are deliberately indifferent to Plaintiff's dietary medical needs.

Not only has Plaintiff failed to show the requisite "deliberate indifference" to any "serious medical needs," he has also failed to demonstrate the necessary injury-in-fact. Defendant argues that Plaintiff has the burden of establishing a constitutional minimum of standing by showing that he suffered injury-in-fact, that the injury is fairly traceable to Defendant's allegedly unlawful conduct, and the injury will be redressed by a favorable decision. Clajon Production Corp. v. Petera, 70 F.3d 1566, 1571 (10th Cir. 1995). The Court agrees. Although failure to adhere to a "special diet" may bring a certain amount of

discomfort, Plaintiff has not shown any injury as a result of the adjustments he has had to make in his diet since his transfer to TCCJ. The question of harm or "injury in fact" is a preliminary inquiry in every case or controversy filed in federal court. Standing to sue is premised upon a personalized injury to a legally cognizable interest of the plaintiff. See e.g., Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Warth v. Seldin, 422 U.S. 490, 499 (1975); Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 218 (1974). Plaintiff has not shown that he personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the Defendant, nor has he met any of the other elements required to make such a showing. Clajon, 70 F.3d at 1571. Accordingly, Plaintiff has not established standing and Defendant is entitled to judgment as a matter of law on Plaintiff's claim of improper medical treatment.

CONCLUSION

Plaintiff has failed to demonstrate the existence of a genuine issue of material fact on his claim of improper medical treatment and Defendants are entitled to judgment as a matter of law.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Defendants' motion for summary judgment (#10) is **granted**.
2. The Clerk of the Court is directed to **deny as moot** any pending motions.

IT IS SO ORDERED.

This 17th day of September, 1997.

A handwritten signature in black ink, appearing to read "Sven Erik Holmes", written over a horizontal line.

Sven Erik Holmes
United States District Judge

SAE
9/15/97

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

VALLEY FORGE INSURANCE)
COMPANY and LUTHERAN)
BENEVOLENT INSURANCE)
EXCHANGE,)
)
Plaintiffs,)
)
vs.)
)
MORRIS DALE VANDERFORD;)
CATHOLIC DIOCESE OF TULSA;)
SAINT CECILIA CATHOLIC)
CHURCH; and GLENN)
ANDREW PRATER,)
)
Defendants.)

FILED

SEP 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 96-CV-1172 K ✓

ENTERED ON DOCKET

DATE 9-19-97

**AGREED JUDGMENT
BETWEEN
VALLEY FORGE INSURANCE COMPANY,
LUTHERAN BENEVOLENT INSURANCE COMPANY, AND
GLENN ANDREW PRATER**

This matter comes on for hearing this 17 day of September 1997, and the Court being fully advised finds that Judgment should be entered for the Plaintiffs.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of Plaintiffs and that the relief requested in Plaintiffs' Amended Complaint is hereby granted; that Plaintiffs, Valley Forge Insurance Company and Jay Angoff, Director of the Missouri Department of Insurance, as Liquidator of Lutheran Benevolent Insurance Exchange owe no duty to indemnify or defend Morris Dale Vanderford for the acts, damages or claims alleged in Civil Action No.

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CJ-95-418 styled Glenn Andrew Prater, Plaintiff, vs. Saint Cecilia Catholic Church, Catholic Diocese of Tulsa, and Morris Dale Vanderford, or for any acts, omissions or damages arising out of the incidents giving rise to said lawsuit.

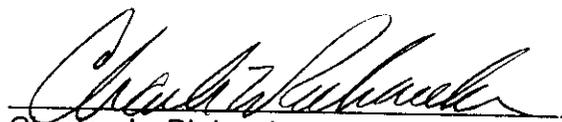
IT IS FURTHER ORDERED that this Judgment is without prejudice to and does not adjudicate the rights or obligations of the Plaintiff to any party to these proceedings except as specifically adjudicated with respect to the Defendant Morris Dale Vanderford.

Judgment rendered this 17 day of September 1997.


United States District Judge

APPROVED:


Gerald P. Green, OBA#3563
E. Marissa Lane, OBA#13314
Kevin T. Gassaway, OBA#3281
PIERCE COUCH HENDRICKSON
BAYSINGER & GREEN
P.O. Box 26350
Oklahoma City, Oklahoma 73126
(405)235-1611
ATTORNEYS FOR PLAINTIFFS


Charles L. Richardson
6846 S., Canton
Suite 200
Tulsa, Oklahoma 74136-3414
ATTORNEYS FOR DEFENDANT,
GLENN ANDREW PRATER

prosecute his wife and co-defendant, Debbie Green, on the same charges. On August 12, 1994, four months later, his wife was in fact sentenced on the charges to two concurrent twenty-year sentences. The plea agreement was not in writing, but a July 12, 1996 affidavit of petitioner's attorney at the time of the plea bargain, Dan Kramer, supports his claim that he pled guilty in exchange for a promise that the charges against his wife would be dismissed. (See Attachment to Docket #5).

In its order of July 15, 1997, this court discussed the petitioner's November 23, 1994 Application for Post-Conviction Relief, which was denied, his second Application for Post-Conviction Relief filed by his attorney without his knowledge, which was given a hearing on July 25, 1995 and resulted in a sentence modification to fifteen years "by agreement," and a third application for post-conviction relief raising the single issue of the breached plea agreement, which was denied on September 10, 1996. In its order denying relief on the third application, the Tulsa County District Court did not require a formal hearing with witnesses and testimony, but found the history in the case as set forth by the state to be accurate in relating that "the complained-of plea agreement was two-fold; that the state would dismiss the charges on petitioner's wife if petitioner pled, but petitioner's wife must also cooperate and not accrue new charges. She failed to cooperate and committed new felony offenses."

In its order of July 15, 1997, this court also discussed the July 12, 1996 affidavit of petitioner's attorney and additional affidavits and police documents which he claims demonstrate that no evidence exists which would show probable cause for

his arrest or show he was guilty of possession of the controlled dangerous substance in Case No. CF-93-4251. Petitioner points out that it was only after the time had expired in which he could timely move the court to withdraw his plea when the state allegedly breached the plea agreement and prosecuted his wife. When he filed his first application for post-conviction relief raising the issue, the district court did not address the issue in its order. As to his second application for post-conviction relief, the Modified Judgment and Sentence did not provide the factual or legal basis for the changing of the original judgment and sentence so no appeal of the decision could have been filed, had petitioner known about it. Petitioner's third post-conviction application informed the court that he was not present at the hearing on his second application and had no knowledge of the events that took place, but the court found that the issue of the breached plea agreement had been waived.

In Coleman v. Thompson, 501 U.S. 722, 750 (1991), the Supreme Court held that when a petitioner has defaulted claims pursuant to an independent and adequate state procedural rule, federal habeas review is barred unless he can establish cause for the default and actual prejudice or demonstrate that a fundamental miscarriage of justice will result if the claim is not addressed. In this case, the petitioner has shown cause and prejudice for his failure to raise his claims in his direct appeal, in that his attempts to withdraw his plea based on the government's alleged breach of the plea agreement have been thwarted by the state's application of the procedural bar and an unexplained five-year reduction in his sentence.

"Where the government obtains a guilty plea predicated in any significant

degree on a promise or agreement with the prosecuting attorney, such promise must be fulfilled to maintain the integrity of the plea." United States v. Hand, 913 F.2d 854, 856 (10th Cir. 1990). Petitioner has the burden of proving the underlying facts establishing the breach of a plea agreement by a preponderance of the evidence. Allen v. Hadden, 57 F.3d 1529, 1534 (10th Cir.), cert. denied, _____ U.S. _____, 116 S.Ct. 544, 133 L.Ed.2d 447 (1995).

If a breach of a plea agreement occurs, courts have wide discretion to fashion appropriate remedies. United States v. Bowler, 585 F.2d 851, 856 (7th Cir. 1978). "[D]epending on the circumstances of the individual case, such relief may include allowing the defendant to withdraw his or her guilty plea, directing specific performance of the plea agreement, or ordering the imposition of a specific sentence if neither of the above options would provide an appropriate remedy." United States v. O'Brien, 853 F.2d 522, 525-26 (7th Cir. 1988).

In the respondent's response, no evidence to rebut petitioner's claim that the plea bargain was breached was offered. Respondent was ordered by this court to provide the court with a transcript of petitioner's sentencing and any evidence relied on by the state court in reaching its decision on September 10, 1996, concerning the contents of the plea agreement.

Respondent has now provided the court with a letter from an Assistant Tulsa County District Attorney who states that there is no record of a plea agreement with petitioner besides the original recommendation of twenty years which was handwritten on the inside of the folder of case CRF-93-4251. Respondent has also

provided the transcripts of petitioner's plea hearing on April 11, 1994, sentencing hearing on April 18, 1994, and application for post-conviction relief hearing on July 25, 1995.

The transcript of petitioner's plea hearing on April 11, 1994 (Exhibit "B" to Docket #8) clearly shows that petitioner plead guilty to three counts after seven former convictions. He stated that he understood the charges and that he was waiving his right to trial freely and voluntarily with no coercion from anyone else. He stated that he was in fact guilty of the felony offenses of unlawful possession of a controlled drug with the intent to distribute it, the unlawful possession of marijuana, and the unlawful possession of drug paraphernalia. His counsel stated that there was a factual basis for his client to plead guilty. There was no mention at the hearing of any plea agreement involving petitioner's wife.

Guilty pleas made in consideration of lenient treatment as against third persons pose a greater danger of coercion than purely bilateral plea bargaining, and, accordingly, "special care must be taken to ascertain the voluntariness of" guilty pleas entered in such circumstances. United States v. Tursi, 576 F.2d 396, 398 (1st Cir. 1978); United States v. Nuckols, 606 F.2d 566, 569 (5th Cir. 1979); Crow v. United States, 397 F.2d 284, 285 (10th Cir. 1968). This court is satisfied that the district court adequately discharged its obligations here. The colloquy between the court and petitioner was so extensive that there could be little doubt about his willingness to plead. He had several opportunities to confess any misgivings to the judge, but he never gave the slightest hint that his plea was anything other than voluntary, and he

admitted that he was in fact guilty of the crimes.

The court also notes that the sworn affidavit of petitioner's counsel dated July 12, 1996, supports the government's claim that the plea agreement required petitioner's wife to cooperate and she failed to do so:

During the court proceedings of 1994, a plea agreement was rendered between myself, Mr. Green and the Prosecution for a plea of no contest. Terms of said agreement was for a plea to 20 years in the Department of Correction in CF-93-4251 and with an understanding that charges against Mr. Green's wife, Debbie Green, would be dismissed. The Tulsa County District Attorney later determined that Mrs. Green had not been sufficiently cooperative and had acquired additional felony charges and therefore the agreement was not honored and Mrs. Green was convicted and sentenced to 20 years in the Department of Correction.

(Attachment to Docket #1).

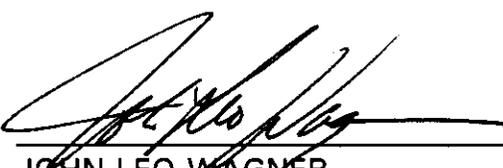
The Tulsa County District Court has made the finding that the complained-of plea agreement was two-fold; that the state would dismiss the charges on petitioner's wife if he pled, but she was to cooperate and not accrue new charges, which she failed to do. (Attachment to Docket #1). The voluntariness of a guilty plea "for purposes of the federal Constitution is a question of federal law." Marshall v. Lonberger, 459 U.S. 422, 431 (1983). A state court's factual findings enjoy a presumption of correctness. Id. at 431-32; Wellman v. State of Me., 962 F.2d 70, 72 (1st Cir. 1992).

"Plea bargain agreements are contractual in nature, and are to be construed accordingly." United States v. Ballis, 28 F.3d 1399, 1409 (5th Cir. 1994); United States v. Ingram, 979 F.2d 1179, 1184 (7th Cir. 1992), cert. denied, 507 U.S. 997 (1993). The government must fulfill any promise that it expressly or impliedly makes

in exchange for a defendant's guilty plea. Id. (citing Santobello v. New York, 404 U.S. 257, 261 (1971)). While the government cannot breach any term of a plea agreement which induced a defendant to plead guilty, the court concludes that no breach has occurred in this case and that petitioner received what was reasonably due him under the agreement. Petitioner himself admits that his wife did commit an additional felony following his incarceration and received a twenty-year sentence for it to run concurrently with the twenty-year term for the offense in petitioner's case. (Docket #1, pg. 5). There is nothing to support his naked assertion that his wife's cooperation and avoidance of further criminal activity were not part of the agreement.

There is no merit to petitioner's habeas corpus claim. His petition for a writ of habeas corpus should be denied.

Dated this 16th day of September, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

s:\order\green.or

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 19 Day of September, 1997.

[Handwritten Signature]

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 18 1997

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

CHRISTY J. DUNCAN,)
SSN: 495-84-5306,)

PLAINTIFF,)

vs.)

CASE No. 96-C-782-C

JOHN CALLAHAN, Acting)
Commissioner of the Social)
Security Administration,¹)

ENTERED ON DOCKET

DEFENDANT.)

DATE SEP 16 1997

REPORT AND RECOMMENDATION

Plaintiff, Christy J. Duncan, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.² This matter has been referred to the undersigned Magistrate Judge for Report and Recommendation.

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

¹ President Clinton appointed John J. Callahan to serve as Acting Commissioner of Social Security, effective March 1, 1997, to succeed Shirley S. Chater. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, John J. Callahan should be substituted, therefore, for Shirley S. Chater, as defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

² Plaintiff's February 25, 1994 application for disability benefits was denied August 11, 1994 and was affirmed on reconsideration. A hearing before an Administrative Law Judge (ALJ) was held May 26, 1995. By decision dated July 24, 1995 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on July 30, 1996. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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

Plaintiff was born January 26, 1967 and left school after the eleventh grade. [R. 34]. She claims to be unable to work since July 1, 1992, as the result of chronic pain and dizziness associated with Fibromyalgia³ and depression. [R. 33, 36]. The ALJ determined that Plaintiff has a severe impairment consisting of fibromyalgia but that she retains the residual functional capacity (RFC) to perform a full range of light work. He determined that, since Plaintiff had not worked sufficiently long enough or earned enough in the past fifteen years, she had no past relevant work (PRW). The case was thus decided at step five of the five-step evaluative sequence for

³ Fibromyalgia has been described as follows:

A cardinal feature of fibromyalgia is the presence of pain, stiffness, and fatigue. Although the pain is often described by patients as being "all over," it is most prominent in the proximal muscle groups, ie, neck, shoulders, elbows, hips, knees, and back. The generalized stiffness of fibromyalgia does not diminish with activity, unlike the stiffness of rheumatoid arthritis, which lessens as the day progresses. Dennis W. Boulware, MD et al., "The Fibromyalgia Syndrome," *Postgraduate Medicine*, Feb. 1, 1990, at 211.

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 Commissioner's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ's determination of Plaintiff's RFC was based upon an incorrect legal standard in consideration and evaluation of the medical evidence; that he erred in not providing a vocational expert and in relying upon the "Grids"; that his assessment of fibromyalgia and its effects was inadequate; that he did not consider the record as a whole in making his determination.

Medical Evidence

The medical portion of the record is sparse, consisting of two pages from Douglas Cox, M.D., eleven pages from Sally Jane Berger, M.D., and a three page report by Glenn W. Cosby, M.D. for the Disability Determination Unit. The remainder covers a four month treatment period from Grand Lake Mental Health Center, Inc.

Dr. Cox apparently examined Plaintiff on July 9, 1993 for complaints of "bad back pain - burning around to (R) ribs", dizziness, sleepiness, kidney/bladder spasms, "was paralyzed", lack of energy and "bad migraines." His assessment was possible fibromyalgia. [R. 116]. Notes dated August 6, 1993 reported Plaintiff "still hurting, not as bad" on Elavil, Flexeril and able to sleep with Roxicet. [R. 115].

Dr. Berger's records commence August 9, 1993 with instructions for taking medication for fibromyalgia and muscle spasm. [R. 136]. The records indicate that Dr. Berger treated Plaintiff for fibromyalgia and various other complaints, including

premenstrual syndrome (PMS) [R.135], dysuria [R. 132], and sinusitis [R. 128] through April, 1995. The record for April 19, 1994, contains a note that an appointment was made at Grand Lake Mental Health (Center) for Plaintiff. [R. 131]. On that date, Zoloft was prescribed.⁴ A year later, April 11, 1995, Dr. Berger wrote that Plaintiff was "doing great! Spirits much better" and physical examination was marked "no abnormality." [R. 127]. The last page of the records from Dr. Berger is a form titled: "Primary Symptoms of Fibromyalgia", dated May 25, 1995, which is checked positive for tenderness of specific anatomical sites, chronic aching, stiffness, sleep disturbances, pain, fatigue, anxiety and depression. On severity of the 18 points for tenderness, eight are marked "intense", four "somewhat intense" and six "mild." [R. 126].

On July 19, 1994, Dr. Cosby recorded Plaintiff's history of pain and burning in back, neck and shoulders, stiffness and pain in muscles and depression since 1991. [R. 118-121]. At the time of his examination, Plaintiff was taking Methocarbamol, Zoloft and Amitriptyline.⁵ Dr. Cosby described Plaintiff as well-developed, well-nourished, well groomed, very pleasant, very cooperative and obviously intelligent. Her vision and hearing were normal, as were her heart and abdomen. Her chest was normal except for some coarse rales on deep breathing. Her cervical spine was freely movable throughout with full range of motion (ROM) but

⁴ Zoloft is an antidepressant, *Physician's Desk Reference*, p. 2109 (49th ed. 1995).

⁵ Methocarbamol, also Robaxin injectable: an adjunct to rest, physical therapy and other measures for the relief of discomfort associated with acute, painful musculoskeletal conditions, p. 2014; Amitriptyline, also Elavil: an antidepressant, p. 2441, *Physician's Desk Reference* (49th ed. 1995).

"extremely tender." She had no limitation of ROM but all joints and muscles were tender. She had multiple marked "trigger points." She walked well, had good grip bilaterally and good fine manipulation. There was no obvious redness, swelling, heat or any joint deformities visible. Dr. Cosby said:

I am aware that fibromyalgia is a controversial term but it appears that she does fit the description. It appears that she probably had some steroid injections with excellent relief. I do not know what her sedimentation rate is. Can not give a prognosis at this point.

[R. 121]. His impression was (1) Fibromyalgia, rheumatica. (2) Early bronchitis from cigarettes. *Id.*

The records from Grand Lake Mental Health Center, Inc. confirm that Plaintiff was referred to the center by Dr. Berger on April 22, 1994. She was placed on a "wait list" as her condition was not an emergency. [R. 141]. On June 7, 1994, Plaintiff was seen after a phone call that she "desperately needed to talk with someone." [R. 156]. Her problems were assessed to be depression, chronic pain, fearfulness for self and children, and anger. A twelve month treatment period, including routine counseling, was anticipated. [R. 145]. On October 27, 1994, Plaintiff was discharged from Grand Lake Mental Health Center for the reason: "Client is no longer in need of services. Depression remaining is appropriate considering physical condition. Client's attitude remains positive." [R. 158].

The ALJ's Decision

The ALJ decided that the objective medical evidence shows that Plaintiff was diagnosed with fibromyalgia and that the condition would cause some limitation. [R.

16]. He determined that Plaintiff's allegations of totally disabling pain were inconsistent with the medical evidence and her reported daily activities. [R. 17]. The ALJ also found that Plaintiff's depression "is mild and situational, and would not have any affect [sic] on her ability to perform work-related activities." *Id.* He completed a PRT form and attached it to his decision.⁶ In discussing the findings on his PRT form, the ALJ noted that Plaintiff had been doing well, did not appear to need further treatment and was discharged from treatment. *Id.*

Because Plaintiff's earnings record indicated that Plaintiff last worked in 1984 as a laborer in a chicken plant, the ALJ found that she had no past relevant work. The ALJ determined that Plaintiff retained an RFC for the full range of light work activities and, based upon her stated age at the time, 28 years, and her limited education, 11th grade, and applying the Medical-Vocational Guidelines (Grids), that a significant number of light jobs exist in the region in which Plaintiff resides that she could do.

Discussion

Plaintiff has not asserted that she meets any "listing". She states merely that she has been diagnosed with fibromyalgia and suffers debilitating pain from that

⁶ The procedure for evaluation of a mental impairment is outlined at 20 C.F.R. § 1520a. If a claimant has a mental impairment, the degree of functional loss resulting from the impairment must be rated in four areas: (1) activities of daily living, (2) social functioning, (3) concentration, persistence or pace; and (4) deterioration or decompensation in work or work-like settings. 20 C.F.R. § 1520a(b)(3). If each of the four areas is rated as having an impact of "none", "never", "slight", or "seldom", the conclusion is that the impairment is not severe, unless the evidence otherwise indicates there is significant limitation of the claimant's mental ability to do basic work activities. *See* 20 C.F.R. § 1520a(c)(1). An ALJ must attach to his decision a PRT form detailing his assessment of the claimant's level of mental impairment. 20 C.F.R. § 1520a(d).

condition. Plaintiff contends that she does not have to establish "totally disabling pain" in order to qualify for benefits under the Social Security Act and accuses the ALJ of mischaracterizing and ignoring evidence favorable to her while over-emphasizing evidence favorable to the Commissioner. [Plf's Brief, p. 3]. Plaintiff further contends that the ALJ failed to comprehend the effects of fibromyalgia. [Plf's Brief, p. 2].

Pain may constitute a disability under the Social Security Act and subjective complaints of pain may support a claim of disability. *Luna v. Bowen*, 834 F.2d 161 (10th Cir. 1987). However, the mere existence of pain is insufficient to support a finding of disability; the pain must be "disabling." *Gossett v. Bowen*, 862 F.2d 802, 807 (10th Cir. 1988) ("Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment.")

The legal standards for evaluating pain are outlined in 20 C.F.R. §§ 404.1529 and 416.929, and were addressed in *Luna*. First, the asserted pain-producing impairment must be supported by objective medical evidence. *Id.* at 163. Second, assuming all the allegations of pain are true, a claimant must establish a nexus between the impairment and the alleged pain. "The impairment or abnormality must be one which 'could reasonably be expected to produce' the alleged pain." *Id.* Third, the decision maker, considering all of the medical data presented and any objective or subjective indications of the pain, must assess the claimant's credibility. *Id.* at 164.

There is scant objective medical evidence to support Plaintiff's claim of disability. While all the physicians agreed that Plaintiff's symptoms appear to support the diagnosis of fibromyalgia, none of them limited her activities in any way. In fact, Dr. Berger's final note indicates that she was "doing great." [R. 127]. And, Dr. Cosby noted that treatment and medication had afforded Plaintiff relief from her symptoms. [R. 118]. "The absence of an objective medical basis for the degree of severity of pain may affect the weight to be given to the claimant's subjective allegations of pain." *Luna*, p. 165.

Plaintiff presented no evidence, other than her own testimony which the ALJ found not credible, to support her claim of debilitating pain. Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). Plaintiff testified that she cannot work because she has chronic back pain to the degree that she can't sit in a straight chair and that she gets so dizzy and light headed that she has to lie down for about 45 minutes to an hour. [R. 37-38]. However, according to statements of Plaintiff's daily activities, she takes care of her children, exercises, and performs household chores such as cooking, washing dishes and laundry, cleaning and shopping. [R. 39-41, 87, 98, 101]. The evidence supports a finding that Plaintiff's testimony as to her impairment was overstated.

As to Plaintiff's claim of depression, she admits that she was released from treatment from the Grand Lake Mental Health Center and that depression is no longer a problem for her. [Plf's Brief p. 4, R. 42]. In order to establish a disabling mental

impairment, Plaintiff must provide evidence to establish marked or frequent functional limitations in at least two of the behavior signs set forth in 20 C.F.R. 404, Subpt. P, App. 1, 12.04. The ALJ concluded, and the Court agrees, that the evidence does not support a finding of disability based upon depression.

The ALJ's opinion indicates that he considered all of the medical reports in the record in making his determination that Plaintiff retains the capacity to do light work. 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 record as a whole contains substantial evidence to support the determination of the ALJ that Plaintiff is not disabled.

Application of the "Grids"

The ALJ relied on the Medical-Vocational Guidelines ("Grids"), 20 C.F.R., Pt. 404, Subpt. P, App. 2, Table No. 2, Rule 202.15, to support his determination that Plaintiff is not disabled. Plaintiff claims that she has a combination of exertional and nonexertional impairments which preclude reliance upon the grids. [Plf's Brief, p. 2-3]. However, as discussed above, the ALJ properly found that Plaintiff could perform the full range of light and sedentary work. Therefore, there was no error in applying the grids to find that she is not disabled. *Thompson v. Sullivan*, 987 F.2d 1482 (10th Cir. 1993).⁷

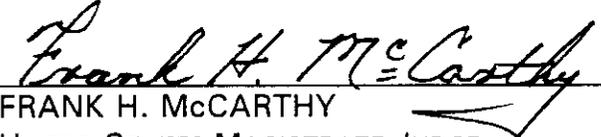
⁷ The Tenth Circuit reached the same conclusion under similar facts in an unpublished decision, *Foss v. Chater*, 54 F.3d 787, 1995 WL 311761 (10th Cir. (Colo.)).

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 18th day of Sept., 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

19 Day of September, 1997.

FILED

SEP 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

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

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)
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) No. 96-CV-909-B ✓
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ENTERED ON DOCKET
SEP 19 1997

DATE

JOURNAL ENTRY OF JUDGMENT FOR ATTORNEY FEES

NOW on this 18 day of Sept., 1997, Lynn Hickey Mitsubishi's Motion for Attorney Fees and Bill of Costs came on to be heard as ordered. The Court finds the Plaintiff's counsel has been duly served with notice of this hearing as provided by law. The Plaintiff appeared by and through his counsel of record, W. Allen Vaughn of Howard & Widdows; and the Defendant appeared by its counsel of record, David T. Marsh of Marsh & Marsh, P.C. The Court having heard all the evidence and being fully advised, finds that Defendant should be reimbursed by the Plaintiff, as and for attorney fees expended in the above-styled proceeding, in the sum of Two Thousand Five Hundred Dollars (\$2,500.00); and costs incurred in the amount of Three Hundred Eighty-Three and 07/100 Dollars (\$383.07).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that judgment is rendered for Defendant, Lynn Hickey Mitsubishi, in the amount of Two Thousand Eight Hundred Eighty-Three and 07/100

Dollars (\$2,883.07), against Plaintiff, with interest thereon from the date of judgment until paid, for all of which let execution issue.


JUDGE OF THE DISTRICT COURT

David T. Marsh (OBA #14505)
MARSH & MARSH, P.C.
15 W. Sixth, Suite 2626
Tulsa, Oklahoma 74119-5420
(918) 587-0141

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MARY L. ROBISON,
SS# 448-36-9653

Plaintiff,

v.

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

Defendant.

ENTERED ON DOCKET
DATE SEP 19 1997

No. 95-C-1056-J ✓

FILED

SEP 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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 18 day of September 1997.


Sam A. Joyner
United States Magistrate Judge

^{1/} Effective March 1, 1997, President William J. 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 as the Defendant in this action.



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

MARY L. ROBISON,
SS# 448-36-9653

Plaintiff,

v.

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

Defendant.

ENTERED ON DOCKET
DATE SEP 19 1997

No. 95-C-1056-J ✓

FILED

SEP 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER^{2/}

Plaintiff, Mary L. Robison, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits. Plaintiff asserts numerous errors. For the reasons discussed below, the Court **reverses and remands** the Commissioner's decision.

I. PROCEDURAL HISTORY & PLAINTIFF'S BACKGROUND

Plaintiff filed her first application for disability insurance benefits on November 14, 1988. The application was denied on December 23, 1988. Plaintiff did not appeal the decision. Plaintiff filed a second application for disability insurance on November 1, 1990. Administrative Law Judge Stephen C. Calvarese denied the

^{1/} Effective March 1, 1997, President William J. 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 as the Defendant in this action.

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

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application prior to a hearing noting that Plaintiff's insured status expired on December 31, 1987, that Plaintiff had presented no new evidence, and that *res judicata* barred Plaintiff from further pursuing her claims. On September 17, 1992, the Appeals Council reversed the decision of the ALJ. On April 14, 1993, ALJ Stephen C. Calvarese reviewed his prior decision, and the decision of the Appeals Council. The ALJ remanded the case to the Disability Determinations Services of the State of Oklahoma for evaluation of Plaintiff's asserted mental disorder. [R. at 319-320].

Plaintiff was granted a hearing before Administrative Law Judge Leslie S. Hauger on September 27, 1994. Plaintiff testified that she was born on November 9, 1938, and was 55 years old at the time of the hearing. [R. at 530]. Plaintiff stated that she had pain and numerous problems with her back, that she had shoulder difficulties beginning in 1985, that she required knee and numerous back surgeries beginning in 1988, and that she was no longer able to work. Plaintiff testified that she attempted suicide in 1989. [R. at 544].

By decision dated December 14, 1994, ALJ Hauger concluded that Plaintiff was not disabled. The ALJ concluded that Plaintiff's pain was not sufficiently severe to constitute disabling pain. The ALJ concluded that prior to Plaintiff's date of last insurance for disability benefits (December 31, 1987), Plaintiff had the ability to perform a full range of sedentary work subject to a protected environment due to Plaintiff's allergies. Based on the testimony of a vocational expert, the ALJ concluded that Plaintiff could perform a significant number jobs in the national economy and was consequently not disabled.

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{3/} See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

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

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

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

42 U.S.C. § 423(d)(2)(A).

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

^{3/} Step one requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (step five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

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

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

"The finding of the Secretary^{4/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

^{4/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

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

III. REVIEW

Insured Status and "Onset"^{5/} of Disability

Social security disability^{6/} provides a system of limited benefits to individuals who meet certain requirements. Generally, an individual must establish that he or she was disabled prior to the expiration of his or her "insured status." Potter v. Secretary of Health and Human Services, 905 F.2d 1346, 1348-49 (10th Cir. 1990) ("the relevant analysis is whether the claimant was actually disabled prior to the expiration of her insured status. . . . A retrospective diagnosis without evidence of actual disability is insufficient. This is especially true where the disease is progressive.") (citations omitted).

In this case, Plaintiff's last date of eligibility for disability insurance is December 31, 1987. The critical question, therefore, is not whether or not Plaintiff suffered from

^{5/} "The onset date of disability is the first day an individual is disabled as defined in the Act and the regulations." Soc. Sec. Rep. Serv., Rulings 1983-1991, SSR 83-20 (West 1983).

^{6/} SSI, or supplemental security income is a separate social security program which provides similar benefits to disabled individuals whose income is below a certain level. SSI benefits do not have the same "insured status" requirements as social security disability benefits or "SDI." According to the records, Plaintiff's monthly household income is too high to qualify for SSI, and issues related to SSI are not before the Court. Therefore, to qualify for social security benefits Plaintiff must establish that she was disabled prior to the expiration of her insured status.

a particular disease or injury prior to December 31, 1987, but whether or not Plaintiff was disabled from the limitations imposed on prior to December 31, 1987. To qualify for disability under the Social Security Act, an individual must be determined "disabled" prior to the expiration of the individual's insured status.

Treating Physicians

Plaintiff asserts that the ALJ failed to provide appropriate reasons for rejecting the opinions of Plaintiff's treating physician.

A treating physician's opinion is entitled to great weight. See Williams, 844 F.2d at 757-58 (more weight will be given to evidence from a treating physician than to evidence from a consulting physician appointed by the Secretary or a physician who merely reviews medical records without examining the claimant); Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). However, a treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). If an ALJ disregards a treating physician's opinion, he must set forth "specific, legitimate reasons" for doing so. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984). In Goatcher v. United States Dep't of Health & Human Services, 52 F.3d 288 (10th Cir. 1995), the Tenth Circuit outlined factors which the ALJ must consider in determining the appropriate weight to give a medical opinion.

(1) the length of the treatment relationship and the frequency of examination; (2) the nature and extent of the treatment relationship, including the treatment provided and the kind of examination or testing performed; (3) the degree to which the physician's opinion is supported by relevant

evidence; (4) consistency between the opinion and the record as a whole; (5) whether or not the physician is a specialist in the area upon which an opinion is rendered; and (6) other factors brought to the ALJ's attention which tend to support or contradict the opinion.

Id. at 290; 20 C.F.R. § 404.1527(d)(2)-(6).

In this case, Susan Miller, D.O., treated Plaintiff for two years. Dr. Miller wrote the following on March 28, 1991.

At the onset of treatment, Mrs. Robison had severe degenerative [sic] joint disease in all of her spine, especially lumbar and lower thoracic, but also in her knees and feet. She had radiographic evidence of this condition when treated by Dr. Modrak. Throughout the course of treatment, her pain and dysfunction continued with frequent fluctuations between tolerable and intolerable pain. She also had severe depression brought on by family situations as well as her constant pain.

There was no period of time during my treatment of Mrs. Robison that she was physically or psychologically able to hold any kind of employment. She made every attempt to control her depression and consulted with every specialist available to her. Her educational level has not equipped her for anything other than manual labor. Her physical condition would not allow her to do any repetitive motions, stand or sit for more than twenty-thirty minutes at a time. Even if her physical condition would have allowed further schooling, her psychological problems prevented her from receiving any additional education.

In my best medical opinion Mary Robison was 100% disabled during the time of my treatment which covered a significant period from the middle of 1987 through 1988 through the middle of 1989.

[R. at 281-82]. In a three page letter dated March 29, 1991, Henry H. Modrak, M.D., summarized Plaintiff's various treatments beginning in 1985 and continuing through

1990. Dr. Modrak concluded that Plaintiff was permanently and totally disabled from work activities. [R. at 284-86].

An ALJ is not bound by the opinions of a treating physician. However, an ALJ must give some reason for rejecting such opinions. In this case, the ALJ never discusses the treating physicians' opinions with respect to Plaintiff's disability, and never provides a reason for rejecting the treating physicians' conclusions that Plaintiff is disabled. On remand, the ALJ should discuss the opinions of Plaintiff's treating physicians and give specific reasons for ignoring, adopting part of, or concluding differently from each treating physician.

Mental Impairment

The procedure for evaluation of a mental impairment is outlined at 20 C.F.R. § 1520a. If a claimant has a mental impairment, the degree of functional loss resulting from the impairment must be rated in four areas.^{7/} 20 C.F.R. § 1520a(b)(3). If each of the four areas is rated as having an impact of "none," "never," "slight," or "seldom," the conclusion is that "the impairment is not severe, unless the evidence otherwise indicates there is significant limitation of [the claimant's] mental ability to do basic work activities." See 20 C.F.R. § 1520a(c)(1). Although the regulations do not specify that a rating above "none" or "slight" is presumed "severe," that is the logical inference. See Hargis v. Sullivan, 945 F.2d 1482, 1488 n.5 (10th Cir. 1991).

^{7/} The four areas are: (1) activities of daily living; (2) social functioning; (3) concentration, persistence, or pace; and (4) deterioration or decompensation in work or work-like settings. 20 C.F.R. § 1520a(b)(3).

If the mental impairment is severe, the Listings must be consulted. 20 C.F.R. § 1520a(c)(2). If a claimant meets or equals a Listing, the claimant is disabled. 20 C.F.R. § 1520a(c)(2). If a claimant does not meet or equal a Listing, the claimant's residual functional capacity must be assessed to determine the level, if any, of the claimant's impairment. 20 C.F.R. § 1520a(c)(3). An ALJ must attach a Psychiatric Review Technique form ("PRT") detailing the ALJ's assessment of the claimant's level of mental impairment, to his decision. 20 C.F.R. § 1520a(d).

The ALJ is also required to determine how Plaintiff's mental impairment impacts Plaintiff's RFC. 20 C.F.R. § 1520a(c)(3). The impact of a mental impairment on a plaintiff's RFC is determined based on the effect the mental impairment has on a Plaintiff's ability to work. The four areas considered essential to work are: (1) activities of daily living, (2) social functioning, (3) concentration, persistence, or pace, and (4) deterioration or decompensation in work or work-like settings. 20 C.F.R. § 1520a(b)(3).

In this case, ALJ Calvarese, upon remand from the Appeals Council, remanded Plaintiff's case for further evaluation of Plaintiff's mental impairment. The record reflects that Plaintiff attempted suicide on at least one and perhaps two occasions.^{8/} In addition, numerous medical doctors note that Plaintiff has psychological problems.

^{8/} On July 24, 1986, Plaintiff's "progress notes" indicate that she had attempted suicide several years ago. [R. at 188]. In addition, Plaintiff was hospitalized for a suicide attempt on March 5, 1989. [R. at 221]. Of course, this date is after Plaintiff's insured status expired. However, in evaluating whether or not Plaintiff was disabled prior to December 31, 1987, an ALJ may consider medical records after that date to the extent that the records reveal relevant information about Plaintiff's condition prior to the expiration of her insured status. Potter v. Secretary of Health and Human Services, 905 F.2d 1346, 1348-49 (10th Cir. 1990) (treating physician may provide retrospective diagnosis of a claimant's condition)

[R. at 281, 432, 434, 495]. The record is not clear with respect to what treatment, if any, Plaintiff has received for a mental impairment.

A prior ALJ remanded this case for further consideration of Plaintiff's mental impairments. In addition, Plaintiff noted her attempted suicide during her hearing before the ALJ and testified that she took "Desyrel" for her mental difficulties. [R. at 544]. The ALJ, however, failed to discuss Plaintiff's asserted mental impairment in the December 14, 1994 Order, and neglected to attach a PRT Form. On remand, the ALJ should evaluate and discuss Plaintiff's mental impairment and attach the appropriate forms.

Pain Evaluation

The legal standards for evaluating pain are outlined in 20 C.F.R. §§ 404.1529 and 416.929, and were addressed by the Tenth Circuit Court of Appeals in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). First, the asserted pain-producing impairment must be supported by objective medical evidence. Id. at 163. Second, assuming all the allegations of pain as true, a claimant must establish a nexus between the impairment and the alleged pain. "The impairment or abnormality must be one which 'could reasonably be expected to produce' the alleged pain." Id. Third, the decision maker, considering all of the medical data presented and any objective or subjective indications of the pain, must assess the claimant's credibility.

[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence.

Id. at 164. In assessing the credibility of a claimant's complaints of pain, the following factors may be considered.

[T]he levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Hargis v. Sullivan, 945 F.2d 1482, 1488 (10th Cir. 1991). See also Luna, 834 F.2d at 165 ("For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication.").

The ALJ summarized Luna and its requirements, some of Plaintiff's medical record, and some of Plaintiff's testimony. [R. at 13]. However, the ALJ provided only a brief conclusory summary of why Plaintiff's complaints of disability based on severe pain were rejected.

In Kepler v. Chater, 68 F.3d 387, (10th Cir. 1995), the Tenth Circuit determined that an ALJ must discuss a Plaintiff's complaints of pain, in accordance with Luna, and provide the reasoning which supports the decision as opposed to mere conclusions. Id. at 8.

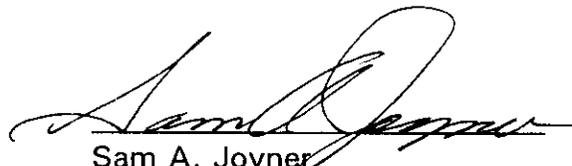
Though the ALJ listed some of these [Luna] factors, he did not explain why the specific evidence relevant to each factor led him to conclude claimant's subjective complaints were not credible.

Id. at 9. The Tenth Circuit remanded the case, requiring the Secretary to make "express findings in accordance with Luna, with reference to relevant evidence as appropriate, concerning claimant's claim of disabling pain." Id. at 10.

Similarly, in this case, although the ALJ outlines the factors in Luna, the ALJ merely summarizes those factors and concludes that claimant's pain was not disabling. Such a conclusory pain analysis is insufficient according to Kepler. On remand, the Secretary should analyze Plaintiff's complaints of pain in accordance with Luna and Kepler, making express findings related to Plaintiff's complaints of pain, the weight given by the ALJ to such complaints, and any limitations imposed on Plaintiff by such pain.

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

Dated this 17 day of September 1997.


Sam A. Joyner
United States Magistrate Judge

F I L E D

SEP 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

JOHN L. WATERDOWN,)
)
 Plaintiff,)
)
 v.)
)
 JOHN J. CALLAHAN,)
 Commissioner of Social Security,¹)
)
 Defendant.)

Case No: 96-C-396-B(W)

ENTERED ON DOCKET
DATE SEP 19 1997

JUDGMENT

Judgment is entered in favor of the Defendant, John J. Callahan, Commissioner of Social Security, in accordance with this court's Order filed September 18, 1997.

Dated this 18th day of September, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

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

F I L E D

SEP 18 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN L. WATERDOWN,

Plaintiff,

v.

JOHN J. CALLAHAN,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

Case No. 96-C-396-B(W)

ENTERED ON DOCKET

SEP 19 1997

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Commissioner of Social Security ("Commissioner") denying plaintiff's application for supplemental security income under §1614(a)(3)(A) of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge Leslie S. Hauger, (the "ALJ"), which summaries are incorporated herein by reference.

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

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.²

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ He found that claimant was a fifty year old man and was impaired by shortness of breath, which was severe enough to reduce his ability to work. The ALJ concluded that claimant had the residual functional capacity to perform a full range of light work of an unskilled nature, subject to working in a

²Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

³The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

protected environment free of fumes, etc., and no fast walking because of lung problems. The ALJ found that claimant's impairment and residual functional capacity precluded him from performing his past relevant work. The ALJ considered claimant's impairment, residual functional capacity, age, education, work experience, and the testimony of a qualified vocational expert and concluded that there were occupations in the national economy in significant numbers that he could perform. Having determined that there were jobs in the national economy that claimant could perform, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

- (1) The ALJ's residual functional capacity assessment is not supported by substantial evidence, reflects erroneous observations of the medical record, and fails to identify evidence to show claimant's testimony was not credible.
- (2) The ALJ's conclusion that claimant can do a significant number of jobs is not supported by substantial evidence, as it is based on vocational testimony elicited by an incomplete hypothetical question.

It is well settled that the claimant bears the burden of proving disability that prevents any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant contends that he has been unable to work since May 4, 1994 because of nervousness, shortness of breath, arthritis, and dizziness (TR 72, 146-147, 157). He admits he has had a "shortness of breath" problem most of his life, but it has gotten worse in the last few years, and he smokes about two packs of

cigarettes a week (TR 146). He was admitted to the hospital in a drunken state on May 7, 1994, complaining that he was having trouble breathing (TR 88-114). A heart attack was ruled out and tuberculosis testing was negative (TR 90-91). He was found to have chronic obstructive pulmonary disease and alcoholism (TR 90). He was given medications and told to quit smoking and drinking (TR 91).

Dr. Angelo Dalessandro examined claimant on June 28, 1994 for the Social Security Administration (TR 115-119). The claimant had no restriction on the movement of any of his joints (TR 117). The neurological examination was normal, and muscle strength was equal (TR 117). The doctor found that claimant had hypertension, chronic obstructive pulmonary disease, and alcoholism (TR 117).

Claimant was treated at the Indian Hospital on May 19, 1994 for chest pains and shortness of breath (TR 124-129). He admitted that he had not been taking his medications and had been drinking (TR 125). X-rays of the lungs showed "left mid-lung interstitial appearing infiltrate. The left hilum is slightly irregular. The right lung is free of active infiltrate. There is flattening of the diaphragm and mild increased lung lucency." (TR 127). Medications were prescribed (TR 126).

Claimant reported that he could not breathe on June 2, 1994 and was given medication refills (TR 122-123). On August 4, 1994, he saw a doctor again for breathing problems and admitted that he was still smoking and drinking a six-pack of beer each day (TR 121).

On December 12, 1994, claimant told his doctor that he was down to one cigarette a day and six beers on the weekends (TR 136). He complained of pain and

stiffness in his hands, knees, and hips (TR 136). The doctor noted that he had no hand deformity, but concluded that he had osteoarthritis, prescribed Motrin for joint pain, and told him to return in one year. (TR 136).

At a hearing on April 25, 1995, claimant stated that he feels nervousness caused by his medications (TR 137). He takes Theophylline, Cimetidine, Thiamine, Ipratropium, Proventil, Azmacort, Ibuprofen, and Nitrostat (TR 137-138). He admitted that he continues to smoke and drinks a six-pack of beer on weekends (TR 146). He stated that his daily activities included doing personal things, vacuuming and doing dishes, lying down for four hours during the day, watching television, and no socializing (TR 148-149). He stated that he can lift 20 pounds, stand 2 hours, walk one block, and sit for 45-60 minutes before he gets out of breath (TR 150-152).

There is no merit to claimant's contentions. There is substantial evidence to support the findings of the ALJ. He considered the entire record, including the testimony, claimant's subjective complaints and prior work record, observations of physicians regarding the nature of any pain, effectiveness and side effects of medications, treatment other than medication for the relief of pain, functional restrictions, claimant's daily activities, and claimant's demeanor at the hearing (TR 15). The primary reasons that he found claimant's allegations to not be fully credible were the lack of objective findings by treating and examining physicians, the lack of medication for severe pain, the frequency of treatments by physicians, and the lack of discomfort shown by claimant at the hearing (TR 15). The ALJ specifically relied on the following:

[T]he objective medical evidence establishes that the claimant has only a moderate restriction on his breathing, which only precludes fast walking. The claimant's treatment notes show that exacerbation of his condition occurs when [he] is non-compliant with his medications. There is no justification for the claimant being non-compliant with his medication as it is furnished to him without charge at the Indian Hospital pharmacy. Therefore, any severe exacerbation of his breathing problems is not taken into account because he failed, without good cause, to follow his prescribed treatment. The claimant's physical examinations do not demonstrate any physical limitations. He has full use of his extremities with intact gross and fine manipulation. There is no evidence of any physical deficit, other than COPD [chronic obstructive pulmonary disease], in the Indian Hospital medical records. The claimant advised his physicians that he drank a 6 pack of beer a day, though his testimony is that he only drinks on [the] weekend. However, there was no evidence that such usage was treated as a continuing medical problem. Also, there is no indication that such drinking has any negative effect on claimant's ability to work. Based on the foregoing, the claimant is capable of performing light work with some limitations based on his COPD [chronic obstructive pulmonary disease]. The claimant has produced no medical evidence showing that he has arthritis, is dizzy or is nervous. There is no evidence that he has complained to his treating physicians that he has such problems, or that they are caused by his medications. The claimant must prove the existence of a disabling impairment by objective medical evidence and the claimant cannot prove the existence of a disabling impairment solely by unverified testimony

(TR 15-16).

This discussion of the evidence did not reflect "erroneous observations" or fail to support the conclusion that claimant was not credible and that he had the residual functional capacity to work, as claimant argues. It is clear that claimant's chronic obstructive pulmonary disease is controllable with medication and that he has failed to obtain the medications and to stop smoking. The failure to follow prescribed treatment is a legitimate consideration in evaluating the validity of an alleged impairment. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 777 (10th

Cir. 1990). The only evidence to support claimant's claims of dizziness and nervousness is his self-serving testimony. The Tenth Circuit has found that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). Unsubstantiated subjective evidence is not sufficient to prove disability. Diaz, 898 F.2d at 777.

The ALJ's conclusion that claimant could do a significant number of jobs was supported by substantial evidence. The ALJ posited a proper hypothetical question to the vocational expert which assumed that claimant could do light work in an environment free of irritating fumes that did not require fast walking (TR 169). 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) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). However, in forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990).

Initially, the ALJ established that the vocational expert was familiar with the regulations pertaining to disability (TR 168). The ALJ's hypothetical question assumed that claimant could do light work, limited to working in an environment with no irritating fumes and doing no fast walking (TR 169). Claimant's representative at

the hearing was only able to elicit favorable testimony from the vocational expert by asking the expert to assume impairments that the ALJ properly deemed unsubstantiated (TR 174-176). These opinions, based on unsubstantiated assumptions, were not binding on the ALJ. Gay v. Sullivan, 986 F.2d 1336, 1341 (10th Cir. 1993).

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 17th day of September, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:\ORDERS\SS\WATER.AFF

IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 17 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

EKL EQUIPMENT COMPANY, an)
Oklahoma Corporation,)
)
Plaintiff,)
)
vs.)
)
JOHN A. RUPE, COLT INTERNATIONAL)
and COLT INVESTMENTS,)
)
Defendants.)

CASE NO. 97 CV 531 H(M) /

ENTERED ON DOCKET
DATE 9-18-97

JOURNAL ENTRY OF JUDGMENT

The above entitled cause comes on ~~for hearing on the~~ 17th day of September, 1997, pursuant to regular assignment, before The Honorable Sven ~~Erick~~ Holmes, Judge of the United States District Court for TheNorthern District of Oklahoma. The parties appear by their respective counsel of record and the Court hears evidence and argument of counsel and is fully advised in the premises.

The parties have agreed to the entry of this journal entry of judgment as a means of settling their dispute.

The Court further finds that Colt International and Colt Investments are simply names under which Defendant John A. Rupe did business. That they are not legal entities and do not exist. That the only legal entities in this case are Plaintiff and Defendant John A. Rupe.

The Court further finds that all of the allegations of the Petition of Plaintiff are true and correct subject to the above set forth finding that Colt International and Colt Investments are not legal entities and do not exist and IT IS SO ORDERED.

Sam T. Allen
only

The Court further finds that each of the parties hereto should bear that party's own costs and expenses including, but not limited to, that party's attorney's fees, and IT IS SO ORDERED.

The Court further finds that the parties have agreed that Plaintiff shall refund Defendant Rupe the sum of \$17,500.00 which Defendant Rupe paid Plaintiff and that Plaintiff has so refunded Defendant Rupe the said sum of \$17,500.00, the receipt whereof is hereby acknowledged by Defendant Rupe.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the title of Plaintiff to the following described real property in Creek County, Oklahoma, to-wit:

Lots Numbered Eleven (11) and Twelve (12) in Block Numbered Seven (7), in WOODLAWN ADDITION to the City of Sapulpa;

The South Forty-eight point four feet (S48.4') of Lot Four (4) and the North Four Feet (N4') of Lot Five (5), all in Block Thirty-three (33), original Town of Sapulpa, also known as 10 No. Linden;

A part of Lot Four (4) in Block Thirty-three (33), original Town of Sapulpa, Oklahoma, described as follows: BEGINNING at a point 8.3 feet South of the Northeast Corner of said Lot Four (4), running Westerly 150 feet; THENCE Southerly 50 feet; THENCE Easterly 150 feet; THENCE Northerly 50 feet to the place of beginning, all in said Block Thirty three (33), original Town of Sapulpa, according to the recorded plat thereof;

All of Block Thirty-two (32) in the original Town, City of Sapulpa, Oklahoma,

is valid and perfect.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said Defendant Rupe does not have any lien upon or right, title, interest, equity or estate in the said land which is the subject of

this action and said Defendant Rupe is hereby forever barred and enjoined from setting up or asserting any interest in the land which is the subject of this action and the title of Plaintiff thereto is hereby quieted and confirmed against the said Defendant Rupe.

The Court further finds that Defendant Rupe has dismissed his counter claims with prejudice. In this connection, the Court further finds that any contract which may have existed between the parties hereto for the sale of the subject land has terminated and neither party hereto has any liability or obligation whatever to the other party arising from or incident to any such contract and IT IS SO ORDERED.



United States District Judge

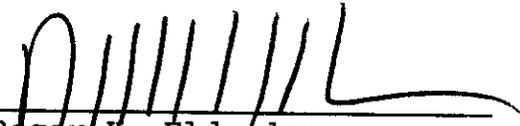
APPROVED AND AGREED:

LOEFFLER, ALLEN & HAM

BY: 

Sam T. Allen, III (OBA #231)
P.O. Box 230, Sapulpa, Ok 74067
PHONE: (918) 224-5302
Attorney for Plaintiff

NORMAN & WOHLGEMUTH

BY: 

Roger K. Eldredge
2900 Mid-Continent Tower
Tulsa, Ok 73103-4023
Attorneys for Defendant Rupe

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE 9-18-97

UNITED STATES OF AMERICA,)
on behalf of the Secretary of Veterans Affairs,)
)
Plaintiff,)
v.)
)
VICTOR L. GREEN aka Victor Green;)
LAURENE FALEGI aka Laurene Felegi)
aka Laurene Sue Green;)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma;)
SEARS, ROEBUCK AND COMPANY,)
)
Defendants.)

FILED

SEP 17 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 96-C-373-H

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 17th day of September, 1997, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on July 14, 1997, pursuant to an Order of Sale dated March 17, 1997, of the following described property located in Tulsa County, Oklahoma:

Lot Two (2), of the Resubdivision of Tract 22, OZARK GARDEN FARMS ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

Appearing for the United States of America is Cathryn D. McClanahan, Assistant United States Attorney. Notice was given the Defendants, Victor L. Green aka Victor Green; Laurene Falegi aka Laurene Felegi aka Laurene Sue Green through her attorney Sheldon E. Morton; County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma;

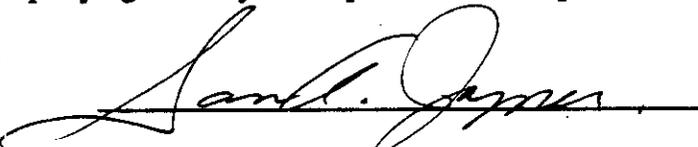
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and Sears, Roebuck and Company through its service agent The Corporation Company, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

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

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Veterans Affairs, a good and sufficient deed for the property.

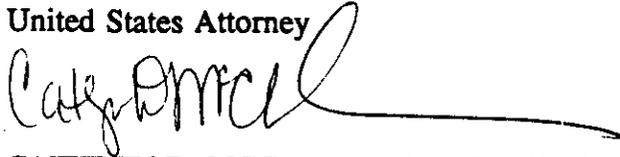
It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.


UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS

United States Attorney



CATHRYN D. MCCLANAHAN, OBA #014853

Assistant United States Attorney

333 West 4th Street, Suite 3460

Tulsa, Oklahoma 74103

(918) 581-7463

Report and Recommendation of United States Magistrate Judge
Case No. 96-C-373-H (Green)

CDM/cas

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

18th Day of September, 1997.
C. Portillo, Deputy Clerk

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

MARCUS FORD,

Plaintiff,

vs.

RON CHAMPION, et al.,

Defendants.

Case No.96-C-015-C

SEP 16 1997

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

ENTERED ON DOCKET

DATE SEP 16 1997

REPORT AND RECOMMENDATION

In this pro se civil rights action, Plaintiff Marcus Ford, an Oklahoma state inmate, alleges that his due process rights were violated in a prison disciplinary proceeding which resulted in 30 days disciplinary segregation and a fine of \$15.00. He alleges the charges against him were false and that he was denied equal protection of the law by prison officials due to his race and because he was "a black with a white woman." [Dkt. 1, p. 2]. Plaintiff asks that he be shipped to a minimum security facility and that his misconduct be expunged. Defendants have filed a motion to dismiss/motion for summary judgment, [Dkt. 4], which has been referred to the undersigned United States Magistrate Judge for report and recommendation.

BACKGROUND

On August 15, 1995, while Plaintiff was incarcerated at Dick Conner Correctional Center, prison officials conducted an investigation into a racially motivated confrontation being organized by a group of inmates, including Plaintiff, as the result of an inmate being assaulted earlier in the day. According to the special report, following an assault on a white inmate by two blacks, a group of white,

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Hispanic, and Indian inmates gathered on the ballfield to retaliate for the assault. A group of black inmates which allegedly included Plaintiff aligned themselves with the perpetrators and set out for the ballfield to engage in a confrontation with the white, Hispanic and Indian group. However, upon seeing prison staff on the scene at the ballfield, the group which allegedly included Plaintiff disbursed before reaching the ballfield. Later that same day, Plaintiff and others who were identified as being involved in planning the confrontation were transferred to Oklahoma State Penitentiary ("OSP").

On August 21, 1995, upon completion of the investigation, Special Investigator Bill McKenzie submitted a misconduct report charging Plaintiff with the offense of Group Disruption. On August 22, 1995 Plaintiff acknowledged receiving a copy of the offense report describing the incident and requested a hearing. [Special Report, Dkt. 5, Attachment B-1]. Plaintiff also acknowledged receiving a copy or description of the evidence and stated his desire that a staff representative be assigned. [Dkt. 5, Att. B-2]. Statements were taken from Plaintiff and the two inmates and one officer Plaintiff identified as witnesses on his behalf. [Dkt. 5, Att. B-3, B-4, B-5].

Plaintiff's hearing was held August 24, 1995. The disciplinary officer found Plaintiff guilty of the violation of Group Disruption; 30 days disciplinary segregation and a fine of \$15.00 were imposed as punishment. As outlined in the disciplinary hearing action report, the evidence relied upon for the finding of guilt was:

Reporting employee's statement that this I/M, with others did plan and organize a group of I/Ms for the purpose of assaulting another group of I/Ms in a racially motivated

confrontation. Information contained in the confidential witness statements in the confidential packet. I/M claims he is not guilty of this offense, he claims he was in his house asleep at this time. None of the I/Ms witnesses can confirm that this I/M was asleep at this time. Reporting employee statement and confidential witness testimony is more believable than this I/M's claims.

[Dkt. 5, Att. B-8]. The special report contains a document entitled Review of Reliability Statement signed by Disciplinary Officer, Captain Steven J. Maxwell which states: "I, Steven J. Maxwell, have on this date, August 24, 1995, independently reviewed the reliability statement and found that it sufficiently supports the reliability of the confidential witness statement(s)."¹ [Dkt. 5, Att. B-7].

Defendants have moved for dismissal, or alternatively summary judgment, contending that: (1) the Plaintiff received the due process that must be met in a prison disciplinary action; (2) Plaintiff has no constitutional right to incarceration in a particular institution; (3) Plaintiff has not alleged an equal protection violation; and (4) the defendants have qualified immunity. Because the Defendants relied on materials outside the pleadings, the Court treats Defendants' motion as a motion for summary judgment under Fed.R.Civ.P. 56(b). In accordance with Fed.R.Civ.P. 12(b) the parties were given an opportunity to present all material pertinent to a motion for summary judgment. [Dkt. 15].

¹ The term "reliability statement" does not describe a particular document or statement. This phrase is used to generally refer to the fact that the disciplinary officer reviewed the confidential statements for their reliability. [Dkt. 16, Ex. A].

SUMMARY JUDGMENT STANDARDS

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). The party opposing summary judgment may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof. *Applied Genetics Intel, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). Conclusory allegations are insufficient to establish a genuine issue of fact. *McKibben v. Chub*, 840 F.2d 1525, 1528 (10th Cir. 1988).

The court may treat a *Martinez* special report as an affidavit in support of the motion for summary judgment, but may not accept the factual findings of the report if the prisoner has presented conflicting evidence. *See Hall v. Bellmon*, 935 F.2d 1106, 1111 (10th Cir. 1991). This process aids the court in determining possible legal bases for relief for unartfully drawn pro se prisoner complaints, but is not

intended to resolve material factual issues. *Id.* at 1109. In addition, the court is required to construe the Plaintiff's pro se pleadings liberally. *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 595-96 (1972).

DISCUSSION

Due Process In Prison Disciplinary Proceeding

Plaintiff alleges that the disciplinary hearing violated his due process rights. Specifically, he claims that the outcome of the disciplinary hearing was based upon a confidential witness statement that was not sufficiently reliable.² There was no loss of good time credits involved in the discipline imposed. Pursuant to *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293 (1995), the imposition of disciplinary segregation does not implicate the Due Process Clause liberty interest. However, a prisoner may not be deprived of property by persons acting under color of state law without due process. *Parratt v. Taylor*, 451 U.S. 527, 537, 101 S.Ct. 1908 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662 (1986).

The due process required for abridgment of a liberty interest is: advance notice of the charges; the right to call witnesses and present evidence if doing so does not jeopardize institutional safety or correction goals; a written statement of the evidence relied on; and the reasons for the disciplinary action. *Wolff v. McDonnell*, 418 U.S.

² Plaintiff makes other claims based on the failure of prison officials to follow prison regulations to the letter. The United States Supreme Court has rejected prison regulations as a source of substantive rights the deprivation of which will necessarily constitute a constitutional infringement. *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995).

539, 566, 94 S.Ct. 2963 (1974). The Court will apply this standard to the deprivation of property claim alleged in this case. Once an inmate receives the *Wolff* due process, the Supreme Court has instructed that the findings of the prison disciplinary board need only be supported by "some evidence in the record." *Superintendent, Mass. Correctional Inst. v. Hill*, 472 U.S. 445, 454-55, 105 S.Ct. 2768 (1985).

Confidential information can be used to support a prison disciplinary decision if the prison staff finds that the confidential informant was reliable. *Taylor v. Wallace*, 931 F.2d 698, 701 (10th Cir. 1991). The Tenth Circuit requires that the disciplinary decision maker "must make a reliability determination prior to its decision." *Id.* at 702. In this case the record contains such a determination in the statement signed by Disciplinary Officer, Steven J. Maxwell. [Dkt. 5, Att. B-7]. However, since the disciplinary officer's determination of reliability does not contain any discussion of the reasons for his reliability determination, the Court ordered that the confidential materials relied upon be submitted for *in camera* review. Prison officials can satisfy a reviewing court that the standard was met by submitting the confidential reports for *in camera* review. *Taylor*, 931 F.2d at 702; *Mendoza v. Miller*, 779 F.2d 1287, 1294-95 (7th Cir. 1985), *cert. denied* 476 U.S. 1142 (1986). Again, the court's review is limited. The Court need only determine whether reliability has been established by some evidence. *Taylor*, 931 F.2d at 701, *citing Hill*, 472 U.S. at 455-56, 105 S.Ct. at 2773-74. "Any reasonable basis for establishing the credibility of the informant's information . . . is acceptable." *Id.* at 702.

This Court has reviewed the investigative report and confidential informant statements submitted *in camera*. These documents reflect that the investigation was begun by prison officials just two hours after the incident in question. Plaintiff, Marcus Ford, was identified as being involved by two inmate confidential informants who separately reported the information to different staff members. One reported Ford's involvement at approximately 1:58 p.m. the day of the incident. The report containing information from the other informant does not identify the time the information was received but states the information was gathered "shortly after the incidents." Although the report does not list previous occurrences it states that the inmate "is a good informant and always gives good information that has proven to be true." [Dkt. 14, Att. F, p.2].

After carefully reviewing the special report and the materials submitted for *in camera* review, the Court finds that the reliability statement and the confidential witness statements contain a sufficient indicia of reliability to satisfy the requirements of due process.

Plaintiff was otherwise afforded adequate due process. He received a copy of the written charges against him; was given an opportunity to form a defense before his hearing; he met with an assigned staff representative who explained the charges, possible consequences, and his disciplinary rights; Plaintiff was permitted to submit statements from three witnesses on his behalf; the hearing officer's evaluation of the evidence and the basis for the punishment was noted by the hearing officer.

Finally, Plaintiff's allegation that he was falsely charged does not amount to a constitutional violation. *See Freeman v. Rideout*, 808 F.2d 949, 951-52 (2d Cir. 1986) (allegation that false evidence was planted by prison guard does not state a constitutional claim where procedural due process protections are provided), *cert. denied*, 485 U.S. 982 (1988). Accordingly, this allegation cannot form the basis of a § 1983 action.

Equal Protection

Regarding plaintiff's equal protection claim, the Court concludes that Plaintiff has not shown that Defendants intentionally or purposefully discriminated against him on the basis of his race in charging him with the misconduct in question. The materials submitted *in camera* indicate that whites, Hispanics, Indians, and blacks all received offense reports for Group Disruption and were all transferred to OSP as a result of their involvement. *See Brisco v. Kusper*, 435 F.2d 1046, 1052 (7th Cir. 1970) (the "Equal Protection Clause has long be limited to instances of purposeful or invidious discrimination rather than erroneous or even arbitrary administration of state powers"). Plaintiff's equal protection allegation is simply based on the alleged deprivation of his individual rights. *See Gamza v. Aquirre*, 619 F.2d 449, 453 (5th Cir. 1980) (holding that "isolated events that adversely affect individuals are not presumed to be a violation of the equal protection clause"). Accordingly, Defendants are entitled to judgment as a matter of law on this claim.

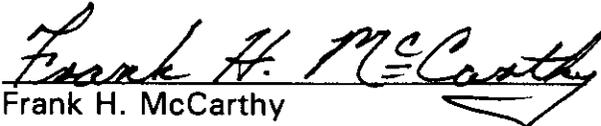
CONCLUSION

After viewing the evidence in the light most favorable to Plaintiff, the Court concludes that the Defendants have made an initial showing negating all disputed material facts regarding Plaintiff's claims; that Plaintiff has failed to controvert Defendants' summary judgment evidence; and that the Defendants are entitled to judgement as a matter of law.

The undersigned United States Magistrate Judge RECOMMENDS that Defendants' motion for summary judgment [Dkt. 4] be GRANTED and the case be DISMISSED.

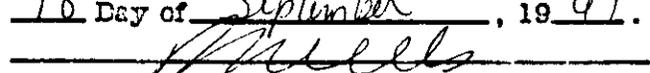
In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from 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 16th day of September, 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

9 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 18 Day of September, 1997.



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

F I L E D

SEP 16 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVID BRUCE HAWKINS,)
)
Plaintiff,)
)
vs.)
)
STEVE W. KAISER, et al.,)
)
Defendants.)

Case No. 96-CV-471-B

ENTERED ON DOCKET
DATE SEP 18 1997

ORDER

Plaintiff's Motion For Default Judgment against Defendant Robert Davis (Docket # 50) is DENIED. The Court notes continuing attempts have been made to properly serve Defendant Robert Davis, and as Plaintiff is now represented by counsel such attempts should continue until successful. The Court will not entertain further motions for default against Defendant Robert Davis for failure to answer or otherwise plead.

Plaintiff's Motion For Leave Of Court To Amend The Complaint To Add Or Include And Name New Defendants (Docket # 52) is DENIED.

Plaintiff's Motion For Citation Of Contempt (Docket # 53) is DENIED.

Plaintiff's Objection (Motion For Reconsideration of Order of July 15, 1997) (Docket # 54) is OVERRULED.

Plaintiff's repetitive Motion For Leave Of Court To Amend The Complaint To Add Or Include And Name New Defendants (Docket # 55) is DENIED.

Plaintiff's Motion For Appointment Of Counsel (Docket # 60) is DENIED as

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MOOT as attorney Fred Gilbert of Tulsa, Oklahoma is presently counsel for Plaintiff.

Plaintiff's repetitive Objection (Motion For Reconsideration of Order of July 15, 1997) (Docket # 61) is OVERRULED.

Plaintiff's Motion For Citation For Contempt (Docket # 66) is DENIED.

The Court notes Plaintiff has violated the stay entered by Order of May 16, 1997, no less than eighteen times. Further, the Court's Order of June 17, 1997, requiring Plaintiff to secure leave of Court prior to filing further court documents has been violated no less than ten times. In light of the entry of special appearance by counsel on behalf of Plaintiff, the Court is of the opinion it is no longer necessary for Plaintiff to secure leave of Court to file his court documents. All filings on behalf of Plaintiff while he is represented by counsel shall be from, and with the signature of, Plaintiff's counsel. VIOLATIONS OF THIS PROVISION SHALL RESULT IN SANCTIONS AGAINST PLAINTIFF UP TO AND INCLUDING DISMISSAL WITH PREJUDICE OF PLAINTIFF'S CLAIMS.

As Plaintiff's Motion To Stay was granted by Order of August 21, 1997, the stay entered May 16, 1997, is hereby lifted.

IT IS SO ORDERED this 16 day of Sept., 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 16 1997

ROBERT DALE GALLIMORE,

Plaintiff,

vs.

MIKE KELLY, *et al.*,

Defendants.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-1200-H(J)

ENTERED ON DOCKET

DATE 9-18-97

REPORT AND RECOMMENDATION

This is a *pro se* civil rights action filed by Plaintiff pursuant to 42 U.S.C. § 1983. Plaintiff alleges that Defendants deprived him of various rights secured to him by the United States Constitution. In particular, Plaintiff alleges (1) that Defendants violated his Eighth Amendment right to be free from cruel and unusual punishment by using excessive force to arrest him and by denying him proper medical treatment after his arrest, and (2) that Defendants violated his Fourteenth Amendment right to due process when they transported him from Oklahoma to Missouri without first having an extradition hearing.

Now before the Court is the "Motion to Dismiss of Defendant Mike Kelly" and the "Motion of Defendant Mike Kelly to Dismiss Plaintiff's Second Amended Complaint." [Doc. Nos. 10 & 23]. Mr. Kelly argues that Plaintiff's claims are barred by a two-year statute of limitations. Plaintiff argues that his claims are timely because they are subject to a five year statute of limitations. In the alternative, Plaintiff argues

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that if his claims are subject to a two year statute of limitations, his claims are timely because the limitations period was tolled for various reasons.

The undersigned finds that Plaintiff's claims are subject to a two-year statute of limitations and that the limitations period was not tolled. Plaintiff's claims are, therefore, untimely and the undersigned recommends that Mr. Kelly's motions to dismiss be **GRANTED** and that this lawsuit be **DISMISSED WITH PREJUDICE** as to all Defendants.

I. FACTUAL BACKGROUND

Plaintiff alleges that all of the events described in his Complaint^{1/} took place on April 13, 1994. On that date, a Kansas police officer attempted to stop a car being driven by Plaintiff. Plaintiff refused to stop the car and the Kansas police officer began pursuing the car. During the pursuit, shots were fired and roadblocks were set up, which the car went around. The car being driven by Plaintiff was eventually pursued across the Kansas state line into Oklahoma.

Plaintiff alleges that there was another person in the car with a gun. According to Plaintiff, this unknown gunman threatened Plaintiff's life and ordered him to drive

^{1/} Plaintiff filed a First Amended Complaint which added four additional parties. [Doc. No. 9]. The First Amended Complaint incorporated by reference the factual allegations contained in the original Complaint. This First Amended Complaint was properly filed because, at the time it was filed, Defendants had not filed answers or dispositive motions. See Fed. R. Civ. P. 15(a) (allowing a plaintiff to amend his complaint once without leave of court when no answer or dispositive motion has been filed by a defendant).

Plaintiff then filed a Second Amended Complaint which incorporated by reference the two prior complaints and added four additional paragraphs of factual allegations. [Doc. No. 22]. Rule 15 requires leave of court before a second amended complaint can be filed. The Court has not granted leave for the Second Amended Complaint to be filed. The Second Amended Complaint is, therefore, not properly before the undersigned. However, for purposes of Mr. Kelly's motions to dismiss only, the undersigned will consider the factual allegations in Plaintiff's Second Amended Complaint because even considering those additional allegations, the undersigned is of the opinion that Plaintiff's claims are untimely.

and not stop the car for the police. At some point during the pursuit, Plaintiff alleges that the unknown gunman bailed out of the car and got away on foot.

Once the car came to a stop, Plaintiff alleges that various police officers immediately fired their weapons at him as he tried to exit the car. Plaintiff ducked down into the car while the firing continued. Plaintiff alleges that he was in fear of his life and to stop the gunfire, he attempted to raise up with his hands in plain sight. While raising up, Plaintiff was struck in the head by a bullet. Plaintiff alleges that he felt he would be killed if he did not run away from the shots. While attempting to run away, Plaintiff was shot in the back. Plaintiff alleges that this second shot was over his heart and was delivered by a high-powered, M-14, semi-automatic deer rifle at a range of approximately 25 yards with 40 grain hollow point slugs. Plaintiff alleges that when he was shot he was unarmed and not firing shots at the officers. Plaintiff also alleges that it was broad daylight and the officers should have been able to see that he was unarmed.

After being shot, Plaintiff was arrested by Oklahoma law-enforcement officers. During the arrest, Plaintiff alleges that the Oklahoma law-enforcement officers forcibly dragged him to the ground by his legs and forcibly moved his arms behind his back, causing further injury and blood loss. After being arrested, James Ed Walker, then Sheriff of Ottawa County, ordered that Plaintiff be transported to a hospital in Missouri, instead of having him treated in Oklahoma. Once Plaintiff arrived in Missouri, the Oklahoma officers released Plaintiff into the custody of Missouri law-enforcement

officers. While in the hospital, Plaintiff alleges that various unknown parties denied him proper medical care.

Plaintiff does not state how long he was in the hospital. Plaintiff has, however, filed a similar lawsuit in the United States District Court for the Western District of Missouri and copies of pleadings from that case have been made a part of the record. See May 27, 1997 Order; Doc. No. 25. According to the Complaint filed in the Missouri action, Plaintiff was in the hospital for four days (i.e., until approximately April 18, 1994) before he was transported to the Newton County Jail in Neosho, Missouri. Thus, the relevant conduct for purposes of Plaintiff's claims occurred on or before April 18, 1994. This action was filed on December 30, 1996 -- two years and eight and one half months after the relevant conduct occurred.

II. ARE PLAINTIFF'S § 1983 CLAIMS SUBJECT TO A TWO OR FIVE YEAR STATUTE OF LIMITATIONS?

Plaintiff argues that the five-year statute of limitations in 12 Okla. Stat. § 95(5) should be applied to this § 1983 action. Section 95(5) provides as follows:

An action upon the official bond or undertaking of an executor, administrator, sheriff, or any other officer, or upon the bond or undertaking given in attachment, injunction, arrest, or in any case whatever required by the statute, can only be brought within five (5) years after the cause of action shall have accrued.

Id. Plaintiff admits that he is not suing based on any "official bond." Rather, Plaintiff argues that § 95(5) applies because the conduct at issue was "an undertaking by a sheriff and other officers in attachment to an arrest, required by statute." Plaintiff's Brief, Doc. No. 21, p. 2.

Plaintiff misunderstands the meaning of "undertaking" as that term is used in § 95(5). An "undertaking" is defined as follows:

A promise, engagement, or stipulation. An engagement by one of the parties to a contract to the other, as distinguished from the mutual engagement of the parties to each other. It does not necessarily imply a consideration.

Black's Law Dictionary p. 1526 (West 6th ed. 1990). See also Webster's Third New International Dictionary p. 2491, 3rd def. (Merriam-Webster, Inc. 1993) (defining undertaking as a pledge, promise or guarantee). The allegations in Plaintiff's First Amended Complaint do not support a finding that Plaintiff's claims are based on the promise, engagement or stipulation of any of the Defendants. Thus, this is not an action on the "undertaking" of a sheriff or other law-enforcement officer. More importantly, however, Plaintiff's argument completely ignores precedent from the United States Supreme Court and from the United States Court of Appeals for the Tenth Circuit.

Congress did not provide a statute of limitations for civil rights claims under § 1983. However, in 42 U.S.C. § 1988 Congress directed the courts to follow a three-step process to determine the limitations period applicable to civil rights claims.

First, courts are to look to the laws of the United States 'so far as such laws are suitable to carry [the civil and criminal rights statutes] into effect.' If no suitable federal rule exists, courts undertake the second step by considering application of state 'common law, as modified and changed by the constitution and statutes' of the forum state. A third step asserts the predominance of the federal interest:

courts are to apply state law only if it is not 'inconsistent with the Constitution and laws of the United States.'

Burnett v. Grattan, 468 U.S. 42, 47-48 (1984) (citations omitted) (quoting 42 U.S.C. § 1988).

Applying the first step of § 1988's analysis, the Supreme Court determined in Burnett that there is no federal law which provides an appropriate limitations period for § 1983 claims. See Burnett, 468 U.S. at 49. In Burnett and other cases, the Supreme Court suggested that courts apply the second step of § 1988's analysis by selecting the "most analogous" and "most appropriate" statute of limitations from the forum state. However, in Wilson v. Garcia, 471 U.S. 261 (1985), "the Supreme Court abandoned that uncertain and confusing practice in favor of a simple, bright-line rule." Blake v. Dickason, 997 F.2d 749, 750 (10th Cir. 1993). In Garcia, the Supreme Court found that "§ 1983 claims are best characterized as personal injury actions," and held that the forum state's personal injury statute of limitations should be applied to all §1983 claims. Garcia, 471 U.S. at 280. In Owens v. Okure, 488 U.S. 235 (1989), the Supreme Court refined the Wilson rule by holding that when the forum state provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow "the general or residual statute for personal injury actions" and not statute of limitations for specific intentional torts. Owens, 488 U.S. at 249-50.

Oklahoma has multiple personal injury statutes of limitations. See, e.g., 12 Okla. Stat. § 95(3), § 95(4) & 95(6). In Oklahoma, the residual statute of limitations

for personal injury actions is § 95(3) and it provides a two-year limitations period. Frederick v. State of Oklahoma, No. 94-6275, 1994 WL 673048, *1 (10th Cir. Nov. 30, 1994). Under that limitations period, Plaintiff's § 1983 claims are time-barred. Plaintiff urges this Court to disregard the Supreme Court's instructions in Wilson and Owens and apply Oklahoma's five-year statute of limitations for official undertakings of sheriffs and other officers. See 12 Okla. Stat. § 95(5). The Court should decline Plaintiff's invitation to ignore Supreme Court precedent.

Under the third step of § 1988's analysis, the undersigned finds that Oklahoma's two-year residual statute of limitations for personal injury actions comports with all relevant federal interests. The Supreme Court has identified the two principal policies underlying § 1983 as the "compensation of persons injured by deprivation of federal rights and [the] prevention of abuses of power by those acting under color of state law." Robertson v. Wegmann, 436 U.S. 584, 591 (1978); Board of Regents v. Tomanio, 446 U.S. 478, 488 (1980). The Supreme Court has also articulated a strong federal interest in having clear, predictable, and easily applied standards for selecting civil rights statutes of limitations. See Owens, 488 U.S. at 235; and Wilson, 471 U.S. at 261. Thus, § 1988's "federal interest" test is applied to the selection of a limitations period generally, and not to the specific injury alleged in a civil rights complaint. Blake, 997 F.2d at 751. Plaintiff offers no reason why

Oklahoma's two-year statute of limitations is insufficient to accommodate § 1983's compensation and deterrence goals.^{2/}

The statute of limitations applicable to Plaintiff's § 1983 claims is 12 Okla. Stat. § 95(3)'s two-year limitations period for "injury to the rights of another." Plaintiff's § 1983 claims were filed more than two years after the relevant conduct detailed in Plaintiff's First and Second Amended Complaints. Plaintiff's § 1983 claims are, therefore, barred by the statute of limitations, unless the statute of limitations was tolled for some reason.

III. WAS THE TWO YEAR STATUTE OF LIMITATIONS IN 12 OKLA. STAT. § 95(3) TOLLED FOR ANY REASON?

The United States Supreme Court has held that in § 1983 actions, federal courts must apply the tolling principles of the state whose statute of limitations will be applied. Chardon v. Soto, 462 U.S. 650 (1983). The undersigned will, therefore, look to Oklahoma law to determine which, if any, tolling principles are applicable to this lawsuit.

^{2/} See McDougal v. County of Imperial, 942 F.2d 668, 673 (9th Cir.1991) (finding one-year statute of limitations sufficient to protect federal interests); Jones v. Preuit & Mauldin, 876 F.2d 1480, 1484 (11th Cir.1989) (same). See also Arnold v. Duchesne County, 810 F. Supp. 1239, 1244-45 (D. Utah 1993) (finding Utah's two-year statute of limitations consistent with federal interests of compensation and deterrence). Cf. Burnett, 468 U.S. at 61 (Rehnquist, J., concurring in the judgment) ("The willingness of Congress to impose a 1-year limitations period in 42 U.S.C. § 1986 demonstrates that at least a 1-year period is reasonable.").

A. THE DISCOVERY RULE AND FRAUDULENT CONCEALMENT

Plaintiff argues that the "discovery rule" is applicable in this case. As a general rule, mere ignorance about the existence of a cause of action or the facts constituting a cause of action will not toll the applicable statute of limitations. McVay v. Rollings Const., Inc., 820 P.2d 1331, 1332 (Okla. 1991); Moore v. Delivery Services, Inc., 618 P.2d 408, 409 (Okla. App. 1980). As a limited exception to this rule, Oklahoma has adopted the discovery rule for tort actions generally. "The discovery rule is applicable to situations where the injury is unknown at the time of the wrongful transaction." In re 1973 John Deere 4030 Tractor, 816 P.2d 1126, 1132 (Okla. 1991). As applied in Oklahoma, the discovery rule allows statutes of limitation "in tort cases to be tolled until the injured party knows or, in the exercise of reasonable diligence, should have known of the injury." RTC v. Grant, 901 P.2d 807, 813 (Okla. 1995). See also John Deere, 816 P.2d at 1132; and Reynolds v. Porter, 760 P.2d 816, 820 n.4 (Okla. 1988).

Plaintiff alleges that he was shot at least three times on April 13, 1994 and that his being shot was the result of excessive force used by several police officers. The undersigned finds it inconceivable that Plaintiff was not aware on April 13, 1994 that he had been injured/shot by the various officers named in Plaintiff's First Amended Complaint. Plaintiff was also aware on April 13, 1994 that he had been transported across state lines to Missouri without a hearing. Plaintiff was also aware by April 18, 1994 (i.e., the date he was released from the hospital) of the type of medical treatment he received in the hospital. Given these facts, the discovery rule is not

applicable to this case. Plaintiff knew or should have known at least by April 18th that he had suffered the injuries he alleges in his First Amended Complaint.

The undersigned's conclusion that Plaintiff was aware of his injuries more than two years prior to this suit being filed is confirmed by a review of pleading filed by Plaintiff in the United States District Court for the Western District of Missouri on September 14, 1994 (i.e., 27 months prior to this lawsuit). Plaintiff's Missouri lawsuit was substantially similar to this lawsuit. See Doc. No. 25. In his Missouri lawsuit, Plaintiff alleges that on April 13, 1994 he was shot in the back three times and transported across state lines without a prior extradition hearing. As in this case, Plaintiff alleged that the officers who shot him used excessive force in violation of the Eighth Amendment and that the transportation across state lines violated his right to due process under the Fourteenth Amendment.^{3/} These pleadings demonstrate unequivocally that Plaintiff had discovered more than two years prior to this lawsuit that he had been injured and that he had a potential cause of action for that injury.

Plaintiff also alleges that various unnamed defendants concealed information from him and that this concealment prevented him from timely filing his claim in the proper court. Without any elaboration or explanation, Plaintiff argues in his brief that the defendants' culpable conduct was concealed from him until he was brought back to Oklahoma on June 25, 1996 under the Interstate Agreement on Detainers Act. As discussed above, the undersigned simply does not accept Plaintiff's assertion that he

^{3/} Plaintiff's Missouri action was dismissed on January 9, 1995 as to the defendants in this case due to lack of venue and lack of personal jurisdiction. See Doc. No. 25.

was unaware prior to June 25, 1996 that between April 13th and April 18th of 1994 he had been shot, transported to Missouri, and treated at a hospital by the various defendants listed in his First Amended Complaint. Plaintiff simply fails to explain how these facts were concealed from him prior to his being transported back to Oklahoma 26 months after the shooting.

Once Plaintiff was returned to Oklahoma, a preliminary hearing was held in connection with criminal charges against Plaintiff arising out of the April 1994 chase in Oklahoma. Plaintiff alleges that at least one of the officers who shot Plaintiff (i.e., Mike Kelly) testified at this preliminary hearing. Plaintiff argues that it was not until he heard this testimony that he knew (1) that he had been shot with a high-powered, M-14, pistol-grip rifle; and (2) that he was transported to Missouri because the sheriff of Ottawa County, Oklahoma did not want to pay his medical expenses. Plaintiff argues again that these facts were concealed from him.

Plaintiff fails to demonstrate how his alleged ignorance of the type of weapon used to shoot him and his ignorance of the motivation behind his transfer to Missouri prevented him from filing a timely claim. Even if Plaintiff were ignorant of these facts, he was still aware that he was shot at close range on April 13, 1994 by various police officers in the back and in, as he alleges, broad daylight with his hands up and while he was unarmed. Knowledge of these facts alone is sufficient to cause an excessive-force-claim under the Eighth Amendment to accrue and begin the statute of limitations running. Plaintiff was also aware, or should have been, by April 18th (i.e., the day he was discharged from the hospital) whether any of the defendants had deprived him of

medical treatment for some serious medical need. Knowledge of these facts alone is sufficient to cause a denial-of-medical-care-claim under the Eighth Amendment to accrue and begin the statute of limitations running.

Under Oklahoma law, fraudulent concealment of facts which would indicate the existence of a cause of action will toll the statute of limitations until the injured party discovers the concealed facts. See Edwards v. Andrews, Davis, 650 P.2d 857 (Okla. 1982); Seitz v. Jones, 370 P.2d 300 (Okla. 1962); and Wills v. Black and West Architects, 344 P.2d 581 (Okla. 1959). To toll the statute of limitations because of fraudulent concealment, the injured party must demonstrate (1) that he could not have discovered the concealed facts with due diligence, and (2) that the other party used an actual artifice to conceal the facts, committed an affirmative act of concealment, or made material misrepresentations in an attempt to prevent suspicion. Wills, 344 P.2d at 584. As with any species of fraud, the injured party's complaint must also contain express allegations of fact detailing the fraudulent concealment. Edwards, 650 P.2d at 859.^{4/}

Plaintiff's First Amended Complaint does not contain allegations sufficient to raise genuine issues of fact regarding fraudulent concealment of any information by any of the defendants. Plaintiff does not allege that the defendants employed an actual artifice, committed an affirmative act of concealment or made material

^{4/} The Seitz case presents a classic case of fraudulent concealment. In that case, a doctor left a metal needle in Plaintiff. X-rays taken after the surgery showed the needle in Plaintiff. The doctor concealed the x-rays from Plaintiff and prevented her from discovering the needle inside her. Under such facts, the statute of limitations for Plaintiff's medical malpractice claim was tolled during the period of the doctor's concealment of the x-rays. See Seitz v. Jones, 370 P.2d 300 (Okla. 1962).

misrepresentations to him. Plaintiff also fails to allege how or why he could not, through due diligence, have discovered the information he alleges to have been concealed. The conclusory allegation in Plaintiff's briefing that certain information was concealed from him is simply insufficient to generate genuine factual issues regarding fraudulent concealment.

B. LEGAL DISABILITY -- 12 OKLA. STAT. § 96

In Oklahoma statutes of limitations are tolled with the following statutory language for those individuals suffering from a "legal disability:"

If a person entitled to bring an action other than for the recovery of real property, except for a penalty or forfeiture, be, at the time the cause of action accrued, under any legal disability, every such person shall be entitled to bring such action within one (1) year after such disability shall be removed

12 Okla. Stat. § 96. Plaintiff argues that the term "legal disability" in § 96 should be defined to include imprisonment.

No definition of "legal disability" is contained in the Oklahoma Statutes. The Oklahoma Supreme Court has, however, defined a legal disability for purposes of § 96 as any disability which prevents a person from being able to manage his own affairs or from comprehending his legal rights and liabilities. Section 96 has been applied by the Oklahoma courts to persons who are minors, insane, incompetent or comatose. See Roberts v. Stith, 383 P.2d 14, 17 (Okla. 1963); Robertson v. Robertson, 654 P.2d 600, 606 (Okla. 1982); Lovelace v. Keohane, 831 P.2d 624, 629 (Okla. 1992); and Walker v. Pacific Bush Trading Co., 536 F.2d 344, 346 (10th Cir. 1976). Plaintiff

has not alleged in any way that he suffers from a disability which prevents him from comprehending his legal rights. The pleadings filed by Plaintiff in this case and in his Missouri case amply demonstrate that Plaintiff is capable of comprehending his legal rights.

No Oklahoma court has ever held or implied that imprisonment qualifies as a legal disability under § 96. The only court to specifically address the issue was the United States District Court for the Western District of Oklahoma and that court held that imprisonment does not constitute a legal disability under § 96. See Battle v. Lawson, 352 F. Supp. 156 (W.D. Okla. 1972) (citing 54 C.J.S. Limitation of Actions § 241, p. 268). The undersigned agrees with the Court in Lawson. There is absolutely no indication that Oklahoma would interpret "legal disability" to include incarceration.

The undersigned also finds it significant that since 1942 the United States Supreme Court has vigorously protected the constitutional right of incarcerated persons to meaningful access to the courts. Over the past 55 years, the Supreme Court has struck down several limitations historically imposed by prison officials on the right of access to the courts.^{5/} Given the significant development of the constitutional right to access the courts, the undersigned is not convinced that a person's incarceration serves as a significant restriction on his ability to file a lawsuit to protect

^{5/} See Ex Parte Hull, 312 U.S. 546 (1941); Cochran v. Kansas, 316 U.S. 255 (1942); Johnson v. Avery, 393 U.S. 483 (1969); Procunier v. Martinez, 416 U.S. 396 (1974); Wolff v. McDonnell, 418 U.S. 539 (1974); and Bounds v. Smith, 430 U.S. 817 (1977).

his rights. There is, therefore, no reason to toll a statute of limitations as a result of a person's incarceration.

Plaintiff makes conclusory statements in his briefing that he has been denied access to the courts in the past. Plaintiff has not, however, included a claim for denial of access to the courts in his First Amended Complaint, and, even if he did, the facts of record would not support such a claim. Within five months of being shot, Plaintiff filed a lawsuit in Missouri substantially similar to this lawsuit. See Doc. No. 25. Within six months of being transferred to Oklahoma, Plaintiff filed this action at the same time he was defending himself *pro se* on the criminal charges brought by the State of Oklahoma in connection with the April 1994 chase. See Doc. Nos. 4, 8, 17, 18. Plaintiff admits that he gave the Complaint in this case to a jailer on December 18, 1996 and it was mailed out on December 24, 1996 and filed in this Court on December 30, 1996. See Doc. No. 4, ¶ 3. Plaintiff has also been granted access to use the law library at the Ottawa County Jail to prosecute this case. See Doc. No. 18. From these facts it is clear that Plaintiff has not been deprived of access to the courts. In any event, a denial of access to the courts is remedied through an action under 42 U.S.C. § 1983 and not by expanding § 96's definition of legal disability beyond that supported by Oklahoma law.

Plaintiff cites three cases in support of his argument that his incarceration should be viewed as a legal disability. See Hardin v. Straub, 490 U.S. 536 (1989) (applying a Michigan tolling statute); Bianchi v. Bellingham Police Dept., 909 F.2d 1316 (9th Cir. 1990) (applying a Washington tolling statute); and State v. Calhoun,

32 P. 38 (Kan. 1893) (applying a Kansas tolling statute). All of these cases were applying a legal disability statute very similar to Oklahoma's to toll a statute of limitations. Each of these cases held that incarceration was a legal disability. However, unlike in Oklahoma the statute at issue in each case specifically defined "legal disability" to include imprisonment. They do not, therefore, provide any support for the proposition that incarceration is a legal disability under Oklahoma law.^{6/}

C. FLIGHT OR ABSENCE -- 12 OKLA. STAT. § 98

Plaintiff argues that his absence from the state Oklahoma during his incarceration in Missouri tolls the applicable statute of limitations. Plaintiff points to 12 Okla. Stat. § 98, which provides as follows:

When a cause of action accrues against a person and that person is out of the state or has concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is concealed. If, after a cause of action accrues against a person and that person leaves the state or conceals himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought. Provided, however, that if any statute which extends the exercise of personal jurisdiction of courts over a person or corporation based upon service outside this state, or based upon substituted service upon an official of this or any other state or nation, or based upon service by publication permits the courts of this state to acquire personal jurisdiction over the person, the period of his

^{6/} It is interesting to note that after Calhoun was decided, the Kansas legislature amended its legal disability statute. See Kan. Stat. § 60-515. The Kansas statute still defines legal disability to include imprisonment. However, the amendment prevent the statute from applying to any prisoner who "has access to the court for purposes of bringing an action" Id.

absence or concealment shall be computed as part of the period within which the action must be brought.

Id.

Essentially, § 98 tolls the applicable statute of limitations while a defendant against whom a cause of action has accrued is not amenable to service of process, either in Oklahoma or some other state. Jarchow v. Eder, 433 P.2d 942 (Okla. 1967); Keller v. Crase, 768 P.2d 905 (Okla. 1989). Given Oklahoma's long-arm statute at 12 Okla. Stat. § 2004(E), permitting service outside the state of Oklahoma, and Oklahoma's substitute service statute at 12 Okla. Stat. § 2004(C)(4),^{7/} permitting service on foreign corporations by serving the Oklahoma Secretary of State, § 98 has limited effect.

Section 98 provides no support for Plaintiff's argument that the statute of limitations was tolled why he was absent from Oklahoma. Section 98 tolls the applicable statute of limitations only when a plaintiff, despite due diligence, is unable to serve a defendant who is absent from Oklahoma or who has concealed himself. Plaintiff has made no allegations and there are no facts in the record which support a finding that the Defendants in this case were absent from Oklahoma or that they in any way concealed themselves, preventing Plaintiff from serving them.

^{7/} Section 2004(C)(4) is a general substitute service statute for corporations. Oklahoma also has other specific substitute service statutes, which further restrict the applicability of § 98. See, e.g., 12 Okla. Stat. § 141 (permitting substitute service of defendants in a civil action to recover for damages resulting from the use or operation of a motor vehicle or watercraft).

In his briefing, Plaintiff makes the following non-sensible equal protection argument:

[I]t would be unconstitutional to deny the plaintiff equal protection if [§ 98] deprived the plaintiff who was forcible [sic] removed from [Oklahoma] by the defendant's [sic], protection of the statute of limitations[,] [w]hile allowing the defendant's [sic] who remained within the state benefit of limitation period.

Plaintiff's Brief, Doc. No. 21, p. 5. Plaintiff seems to be arguing that Defendants are protected by the statute of limitations while Plaintiff is not and that this distinction somehow violates the Fourteenth Amendment's equal protection clause. The undersigned is at a loss to understand what benefit the statute of limitations provides Plaintiff and how that benefit is being deprived by § 98.

With § 98, Oklahoma has struck a balance between allowing plaintiffs to pursue valid claims and sparing defendants from having to litigate stale claims. Section 98 allows statutes of limitation to run as to those defendants subject to service of process and prevents the statute of limitations from running as to those defendants not subject to service of process. Thus, the only classification made by § 98 is between persons subject to service of process and persons not subject to service of process. Because there is a rational relation between the legitimate objective sought to be achieved by § 98 and the classification drawn by § 98, the undersigned finds that § 98 in no way violates the Fourteenth Amendment's equal protection clause. See Romer v. Evans, --- U.S. ---, 116 S. Ct. 1620, 1628 (1996); Harris v. McRae, 448 U.S. 297, 326 (1980); United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 533 (1973) (all holding

that where, as here, the statute neither invades a substantive constitutional right nor operates to the detriment of a suspect class, the equal protection clause only requires that the classification drawn by the statute be rationally related to a legitimate state interest).

D. FILING IN WRONG COURT

As discussed above, Plaintiff filed a lawsuit substantially similar to this lawsuit in the United States District Court for the Western District of Missouri on September 14, 1994. Plaintiff's Missouri action was dismissed on January 9, 1995 as to the defendants in this case due to lack of venue and lack of personal jurisdiction. See Doc. No. 25. Plaintiff argues that by filing in Missouri as to the defendants in this case, he simply filed in the wrong court and that the applicable statute of limitations should be tolled during the pendency of the Missouri action.

Plaintiff's argument is without merit. However, even if Plaintiff's "wrong court" tolling principle were applied to this case, his § 1983 claims would still be barred by 12 Okla. Stat. § 95(3)'s two-year statute of limitations. As discussed above, the relevant conduct for purposes of Plaintiff's claims occurred on or before April 18, 1994. This lawsuit was filed approximately 32½ months later on December 30, 1996. Plaintiff's Missouri lawsuit against the defendants in this case was only pending for approximately 4 months (i.e., from September 14, 1994 to January 9, 1995). Even if the 4 months is excluded from the limitations period, Plaintiff's claims still accrued 28½ months (i.e., more than two years) before this lawsuit was filed.

Thus, even applying Plaintiff's "wrong court" tolling principle, Plaintiff's claims are not timely.

Plaintiff cites no authority from Oklahoma which would support his general "wrong court" tolling principle. Oklahoma addresses the "wrong court" problem by allowing an action to be refiled, without statute of limitations problems, within one year of a dismissal if the dismissal was "otherwise than upon the merits." 12 Okla. Stat. § 100.^{8/} Plaintiff's Missouri action was dismissed on January 5, 1995. This action was filed more than one year later on December 30, 1996. Section 100 is, therefore, not applicable to this case.

E. RELATION BACK -- FED. R. CIV. P. 15(c)

Plaintiff argues that the Complaint he filed to initiate this lawsuit should relate back, pursuant to Fed. R. Civ. P. 15(c), to the date he filed the Complaint in the Missouri action. By its title and its express terms, Rule 15 deals only with the amendment of pleadings within the same litigation. The Complaint which initiated this case was a new and independent pleading, it was not an amendment to a pleading filed in the Missouri case. There is nothing for the original Complaint in this case to relate back to. Rule 15 simply does not operate the way in which Plaintiff argues that it should. That is, Rule 15 does not permit pleadings in one case to relate back to pleadings filed in other cases in other districts.

^{8/} The cases cited by Plaintiff simply apply New York's version of 12 Okla. Stat. § 100. See Delgado v. New York City Dept. of Corrections, 797 F. Supp. 327 (S.D.N.Y. 1992); and Town of Colonie v. Cahill, 567 N.Y.S.2d 956 (3d Dept. 1989).

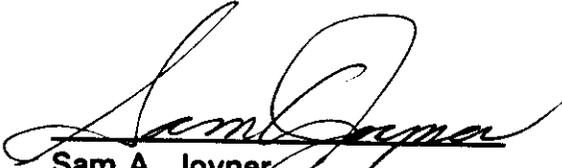
CONCLUSION

Oklahoma law supplies the statute of limitations for Plaintiff's claims under 42 U.S.C. § 1983. The applicable Oklahoma statute of limitations is 12 Okla. Stat. § 95(3), which provides a two-year limitations period. Plaintiff's Complaint was filed more than two years after the claims in his Complaint accrued and no provision of Oklahoma law operates to toll the limitations period. Thus, Plaintiff's claims are untimely. Consequently, the undersigned recommends that Mike Kelly's motions to dismiss (doc. nos. 10 & 23) be **GRANTED** and that this case be **DISMISSED WITH PREJUDICE** as to all Defendants.

OBJECTIONS

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 16 day of September 1997.


Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

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

16th Day of September, 1997.
C. Pustulley, Deputy Clerk.

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

F I L E D

SEP 16 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES L. TRIPLETT,)
)
)
Plaintiff,)
)
)
v.)
)
)
JOHN J. CALLAHAN,)
Commissioner of Social Security,¹)
)
Defendant.)

Case No: 96-C-338-W

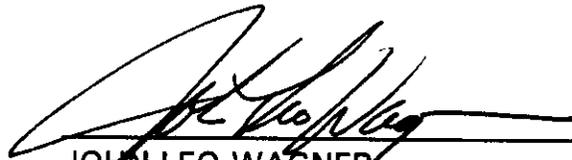
ENTERED ON DOCKET

DATE SEP 18 1997

JUDGMENT

Judgment is entered in favor of the Defendant, John J. Callahan, Commissioner of Social Security, in accordance with this court's Order filed September 16, 1997.

Dated this 16th day of September, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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

(15)

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

JAMES L. TRIPLETT,

Plaintiff,

v.

JOHN J. CALLAHAN,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

Case No. 96-C-338-E(W)

F I L E D

SEP 16 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE SEP 18 1997

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Commissioner of Health and Human Services ("Commissioner") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge R.J. Payne (the "ALJ"), which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence

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

in the record to support the final decision of the Commissioner that claimant is not disabled within the meaning of the Social Security Act.²

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform the physical exertional and nonexertional requirements of work, except for more than the occasional lifting of up to 20 pounds, more than the frequent lifting or carrying of up to 10 pounds, performing prolonged walking, standing, and sitting, and being exposed to pollutants, irritants, unprotected heights, dangerous moving

²Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Commissioner's decisions. The Commissioner's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Commissioner's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

³The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

machinery, and operation of motorized vehicles. He concluded that the claimant was unable to perform his past relevant work as a custodian and truck driver. The ALJ found that the claimant was 48 years old, which is defined as a younger individual, had a GED high school education, and did not have any acquired work skills that are readily transferable to the skilled or semiskilled work activities of other work. The ALJ found that, although claimant's additional exertional and nonexertional limitations did not allow him to perform the full range of light work, there were a significant number of jobs in the national economy that he could perform, such as unskilled light office helper, assembly, cashier, unskilled sedentary assembly, and order clerk. Having determined that there were a significant number of jobs in the national economy that claimant could perform, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

- (1) The ALJ failed to properly consider the limiting effects of claimant's cardiac impairment and related anginal attacks and fatigue as discussed by examining and treating physicians.
- (2) The ALJ failed to properly consider claimant's mental impairments of anxiety and depression and to develop the record on this issue, which was discussed by a physician who prescribed Prozac.
- (3) The ALJ erred in failing to pose hypothetical questions to the vocational expert which included the cardiac and mental impairments.

It is well settled that the claimant bears the burden of proving disability that prevents any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant alleges that he has been unable to work since September 19, 1991 due to heart problems, bulging discs and arthritis in his back, and a "chemical exposure problem." (TR 71). He suffered a heart attack in November of 1989 and underwent a catheterization and angioplasty (TR 264-270). He underwent a second angioplasty in April of 1990 (TR 274-279). A third angioplasty was done in August of 1990 (TR 96, 233-239). On September 24, 1990, he had an unremarkable exercise test (TR 117).

On October 17, 1990, claimant's doctor, Dr. Dwight Korgan, reported that he was seen to check on "fits of anger." (TR 218). Claimant told the doctor he had not gotten a transfer and a job promotion because he had been ill (TR 218). He said that he didn't want to change jobs because of insurance coverage (TR 218). He admitted that he was smoking at least a pack a day (TR 218). The doctor found he was having some depression with secondary anger and prescribed Prozac (TR 218). On November 7, 1990, he reported that his depression had gotten "a little bit better" with the Prozac and he did "fairly well at work" but had no energy in the evenings (TR 217).

On January 2, 1991, claimant told Dr. Korgan he had stopped taking Prozac because he ran out, but it helped him "get along better at work." (TR 216). He was still smoking and suffering angina (TR 216). On April 12, 1991, he reported that he only took Prozac once a day and his anxiety and depression was improved slightly overall (TR 213). On June 3, 1991, he complained of breathing problems and was told his smoking was killing him (TR 212). By July 5, 1991, he was recovered and

complained of a thumb injury sustained playing softball (TR 210). On September 19, 1991, he suffered a lumbar strain lifting a patient at work (TR 208). The back pain had lessened 50% by October 16, 1991 (TR 206).

However, on November 7, 1991, Dr. Jimmy Martin examined him for workers' compensation purposes and concluded that he had sustained a sensory nerve injury in his lower back and had evidence "of at least a severe bulging or herniated disk in his low back" and was therefore 100% temporarily totally disabled from September 19, 1991 for an indefinite time period (TR 255). He re-injured his back on November 13, 1991 attempting to accost a man who had raped his daughter, and Dr. Korgan noted that a CT scan showed he had bulging discs at L3-4 and 4-5 (TR 204).

On April 6, 1992, Dr. Korgan wrote a letter to claimant's employer advising that he needed to do a different type of work because of his lumbar spasms and pain (TR 199). On May 12, 1992, Dr. Martin found that he had a permanent partial impairment of 35% to the whole person as a result of his back injury for workers' compensation purposes (TR 256-257). Dr. Martin stated that he should "undergo vocational rehabilitation in order to learn a more sedentary type of employment." (TR 257). On July 1, 1992, Dr. Korgan reported that claimant had "improved some," but he could not do his previous job, although there were "more things that he can do w[ith] the back improving." (TR 197).

On August 3, 1992, claimant told the doctor his back was "ok", and Dr. Framjee had examined him and found no evidence of lumbar problems (TR 196). The

doctor concluded that he was "completely well from the chronic strain" and wrote a note allowing him to go back to work with back precautions (TR 196).

On January 26, 1993, claimant reported that he had been suffering from the flu and back pain (TR 194). Claimant said he had gotten a rowing machine, and Dr. Korgan encouraged him to exercise and stated that he could work and lift 25 pounds (TR 194). On April 21, 1993, claimant told the doctor he had started a snack machine route and was "able to do that ok" and had finally quit smoking for two months (TR 193). The doctor filled out a form stating that he could do light work and had been able to do it since August 3, 1992 (TR 193).

On June 10, 1993, claimant was admitted to the hospital with chest pain (TR 124-126). After treatment he was released "feeling great" and told to stop smoking (TR 127). On June 14, 1993, Dr. Richard Hastings examined claimant for workers' compensation purposes (TR 169-173). The doctor reported that he had a regular heart rate and rhythm, no venous distention or edema, good pulses, no wheezing, and a normal gait (TR 171-172). The doctor found that claimant was "in New York Heart Association Class III/IV," as far as physical activity and related symptoms were concerned (TR 172). The doctor concluded that claimant was 60% permanently totally disabled for workers' compensation purposes (TR 173).

On June 22, 1993, the doctor stated that he was "doing well on the Cardizem alone." (TR 192). On July 4, 1993, claimant told the doctor he was mowing his lawn and strained his back (TR 191). He reported that he had gone off his Prozac and Zantac (TR 191).

On November 11, 1993, Dr. Hastings did a second evaluation and found that claimant was totally disabled due to his myocardial infarction, pulmonary hypersensitivity pneumonitis, and mild anxiety and depression (TR 164). By December 8, 1993, he reported that he had gone pheasant hunting in a field and had suffered breathing problems (TR 190). An EKG was unchanged from three years earlier (TR 190). He told a Social Security administrator on January 7, 1994 that he had no plans or appointment to see a doctor in the future (TR 87).

On January 21, 1994, Dr. Beau Jennings did a consultative examination of claimant and found that he had a regular heart rate and rhythm without a murmur, he had equal deep tendon reflexes, good peripheral pulses, and negative straight leg raising, the range of motion of his upper and lower extremities was normal, and none of his joints were swollen, red, or deformed (TR 176). His lung fields were clear (TR 176). The doctor concluded that he was status post myocardial infarction and had chronic low back pain and occasional shortness of breath (TR 175-177).

There are no medical records until April 20, 1995, when claimant was hospitalized for chest pain (TR 280-380). X-rays showed no change in the heart and lungs (TR 312). A repeat cardiac catheterization was performed, and no large branch closure was revealed (TR 345). No angioplasty was required (TR 345-355). Claimant was told to continue his medications and stop smoking (TR 346).

Claimant was seen by Dr. Korgan on May 1, 1995. He reported he was "off cigarettes." (TR 388). The doctor stated the April catheterization "did not show anything significant . . . he, indeed, had fairly good flow." (TR 388). The doctor

stated: "[h]is angina is stable and clinically he's fine I'm still not entirely sure part of it was GI [gastrointestinal]" (TR 388). The doctor "encouraged him to find an occupation where he could be useful" (TR 388).

Dr. Korgan completed a residual functional capacity evaluation and found that claimant could sit five hours and three to four hours continuously in an eight-hour workday, lift and carry up to ten pounds frequently and eleven to twenty pounds occasionally, bend, squat, climb, stoop and crouch only occasionally, and never be exposed to unprotected heights and only occasionally drive automotive equipment and be exposed to dust and fumes (TR 391-392). He concluded that claimant's pain was moderate and he would need to rest at work or miss work due to pain as needed (TR 392). He found that claimant would be a reliable employee "in that he would be available when his pain was not too severe to work" (TR 392).

At a hearing on September 22, 1994, claimant testified that an average day consisted of his getting up between 2 and 3 a.m., drinking coffee, reading for an hour, laying down on the couch, seeing his wife off to work, and laying down and watching television until 10:30 or 11:00 p.m. (TR 400). He stated he could walk four blocks before he experienced pain in the hips and lower back (TR 402). He was able to stand in one position for fifteen minutes and sit one to two hours (TR 403). On better days, he guessed he could lift or carry ten to twenty pounds frequently (TR 403). Although he experienced arm and hand pain and numbness, it occurred only once every two months (TR 404). He said he experienced chest tightness and shortness of breath from odors of laundry soap, perfumes, deodorizers, and cleaning

fluids and dizziness lasting approximately two minutes three or four times a week (TR 404-405). He admitted that he smoked one and a half packs of cigarettes a day (TR 405).

There is no merit to claimant's contentions. The ALJ did not fail to consider the limiting effects of claimant's cardiac impairment and related anginal attacks and fatigue as discussed by examining and treating physicians. He noted that claimant had alleged "severe disabling pain, weakness, dyspnea, shortness of breath, dizziness, fatigue, loss of memory, sleep disturbance, chest pain, cramps, and shakiness to the extent that he cannot engage in any work activities." (TR 23). The ALJ stated that in making the determination that claimant had a residual functional capacity for light work, his subjective complaints were given full consideration (TR 23). The ALJ stated that he followed Social Security regulations to evaluate claimant's symptoms, including pain, and the criteria set out in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). The court in Luna discussed the factors in addition to medical test results that agency decision makers should consider when judging the credibility of subjective claims of pain greater than that usually associated with a particular impairment.

[W]e have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems . . . [and] the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive.

See also, Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991).

The ALJ discussed claimant's testimony at the hearing, and then concluded:

If claimant were in the constant and disabling painful breathless condition as alleged, it is reasonable to assume claimant would exhaust every means possible to obtain relief of those symptoms to include ceasing smoking as persistently recommended by claimant's treating physicians. Although claimant alleged he did not have money for his pain and heart medications, he apparently had money for cigarettes. There are also public facilities available to those who do not have insurance or who are unable to pay for medical care. He further stated that, on a bad day, his pain was a 10 on a scale of 1 to 10 where 10 is severe and intractable pain. However, he said he treated his 10 level pain by laying down, putting heat on the area, and taking pain pills. With a true level 10 pain, the undersigned questions whether claimant could lay down for the time it takes to apply heat. Moreover, watching television for 12 hours a day requires significant attention and concentration which is inconsistent with severe pain.

The record does not show lifting up to 20 pounds occasionally would precipitate or aggravate claimant's condition. Medication and therapy have been effective in alleviating some of claimant's symptoms, and the record does not show significant side effects from his medication regimen. Although claimant takes medication for relief of his symptoms, those medications do not preclude claimant from functioning at his residual functional capacity and claimant would remain reasonably alert to perform required functions in the work setting. The claimant is afflicted with symptoms from a variety of sources, to include mild to moderate, chronic pain, which are sufficiently severe as to be noticeable to him at all times; but that nonetheless claimant would be able to remain attentive and responsive in a work setting, and could carry out normal work assignments satisfactorily.

(TR 24).

The ALJ noted that claimant had been given disability ratings for workers' compensation benefits purposes, but that definitions of disability are not the same in all government and private disability programs (TR 25). He stated that a finding by a private organization that a person is disabled does not mean that the person meets the disability requirements of the Social Security Act (TR 25). Thus, he gave little

weight to claimant receiving disability payments under workers' compensation (TR 25).

The ALJ found that the opinion of Dr. Martin, who examined claimant twice for workers' compensation injuries, that claimant should learn a more sedentary type of employment than his custodial work was not necessarily inconsistent with a residual functional capacity for a wide range of light work since claimant testified that his custodial work required lifting at least 30 pounds, which is consistent with medium work (TR 25). The ALJ concluded that, with a sit/stand option, claimant's residual functional capacity was "more sedentary" because prolonged walking and standing is not required (TR 25). He found that the record did not reflect functional restrictions by claimant's treating physicians that would preclude a wide range of light work activity (TR 25).

There is substantial evidence to support the ALJ's finding that the testimony of claimant was unconvincing, not substantiated by objective medical findings, and credible only to the extent consistent with a residual functional capacity for a wide range of light work activity (TR 25). On April 6, 1992, August 3, 1992, January 26, 1993, April 21, 1993, and May 1, 1995, Dr. Korgan stated that he could work (TR 193, 194, 196, 199, 388). On May 12, 1992, Dr. Martin found that he could do sedentary work (TR 257). On August 3, 1992, Dr. Framjee concluded that he could go to work with back precautions (TR 196). In July of 1991, he was playing softball, in January of 1993 he was using a rowing machine, in July of 1993 he was mowing his lawn, and in December of 1993 he was going pheasant hunting (TR 190, 191,

194, 210). On April 21, 1993, he told the doctor he had started a snack machine route (TR 193). An April, 1995 catheterization showed no blood flow problems to his heart (TR 345, 388).

There is also no merit to claimant's second contention that the ALJ failed to properly consider claimant's mental impairments of anxiety and depression and to develop the record on this issue, which was discussed by a physician who prescribed Prozac. It is true that the ALJ has a duty to develop a record where there is evidence of a disabling condition. Carter v. Chater, 73 F.3d 1019, 1021-22 (10th Cir. 1996). This is true even where the claimant is represented by counsel. Baca v. Dept. of Health & Human Servs., 5 F.3d 476, 479-80 (10th Cir. 1993). However, the ALJ is only required to order a consultative examination where medical evidence is inconclusive, and there is the presence of some objective evidence in the record suggesting the existence of a condition which could have a material impact on the disability decision requiring further investigation. Hawkins v. Chater, No. 96-5110, slip op. at 12 (10th Cir. filed May 13, 1997).

Specifically, the claimant has the burden to make sure there is, in the record, evidence sufficient to suggest a reasonable possibility that a severe impairment exists. When the claimant has satisfied his or her burden in that regard, it then, and only then, becomes the responsibility of the ALJ to order a consultative examination if such an examination is necessary or helpful to resolve the issue of impairment.

Id.

Claimant's physician, who was not a mental health professional, prescribed Prozac for claimant's pain-related anxiety and depression during 1990 and 1991,

when he was still working. The record shows that the medication adequately controlled the condition and led to no adverse side effects. Claimant was not referred for psychological evaluation or treatment. His doctor did not find that the depression restricted his activities in any way. An impairment that can be reasonably controlled with treatment cannot provide a basis for an award of Social Security disability benefits. Pacheco v. Sullivan, 931 F.2d 695, 698 (10th Cir. 1991).

Furthermore, neither claimant nor his attorney brought to the ALJ's attention during the hearing that he suffers from mental problems. In fact, when asked if he was currently receiving treatment for any emotional or mental conditions, claimant replied: "[n]o, sir." (TR 405). The court holds that the few references to anxiety and depression on which claimant relies, several of which were dated before the onset of his alleged disability, are insufficient to suggest a reasonable possibility that a severe impairment exists which would trigger a duty to further develop the record regarding a disabling mental impairment.

Finally, there is no merit to claimant's contention that the ALJ erred in failing to pose hypothetical questions to the vocational expert which included the cardiac and mental impairments. 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, 945 F.2d at 1492 (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). However, in forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Evans v.

Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990).

Initially, the ALJ established that the vocational expert had reviewed the record in the case and been present during claimant's testimony (TR 421). The ALJ's hypothetical question assumed that claimant could do sedentary and light work, with only occasional stooping, twisting or bending, in an environment that was free of fumes, smoke, and chemicals (TR 422). Claimant's representative at the hearing was only able to elicit favorable testimony from the vocational expert by asking the expert to assume impairments that the ALJ properly deemed unsubstantiated (TR 426-427). These opinions, based on unsubstantiated assumptions, were not binding on the ALJ. Gay v. Sullivan, 986 F.2d 1336, 1341 (10th Cir. 1993).

There is substantial evidence to support the ALJ's conclusion that claimant has a residual functional capacity for a wide range of light work which is incompatible with the demands of his past relevant work, but would allow him to perform a significant number of other jobs, considering his age, education, and previous work experience (TR 22). There is substantial evidence to support his findings that claimant's back, heart, finger, and respiratory impairments would reasonably prevent the lifting of more than twenty pounds and the prolonged walking and standing required of medium and heavier physical work, but not the lifting of up to twenty pounds occasionally and the occasional stooping or bending of light work.

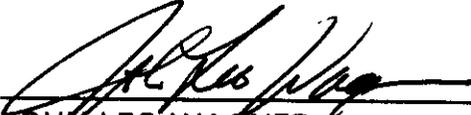
There is substantial evidence to support a conclusion that claimant's allegations of disabling cardiac pain were not credible. It has been recognized that "some

claimants exaggerate symptoms for purposes of obtaining government benefits, and deference to the fact-finder's assessment of credibility is the general rule." Frey v. Bowen, 816 F.2d 508, 517 (10th Cir. 1987). Credibility determinations are generally binding upon review. Gossett v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988).

The court also notes that claimant's doctors have told him time and again to quit smoking or it will kill him. He has failed to follow the doctor's advice. The failure to follow prescribed treatment is a consideration in evaluating the validity of an alleged impairment. Decker v. Chater, 86 F.3d 953, 955 (10th Cir. 1996); Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 777 (10th Cir. 1990).

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 16th day of September, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:\ORDERS\TRIPLETT.WPD

DATE 9-18-97

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
on behalf of the Secretary of Veterans Affairs,)
)
Plaintiff,)
)
v.)
)
FRANK ALLEN BISHOP, a single person;)
COUNTY TREASURER, Osage County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Osage County, Oklahoma,)
)
Defendants.)

F I L E D

SEP 17 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 96-CV-1194-K ✓

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 17th day of September, 1997, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on July 15, 1997, pursuant to an Order of Sale dated April 3, 1997, of the following described property located in Osage County, Oklahoma:

Lot Ten (10), Block Two (2), SKYLINE RIDGE ADDITION, Block 1 to 10 inclusive, an Addition to Tulsa, Osage County, State of Oklahoma, according to the Recorded Plat thereof.

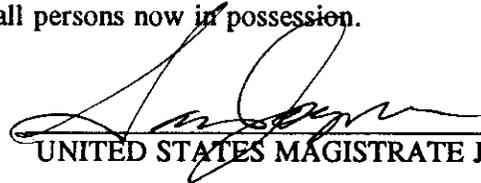
Appearing for the United States of America is Phil Pinnell, Assistant United States Attorney. Notice was given the Defendants, Frank Allen Bishop, a single person; and County Treasurer, Osage County, Oklahoma and Board of County Commissioners, Osage County, Oklahoma, through John S. Boggs, Assistant District Attorney, Osage County, Oklahoma, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge

finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Pawhuska Journal-Capital, a newspaper published and of general circulation in Osage County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Veterans Affairs, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Veterans Affairs, a good and sufficient deed for the property.

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

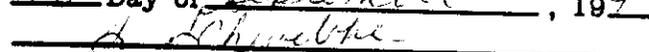

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney


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

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 18 Day of September, 1997.


Report and Recommendation of United States Magistrate Judge
Case No. 96-CV-1194-K (Bishop)

PP:cas

DATE 9-18-97

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

TERRY L. WALLACE,)
)
 Plaintiff,)
)
 vs.) Case No.97 CV 0101K ✓
)
 CITY OF TULSA, OKLAHOMA,)
 a municipality of the State of)
 Oklahoma.)
)
 Defendant.)

F I L E D

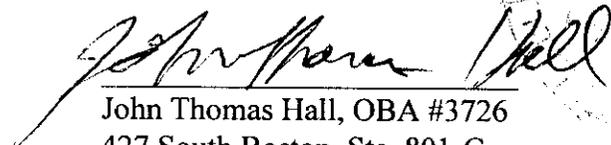
SEP 17 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DISMISSAL AS TO JAMES B. MURRAY

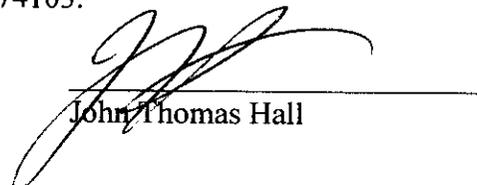
Plaintiff Terry L. Wallace dismisses without prejudice defendant James B. Murray.

Respectively submitted,


 John Thomas Hall, OBA #3726
 427 South Boston, Ste. 801-G
 Tulsa, OK 74103
 (918) 749-5201

CERTIFICATE OF SERVICE

I certify that on the same date this Dismissal was filed in the United States District Court for the Northern District of Oklahoma that a true and correct copy of said Dismissal was served upon the above-named Plaintiff by mailing said copies to Defendant's attorney of record: Paul F. Prather, Assistant City Attorney, 200 Civic Center, Tulsa, OK 74103.


 John Thomas Hall

ENTERED ON DOCKET
DATE 9-18-97

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
on behalf of Rural Housing Service,)
formerly Farmers Home Administration,)
Plaintiff,)

v.)

LONNIE KELLY;)
STATE OF OKLAHOMA ex rel.)
Oklahoma Tax Commission;)
SEARS, ROEBUCK AND COMPANY;)
COUNTY TREASURER, Ottawa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Ottawa County, Oklahoma,)
Defendants.)

FILED

SEP 17 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 96-CV-799-K

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 17th day of September, 1997, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on July 16, 1997, pursuant to an Order of Sale dated March 14, 1997, of the following described property located in Ottawa County, Oklahoma:

Lot 9 in Block 9 in MIDWAY VILLAGE ADDITION, PLAT NO. 3, to the Town of North Miami, now Commerce, Ottawa County, Oklahoma, according to the recorded plat thereof. Subject, however, to any valid outstanding easements, rights-of-way, mineral leases, mineral reservations, and mineral conveyances of record.

Appearing for the United States of America is Peter Bernhardt, Assistant United States Attorney. Notice was given the Defendants, Lonnie Kelly; State of Oklahoma ex rel. Oklahoma Tax Commission through Kim D. Ashley, Assistant General Counsel; Sears,

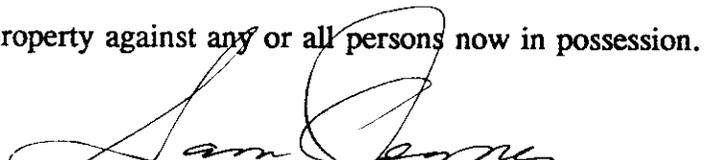
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Roebuck and Company through its attorney J. Michael Morgan; County Treasurer, Ottawa County, Oklahoma and Board of County Commissioners, Ottawa County, Oklahoma, through Ben Loring, District Attorney, Ottawa County, Oklahoma; and Purchaser, Susan L. Rhodes, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Miami News-Record, a newspaper published and of general circulation in Ottawa County, Oklahoma, and that on the day fixed in the notice the property was sold to Susan L. Rhodes, 224 East Steve Owens Boulevard, Miami, Oklahoma 74354, she being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

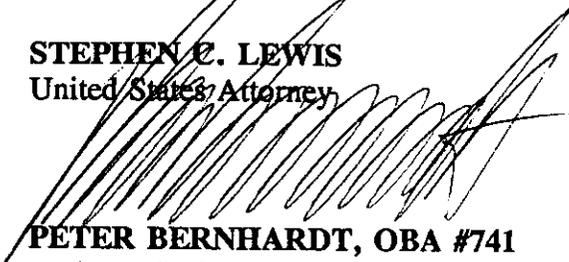
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, Susan L. Rhodes, 224 East Steve Owens Boulevard, Miami, Oklahoma 74354, a good and sufficient deed for the property.

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


UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

Report and Recommendation of United States Magistrate Judge
Case No. 96-CV-799-K (Kelly)

PB:cas

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
_____ Day of _____, 19__.

CERTIFICATE OF SERVICE

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
18 Day of September, 1997.

ENTERED ON DOCKET
DATE 9-18-97

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DEAN WITTER REYNOLDS, INC.,)
)
 Plaintiff,)
 v.)
)
 WILBERT H. MAXIMORE, Individually)
 and as Trustee of the ELZABAD TRUST,)
 an express trust; the ELZABAD TRUST,)
 an express trust; and the UNITED STATES)
 OF AMERICA,)
)
 Defendants,)
)
 UNITED STATES OF AMERICA,)
)
 Cross Claim-Plaintiff,)
 v.)
)
 WILBERT H. MAXIMORE,)
 Individually and as Trustee of the)
 ELZABAD TRUST;)
 the ELZABAD TRUST, and)
 MIDLAND MORTGAGE COMPANY,)
)
 Defendants On Cross Claim)

FILED
IN OPEN COURT

SEP 17 1997

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

CIVIL ACTION NO. 96-CV-847-K ✓

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 17th day of September, 1997, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on July 14, 1997, pursuant to a Judgment of Foreclosure and Order of Sale dated February 24, 1997, of the following described property located in Tulsa County, Oklahoma:

Lot Twenty (20), Block Three (3), Kendalwood IV, an Addition to the City of Glenpool, Tulsa County, Oklahoma, according to the recorded plat thereof, and also referred to or described as 1097 East 137th Place, Glenpool, Oklahoma 74033.

JB

Appearing for the United States of America is Phil Pinnell, Assistant United States Attorney. Notice was given the Plaintiff, Dean Witter Reynolds, Inc. through its attorneys Charles E. Geister, III, and Phillip G. Whaley; Defendant and Defendant On Cross Claim, Wilbert H. Maximore, Individually and as Trustee of the Elzabad Trust; Defendant and Defendant On Cross Claim, Elzabad Trust, c/o Wilbert H. Maximore; Defendant On Cross Claim, Midland Mortgage Company, through its attorney Ronald L. Ripley; Purchaser, Bahnmaier Enterprises, Inc. and Gene Fulbright Construction, by mail. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Glenpool Post, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to Bahnmaier Enterprises, Inc. and Gene Fulbright Construction, P.O. Box 842, Glenpool, Oklahoma 74033, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, Bahnmaier Enterprises, Inc. and Gene Fulbright Construction, P.O. Box 842, Glenpool, Oklahoma 74033, a good and sufficient deed for the property.

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


UNITED STATES MAGISTRATE JUDGE

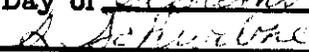
APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



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

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 18 Day of September, 1997.


Report and Recommendation of United States Magistrate Judge
Case No. 96-CV-847-K (Maximore)

FP:cas

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

F I L E D
SEP 10 1997

U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ELMO COLE, JR.

Plaintiff,

vs.

CARL SLOAN, BOB GREEN, and RICK
STEPHENS

Defendants.

Case No. 96-CV-1189-K

ENTERED ON DOCKET

DATE 9-17-97

ORDER

Defendants' MOTION TO DISMISS [Dkt. 8] has been referred to the undersigned United States Magistrate Judge for report and recommendation.

Plaintiff proceeding pro se brings this civil rights action pursuant to 42 U.S.C. § 1983. According to the complaint filed December 27, 1996, Plaintiff was arrested in Tulsa County with an invalid warrant and without probable cause. Plaintiff claims that Defendants intentionally went beyond the scope of a Mayes County warrant to arrest him outside that jurisdiction in Tulsa County without the assistance of Tulsa County authorities. He alleges these actions violate the 4th and 14th Amendments to the United States Constitution and 18 U.S.C. § 1503. Plaintiff seeks actual and punitive damages of \$3 million.

Defendants seek dismissal of this action pursuant to Fed.R.Civ.P. 12(b)(6) for "failure to state a claim upon which relief can be granted." They claim Plaintiff's action is barred by the applicable statute of limitations. Defendants allege that Plaintiff's claims for events which occurred on July 25, 1994, were brought more than two years after the alleged actions, and therefore are barred by the statute of

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limitations. Plaintiff does not dispute that the events in question took place on July 25, 1994.

In *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 2372, 129 L.Ed.2d 383 (1994), the Supreme Court ruled that when a state prisoner seeks damages in a § 1983 civil rights suit, and the district court determines that a judgment in favor of the Plaintiff would imply the invalidity of his conviction or imprisonment, the complaint must be dismissed unless the Plaintiff can demonstrate that the conviction or sentence has already been invalidated. A § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence *does not accrue* until the conviction or sentence has been invalidated. *Id.* 114 S.Ct. at 2374. The *Heck* Court instructed that when a state prisoner seeks damages in a §1983 suit:

the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.

Id., 114 S.Ct. at 2372.

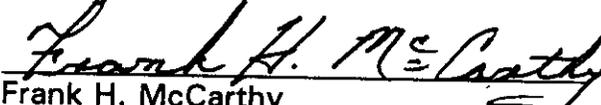
If Plaintiff's conviction flowed from the allegedly illegal arrest, *Heck v. Humphrey* may supply the rule of decision for this case. However, the parties did not address *Heck* in their briefs. Accordingly, the Court has no information about the following matters which are relevant to the application of *Heck* and the resolution of Defendants' motion: whether Plaintiff was convicted as a result of the allegedly illegal arrest; and if so, whether that conviction has been invalidated. In accordance with Fed.R.Civ.P. 12(b), the court will treat Defendants' motion as one for summary

judgment under Fed. R. Civ. P. 56, and shall give all parties "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." See Fed. R. Civ. P. 12(b). See also *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991).

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Defendants' motion to dismiss [Dkt. 8] is treated as one for summary judgment under Rule 56;
- (2) Defendants shall have until **October 1, 1997** in which to file a brief supplementing their motion pursuant to Rule 56 and addressing the applicability of *Heck v. Humphrey* to this case;
- (3) Plaintiff shall have until **October 17, 1997** in which to respond to Defendants' supplement pursuant to Rule 56 and to address the applicability of *Heck v. Humphrey*. Plaintiff is advised of his right to file counter-affidavits or other responsive material and is alerted to the fact that his failure to so respond might result in the entry of summary judgment against him. See *Hall*, 935 F.2d at 1111.

SO ORDERED this 16th day of September, 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

SEP 16 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SUE TYLER, by and through her Personal)
Representative DON TYLER, and SABRINA)
TYLER, by and through her Guardians ad Litem)
BRETT and LOYDELL MILLER,)

Plaintiffs,)

vs.)

STERLING DRUG, INC.,)

Defendant.)

Case No. 96-CV-531-C(J) ✓

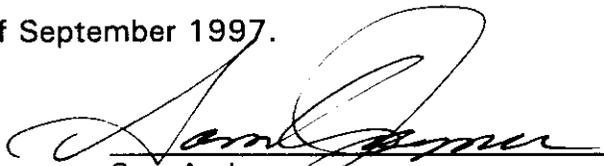
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DATE SEP 17 1997

ORDER

On July 23, 1997, the Court heard argument on Defendants' Motions to Compel [Doc. Nos. 56-1, 56-2]. Due to Plaintiffs' failure to provide appropriate expert reports to Defendant, the Court finds, pursuant to Fed. R. Civ. P. 37(a)(4)(A), that attorneys fees should be awarded. The Court has reviewed the application and supplement filed by Defendant and the objections filed by Plaintiffs. Pursuant to Fed. R. Civ. P. 37(a)(4)(A) the Court finds that a reasonable fee is \$1,050.00. The Court is not finding that the additional time expended by Defendant is improper. However, considering all factors, Plaintiff should only be required to pay \$1,050.00. Plaintiffs should pay this amount to Defendant within 30 days of the date of this Order.

SO ORDERED this 16 day of September 1997.



Sam A. Joyner
United States Magistrate Judge

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ENTERED ON DOCKET
DATE 9-17-97

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

F I L E D

SEP 16 1997 *110*

UNITED STATES OF AMERICA,)
)
vs.)
)
LESLIE C. HIGGINS,)
)
Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 97CV555 K (W)

AGREED JUDGMENT AND ORDER OF PAYMENT

Plaintiff, the United States of America, having filed its Complaint herein, and the defendant, having consented to the making and entry of this Judgment without trial, hereby agree as follows:

1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.

2. The defendant hereby acknowledges and accepts service of the Complaint filed herein.

3. The defendant hereby agrees to the entry of Judgment in the principal sum of \$7,183.47, plus accrued interest of \$2,848.83, plus administrative costs in the amount of \$130.42, plus interest thereafter at the rate of 8% per annum until judgment, plus interest thereafter at the legal rate until paid, plus costs of this action, until paid in full.

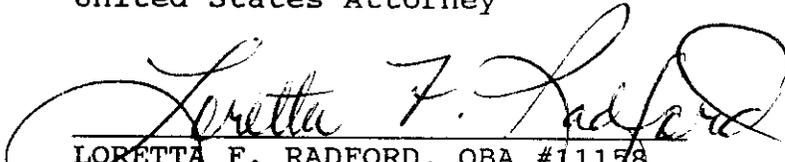
4. Plaintiff's consent to the entry of this Judgment and Order of Payment is based upon certain financial information which defendant has provided it and the defendant's express representation to Plaintiff that she is unable to presently pay the amount of indebtedness in full and the further representation

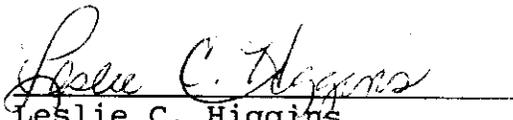
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Leslie C. Higgins, in the principal amount of \$7,183.47, plus accrued interest in the amount of \$2,848.83, plus administrative costs in the amount of \$130.42, plus interest at the rate of 8% until judgment, plus interest thereafter at the current legal rate until paid, plus the costs of this action.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Stephen C. Lewis
United States Attorney


LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney


Leslie C. Higgins

of the defendant that Leslie C. Higgins will well and truly honor and comply with the Order of Payment entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:

(a) Beginning on or before the 5th day of September, 1997, the defendant shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of \$60.00, and a like sum on or before the 5th day of each following month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.

(b) The defendant shall mail each monthly installment payment to: United States Attorney, Debt Collection Unit, 333 West 4th Street, Suite 3460, Tulsa, Oklahoma 74103.

(c) Each said payment made by defendant shall be applied in accordance with the U.S. Rules, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided by 28 U.S.C. § 1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.

4. Default under the terms of this Agreed Judgment will entitle the United States to execute on this Judgment without notice to the defendant.

5. The defendant has the right of prepayment of this debt without penalty.

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

ENTERED ON DOCKET
DATE 9-17-97

F I L E D

SEP 16 1997 *P*

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

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

Plaintiff,

vs.

Case No. 96-CV-91-K
(Base File)

MAYES COUNTY JAIL, et al.,

Defendants.

PERRY SANDERS,

Plaintiff,

vs.

Case No. 96-CV-297-K

MAYES COUNTY JAIL, et al.,

Defendants.

REPORT AND RECOMMENDATION

Defendants' motion summary judgment filed December 26, 1996, Docket Number 59 in consolidated case number 96-CV-91-K is before the undersigned United States Magistrate Judge for report and recommendation.

This case is subject to a stay entered August 5, 1997. By order dated August 21, 1997, the Court lifted the stay to give Plaintiff 20 additional days in which to respond to Defendants' motion for summary judgment. That deadline has passed and Plaintiff has not filed a response.

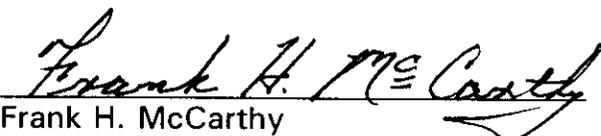
89

According to N.D. LR 7.1 C., the court, in its discretion may deem a matter confessed, and may enter the relief requested for the failure to timely respond to a motion. Further, according to N.D.LR 56.1, all material facts set forth by Defendant are deemed admitted for the purpose of summary judgment as a result of Plaintiff's failure to respond to Defendants' motion.

The undersigned United States Magistrate Judge RECOMMENDS that Defendants' motion for summary judgment Docket 59 in Case No. 96-CV-91-K be GRANTED and Case No. 96-CV-297-K DISMISSED WITHOUT PREJUDICE.

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 16th 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 17 Day of September, 1997.

L. Schwelke

FILED ON DOCKET
DATE 9-17-97

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

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

Plaintiff,

vs.

MAYES COUNTY JAIL, et al.,

Defendants.

MIKE FIDLER,

Plaintiff,

vs.

MAYES COUNTY JAIL, et al.,

Defendants.

FILED

SEP 16 1997

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

Case No. 96-CV-91-K
(Base File)

Case No. 96-CV-298-K

REPORT AND RECOMMENDATION

Defendants' motion summary judgment filed December 26, 1996, Docket Number 58 in consolidated case number 96-CV-91-K is before the undersigned United States Magistrate Judge for report and recommendation.

This case is subject to a stay entered August 5, 1997. By order dated August 21, 1997, the Court lifted the stay to give Plaintiff 20 additional days in which to respond to Defendants' motion for summary judgment. That deadline has passed and Plaintiff has not filed a response.

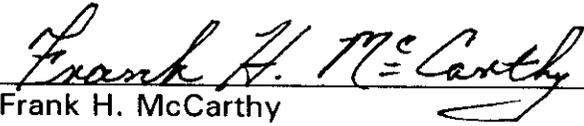
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According to N.D. LR 7.1 C., the court, in its discretion may deem a matter confessed, and may enter the relief requested for the failure to timely respond to a motion. Further, according to N.D.LR 56.1, all material facts set forth by Defendant are deemed admitted for the purpose of summary judgment as a result of Plaintiff's failure to respond to Defendants' motion.

The undersigned United States Magistrate Judge RECOMMENDS that Defendants' motion for summary judgment Docket 58 in Case No. 96-CV-91-K be GRANTED and Case No. 96-CV-298-K DISMISSED WITHOUT PREJUDICE.

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 16th 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 17 Day of September, 1997.



ENTERED ON DOCKET
DATE 9-17-97

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

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

Plaintiff,

vs.

MAYES COUNTY JAIL, et al.,

Defendants.

PERRY SANDERS,

Plaintiff,

vs.

MAYES COUNTY JAIL, et al.,

Defendants.

FILED

SEP 16 1997

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

Case No. 96-CV-91-K
(Base File)

Case No. 96-CV-297-K

REPORT AND RECOMMENDATION

Defendants' motion summary judgment filed December 26, 1996, Docket Number 59 in consolidated case number 96-CV-91-K is before the undersigned United States Magistrate Judge for report and recommendation.

This case is subject to a stay entered August 5, 1997. By order dated August 21, 1997, the Court lifted the stay to give Plaintiff 20 additional days in which to respond to Defendants' motion for summary judgment. That deadline has passed and Plaintiff has not filed a response.

ENTERED ON DOCKET

DATE 9-17-97

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

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

Plaintiff,

vs.

MAYES COUNTY JAIL, et al.,

Defendants.

MIKE FIDLER,

Plaintiff,

vs.

MAYES COUNTY JAIL, et al.,

Defendants.

Case No. 96-CV-91-K
(Base File)

Case No. 96-CV-298-K

F I L E D

SEP 16 1997

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

REPORT AND RECOMMENDATION

Defendants' motion summary judgment filed December 26, 1996, Docket Number 58 in consolidated case number 96-CV-91-K is before the undersigned United States Magistrate Judge for report and recommendation.

This case is subject to a stay entered August 5, 1997. By order dated August 21, 1997, the Court lifted the stay to give Plaintiff 20 additional days in which to respond to Defendants' motion for summary judgment. That deadline has passed and Plaintiff has not filed a response.

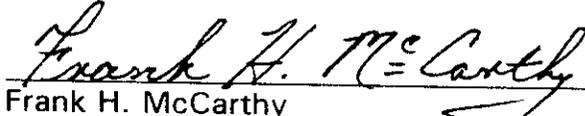
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According to N.D. LR 7.1 C., the court, in its discretion may deem a matter confessed, and may enter the relief requested for the failure to timely respond to a motion. Further, according to N.D.LR 56.1, all material facts set forth by Defendant are deemed admitted for the purpose of summary judgment as a result of Plaintiff's failure to respond to Defendants' motion.

The undersigned United States Magistrate Judge RECOMMENDS that Defendants' motion for summary judgment Docket 58 in Case No. 96-CV-91-K be GRANTED and Case No. 96-CV-298-K DISMISSED WITHOUT PREJUDICE.

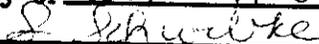
In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from 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 16th 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 17 Day of September, 1997.



ENTERED ON DOCKET

DATE 9-17-97

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

KAREN A. JENCKS,

Plaintiff,

v.

MODERN WOODMEN OF AMERICA,
INC.,

Defendant.

)
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)
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)
)
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)

Case No. 95-C-948-K

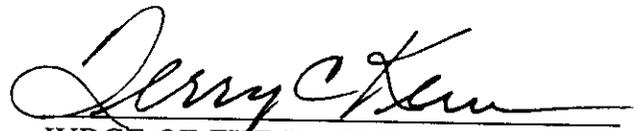
F I L E D

SEP 16 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Comes now before the Court the parties' Joint Motion for Leave from Judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. For good cause shown, the Joint Motion is granted, and Defendant Modern Woodmen of America, Inc. is relieved and released from the Judgment and Amended Judgment entered in this matter, with each party bearing their respective costs and fees.


JUDGE OF THE DISTRICT COURT

ENTERED ON DOCKET

DATE 9-17-97

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

RICKY D. WILKERSON,

Plaintiff,

vs.

CHRYSLER CORPORATION, a Delaware
corporation.

Defendant.

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)
)
)
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)

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

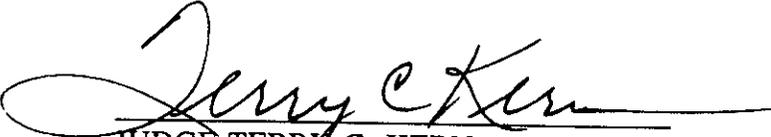
F I L E D

SEP 16 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Upon review of the Stipulation of Dismissal filed by the parties hereto, it is this 15
day of September, 1997, hereby **ORDERED, ADJUDGED AND DECREED**, that
the foregoing action be dismissed with prejudice. The parties shall pay their own costs,
including attorneys' fees, the parties having waived all claims for costs herein.


JUDGE TERRY C. KERN

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

ENTERED ON DOCKET
DATE 9-17-97

MARILEE HILL, et al.,)
)
 Plaintiffs,)
)
 vs.)
)
 ANDREW CUOMO, SECRETARY OF)
 HOUSING AND URBAN DEVELOPMENT,)
)
 Defendant.)

No. 97-C-605-K ✓

F I L E D

SEP 16 1997 *PS*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

O R D E R

Before the Court is the application of the defendant for order of dismissal (#3). Plaintiffs have failed to respond and the time for doing so has passed. The Court has reviewed the case file and sees no reason to deny the relief requested.

It is the Order of the Court that this action is hereby dismissed with prejudice.

SO ORDERED this 15 day of SEPTEMBER, 1997.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

DATE 9-17-97

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

F I L E D

TEESA WILLIAMS,

Plaintiff,

v.

UNIVERSAL RENTALS
AND SALES,

Defendant.

SEP 16 1997 *MD*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

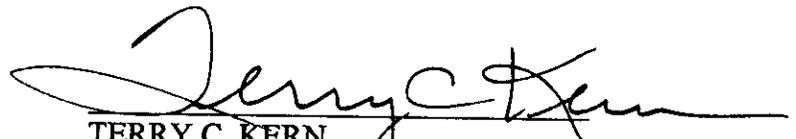
No. 96-CV-1024-K ✓

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 15 day of September, 1997.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 9-17-97

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
 v.)
)
 Z. DANNY DAVIS aka Danny Davis;)
 DENISE DAVIS;)
 STATE OF OKLAHOMA ex rel.)
 Oklahoma Employment Security Commission;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

FILED

SEP 16 1997

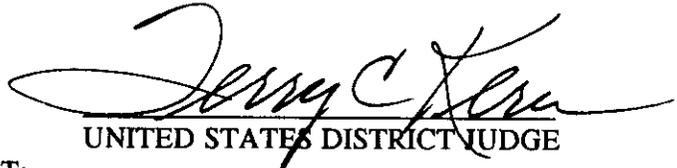
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 95-C-0060-K

ORDER

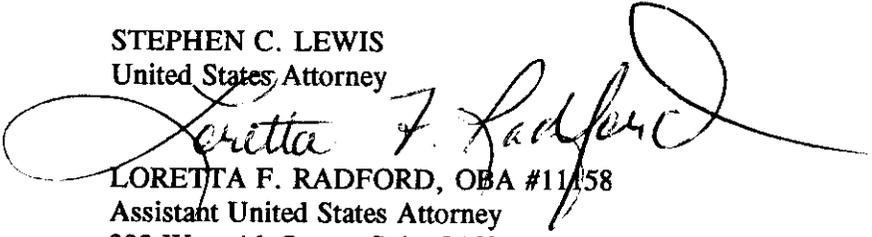
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 16 day of September, 1997.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



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

LFR:css

ENTERED ON DOCKET

DATE 9-17-97

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

FREEMAN R. ARKEKETA, JR.,)

Plaintiff,)

vs.)

STANLEY GLANZ,)

Defendant.)

No. 95-C-337-K

F I L E D

SEP 16 1997

JUDGMENT

Phil Lombardi, Clerk
U.S. DISTRICT COURT

This matter came before the Court for consideration of the Defendant's motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

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

ORDERED THIS DAY OF 15 SEPTEMBER, 1997


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

DATE 9-17-97

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

F I L E D

SEP 16 1997

FREEMAN R. ARKEKETA, JR.,)
)
Plaintiff,)
)
vs.)
)
STANLEY GLANZ,)
)
Defendant.)

No. 95-C-337-K

Phil Lombardi, Clerk
U.S. DISTRICT COURT

O R D E R

Before the Court is the defendant's supplemental motion for summary judgment and/or motion to dismiss. Plaintiff, acting pro se, filed this action against defendant Glanz, Sheriff of Tulsa County, alleging that officials at the Tulsa County Jail refused to provide plaintiff with underwear and refused to allow outside sources to provide underwear to him.

On March 29, 1996, the Magistrate Judge filed a Report and Recommendation, which stated that "the deprivation of underwear and/or socks does not, alone, rise to the level of a Federal Constitutional violation." However, the Magistrate Judge recommended denial of the defendant's motion for summary judgment on the basis that the defendant had not addressed plaintiff's assertion that the deprivation of underwear constituted an Equal Protection violation, because women inmates were allowed underwear from outside sources. In the absence of objection, this Court adopted the Report and Recommendation by order filed April 24, 1996. The defendant has now filed a supplemental motion, addressing the outstanding allegations.

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992).

To prove an equal protection violation, the plaintiff must prove purposeful discrimination. Giano v. Senkowski, 54 F.3d 1050, 1057 (2d Cir.1995). In one aspect of his claim, plaintiff alleges that the Sheriff's office had a policy of refusing to provide indigent inmates with underwear. In his answer to plaintiff's interrogatories, defendant states: "At the time of Plaintiff's incarceration the Sheriff's Office supplied indigent males with boxer shorts. These shorts were deemed unsuitable for females because of anatomical differences and feminine hygiene requirements." (Exhibit A to Defendant's Brief at 3). The affidavit of Captain Harry Wakefield, attached as Exhibit B to Defendant's Brief, states in paragraph 1 that "The Tulsa County Sheriff's Office will only issue Underwear [sic] to those inmates who are indigent."

Plaintiff has sought to refute this contention by citing examples of other inmates, who allegedly were denied underwear and told it was Sheriff's Office policy. However, the most detailed example cited by plaintiff, that of inmate Jerry Don Payne, is explained by the affidavit of Sergeant Lyndall B. Cole, (Exhibit B to Defendant's Brief), who reviewed Payne's request form, and erroneously informed Payne that the Sheriff's Office policy did not permit underwear to be furnished. Cole's affidavit goes on to state that after another inmate provided Cole with an affidavit by Captain Wakefield, which stated the Sheriff's Office would provide underwear to indigent inmates, Cole reversed himself and provided Payne the underwear. Again, the Equal Protection Clause has long been limited to instances of purposeful or invidious discrimination rather than erroneous or even arbitrary administration of state powers. Briscoe v. Kusper, 435 F.2d 1046, 1052 (7th Cir.1970). Plaintiff has failed to establish the existence of a policy of the Tulsa County Sheriff's Office which discriminates against indigent inmates.

Next, plaintiff contends that it is an equal protection violation for the Tulsa County Jail to permit outside sources (e.g., family members) to bring underwear to female inmates, and to prohibit the same service performed for male inmates. The defendant responds as follows:

However, with respect to the provision of underwear the defendant made an administrative policy decision that due [to] the anatomical differences between men and women, specifically menstruation, a substantial health and sanitary issue existed that

required women to be supplied undergarments that would adequately address the important sanitary and hygienic situation. It is not disputed that maintaining sanitary and hygienic conditions in a jail are a legitimate if not substantial government interest. The standard boxer short available to men through the commissary would not adequately address sanitation and hygiene problems posed by menstruation. In addition, the wide ranges of sizes of female undergarments in comparison to standard sizes of male boxer shorts, coupled with the relatively small percentage of the jail population being women made it impractical, given the jail's limited resources, for the jail administrators to insure that a ready supply [of] female undergarments would be available at all times to deal with the ongoing hygienic issue posed exclusively by women. An internal policy decision was made, after weighing and balancing the various issues and concerns, that the appropriate course of action was to allow women prisoners to receive undergarments from outside sources. Jail officials felt this solution best addressed legitimate and important governmental interests posed by men and women prisoners who are not similarly situated because of anatomical functions, while maintaining the desired effect of uniformity of the prison outfit among the vast majority to [sic] the prison population. In addition, it limited the amount of outside items being brought into the prison, which is always an ongoing security concern in any prison setting. (Defendant's Brief at 4-5).

This Court must afford prison officials deference in executing their discretionary judgments. See Hewitt v. Helms, 459 U.S. 460, 472 (1983). The dissimilar treatment of dissimilarly situated persons does not violate equal protection. Women Prisoners of D.C. Correct. v. D.C., 93 F.3d 910, 924 (D.C.Cir.1996) (quoting Klinger v. Dept. of Corrections, 31 F.3d 727, 731 (8th Cir.1994)). A classification drawn on the basis of gender is subject to intermediate scrutiny, i.e., the policy will be upheld only if it

is substantially related to an important or substantial state interest. See Okla. Educ. Ass'n. v. Alcoholic Beverage Laws Enforcement Commission, 889 F.2d 929, 932 (10th Cir.1989). The Court concludes that the Sheriff's Office concern with both hygiene and security represent important or substantial state interests which justifies the policy difference regarding men and women.

None of the other classifications put forth by plaintiff (indigence, underwear size) represent a suspect class, and therefore the defendant need only show a rational relationship between the policy and a legitimate state interest. The defendant has done so. Again, the Court finds no policy that indigent inmates are routinely denied underwear. As for size, plaintiff has presented no evidence that a request for sizes "extra large and above" have been made and denied. These claims fail as well.

It is the Order of the Court that the supplemental motion of the defendant for summary judgment (#66) is hereby GRANTED.

ORDERED this 15 day of September, 1997.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

pm
9-5-97

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

FILED
SEP 15 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 THE SUM OF FORTY-THREE THOUSAND)
 SIX HUNDRED FORTY-SIX AND NO/100)
 DOLLARS (\$43,646.00) IN UNITED)
 STATES CURRENCY,)
)
 Defendant.)

No. 96-CV-505-B

ENTERED ON DOCKET
DATE SEP 17 1997

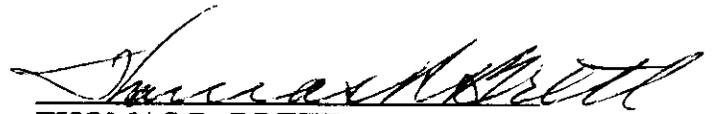
**ORDER DISMISSING CLAIM OF GUESSINAI VERNERS HOLLAND
AND FOR EXCHANGE OF EXHIBITS BY GOVERNMENT
AND CLAIMANT LAROAN VERNERS**

On September 4, 1997, pretrial conference was held with Claimants Guessinai Verners Holland and Laroan Verners present by telephone and the government present by Assistant United States Attorney Catherine Depew Hart.

Claimant Guessinai Verners Holland advised the Court that she has no ownership or other claim to the defendant \$43,646, and the Court dismissed the claim of Guessinai Verners. Trial to the Court will be held on October 20, 1997, commencing at 9:30 a.m. as to the claim of Laroan Verners, the only remaining claim as to the defendant currency.

The government and Claimant Laroan Verners shall exchange any and all pre-marked exhibits on or before September 23, 1997, with statements as to what purpose the exhibits are offered.

IT IS SO ORDERED, this 15 day of September 1997.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett", written over a horizontal line.

THOMAS R. BRETT
Senior United States District Judge

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

GEA RAINEY CORPORATION,
an Oklahoma corporation,

Plaintiff,

vs.

BASF CORPORATION,
a Delaware corporation,

Defendant.

FILED

SEP 15 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT
Case No. 96-CV-1203-C

EOD 9/16/97

STIPULATION OF DISMISSAL

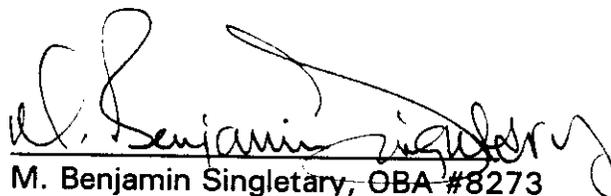
Pursuant to Rule 41 (a)(1) of the Federal Rules of Civil Procedure, the parties hereto, GEA Rainey Corporation and BASF Corporation, hereby stipulate to the dismissal of both Plaintiff's claims and Defendant's counterclaims, with prejudice, for the reason that the parties hereto have reached a settlement of all issues herein.

GEA RAINEY CORPORATION



Kevin T. Gassaway, OBA #3281
Attorney for Plaintiff
Pierce Couch Hendrickson
Baysinger & Green, L.L.P.
100 West 5th St., Suite 707
Tulsa, Oklahoma 74103-4290
(918) 583-8100

BASF CORPORATION



M. Benjamin Singletary, OBA #8273
Theodore Q. Eliot, OBA #2669
Attorneys for Defendant
Gable Gotwals Mock Schwabe
15 West 6th St., Suite 2000
Tulsa, Oklahoma 74119-5447
(918) 582-9201

110
ET

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

F I L E D
SEP 15 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

TAMKIN DEVELOPMENT CORP.,)
)
Plaintiff,)
)
vs.)
)
VENTURE STORES, INC.,)
)
Defendant.)

Case No. 97-C-804-B

ENTERED ON DOCKET
DATE SEP 16 1997

ADMINISTRATIVE CLOSING ORDER

The Plaintiff has advised the Court that the Parties have entered into a settlement agreement, 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 other purpose required to obtain a final determination of the litigation.

IF, by *1-20-98* the Parties have not moved to reopen this case for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 15th 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 15 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
v.)
RICHARD L. FULLER, et al.,)
)
Defendants.)

EOD 9/16/97

CIVIL ACTION NO. 96-CV-511-B

ORDER AMENDING JUDGMENT

NOW, on this 15th day of Sept, 1997, there came

on for consideration the Motion of the United States to amend the Judgment of Foreclosure previously entered on April 9, 1997 concerning the following described property:

Beginning at the Northwest Corner of the SE¼ NE¼ NW¼; Thence South 300 Feet; Thence East 404.0 Feet; Thence North 300 Feet; Thence West 404.0 Feet to the Point of Beginning, all in the SE¼ NE¼ NW¼ of Section 29, Township 21 North, Range 18 East of the Indian Base and Meridian, Mayes County, State of Oklahoma, LESS AND EXCEPT that portion of land described in Quit Claim Deed, filed April 5, 1923 in Book 97 at Page 427 in favor of The Board of County Commissioners of Mayes County, Oklahoma.

The Court finds said Motion is well taken.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Judgment of Foreclosure previously entered on April 9, 1997, be and is amended by stating that the Defendant, Fred Timm, was served by publishing notice of this action in the Pryor Daily Times, a newspaper of general circulation in Mayes County, Oklahoma, once a week for six (6) consecutive weeks beginning January 19, 1997, and continuing through February 23, 1997, as more fully appears from the verified proof of publication duly filed on March 5, 1997.



UNITED STATES DISTRICT JUDGE

17

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

THOMAS R. ALLISON,)
)
 Plaintiff,)
)
 vs.)
)
 STATE FARM FIRE AND CASUALTY)
 COMPANY,)
)
 Defendant.)

SEP 15 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-614-B ✓

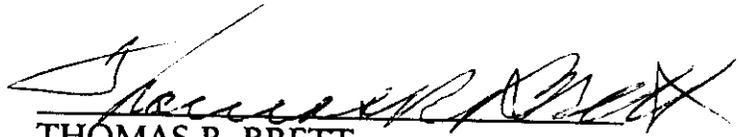
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DATE SEP 16 1997

ORDER

Defendant having confessed and stipulated to Plaintiff's Motion To Dismiss, the above-styled matter is hereby DISMISSED WITHOUT PREJUDICE pursuant to Fed.R.Civ.P. 41(a)(2).

IT IS SO ORDERED this 15 day of September, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

11

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

F I L E D

SEP 15 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

No. 95-C-1214-E

ENTERED ON DOCKET

DATE SEP 16 1997

O R D E R

Now before the Court is the Motion to Reconsider (Docket #86) and the Petition for Writ of Error Coram Nobis (Docket #87) of the plaintiff, Billie, Joe Loghry.

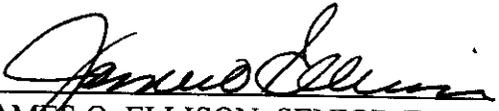
Summary Judgment in this matter was entered in favor of the Defendant, and since that time, the Court has entered a Writ of Ejectment and Assistance by which Mr. Loghry and his belongings have been removed from the property at issue. By way of his Motion to Reconsider and Petition for Writ of Error Coram Nobis, Mr. Loghry seeks to have this court revisit issues that were thoroughly reviewed and considered prior to granting defendant's Motion for Summary Judgment. Moreover, Mr Loghry raises no new arguments nor fact issues in his motions.

The Motion to Reconsider (Docket #86) and the Petition for Writ of Error Coram Nobis

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(Docket #87) are denied.

ORDERED this ^{21st}~~12th~~ day of September, 1997.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

SEP 15 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AMOCO CORPORATION,

Plaintiff,

v.

LANDMARK GRAPHICS CORPORATION
and CAEX SERVICES, INC.,

Defendants.

Case No. 97-CV-450-H(M)

ENTERED ON DOCKET

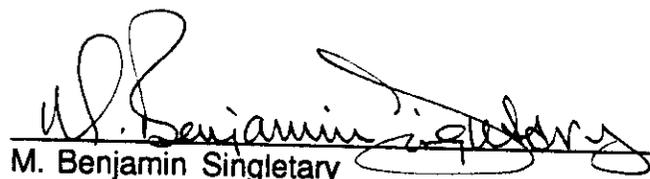
DATE

9-16-97

**NOTICE OF VOLUNTARY DISMISSAL WITHOUT
PREJUDICE OF CAEX SERVICES, INC.**

Amoco Corporation ("Amoco"), pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure, hereby gives notice that it voluntarily dismisses Defendant CAEX Services, Inc. from this action without prejudice.

DATED: September 15, 1997.



M. Benjamin Singletary
**GABLE GOTWALS MOCK SCHWABE
KIHLE GABERINO**
15 West Sixth Street - Suite 2000
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Garland E. Autrey
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**ATTORNEYS FOR PLAINTIFF
AMOCO CORPORATION**

ct

OF COUNSEL:

Robert E. Sloat
James A. Gabala, P.E.
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P.O. Box 87703
200 E. Randolph Drive
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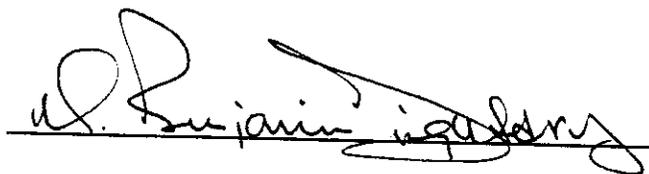
CERTIFICATE OF MAILING

I hereby certify that on the 15th day of September 1997, a true and correct copy of the above and foregoing instrument was mailed, with proper postage thereon fully prepaid, to:

Fred Rahal, Jr.
Riggs, Abney, Neal, Turpen,
Orbison & Lewis
502 W. 6th Street
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Looper, Reed, Mark & McGraw
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Two Embarcadero Center, 8th Flr
San Francisco, CA 94111



A handwritten signature in black ink, appearing to read "D. Benjamin Ingold", is written over a horizontal line.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 15 1997

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

BRIAN WALLS, *et al.*,

Plaintiffs,

-vs-

THE AMERICAN TOBACCO COMPANY,
INC., *et al.*,

Defendants.

Civil Case No. 97-CV-218-H

ENTERED ON DOCKET

DATE 9-16-97

**STIPULATION OF
VOLUNTARY DISMISSAL WITHOUT PREJUDICE**

Plaintiffs and defendant Philip Morris Companies, Inc. stipulate to the voluntary dismissal of defendant Philip Morris Companies, Inc., without prejudice, pursuant to Fed. R. Civ. P. 41.

Respectfully submitted,

James Clinton Garland
THE COMMERCIAL LITIGATION GROUP
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Attorneys for Defendant Philip Morris Companies, Inc.

Certificate of Service

The undersigned, one of the attorneys for the plaintiffs herein, hereby certifies that a true and correct copy of the above and foregoing document was mailed, by United States mail, postage prepaid, on this 10th day of September, 1997, to the following:

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Leanne Burnett
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Batus, Inc., and Batus Holdings, Inc.*

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RJR Nabisco, Inc.*

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Attorneys for Defendant Chebon Enterprises, Inc.

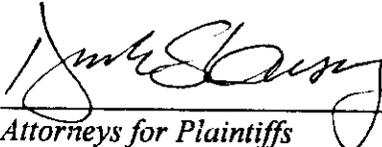
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Attorney for Standard Tobacco Co.

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Phone: (316) 688-1166
Fax: (316) 686-1077


Attorneys for Plaintiffs

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

DENISE PATTERSON,

Plaintiff,

v.

CONTINENTAL AIRLINES,
a Delaware Corporation,

Defendant.

)
)
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)
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)
)
)

ENTERED ON DOCKET

DATE 9-16-97

Case No. 96C 416H

FILED

SEP 12 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL

NOW before the Court is the Stipulation of Dismissal of the parties to this action, advising that this matter has been compromised and settled. Upon review of such Stipulation of Dismissal, this court finds that an Order of Dismissal should be entered.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this matter be, and hereby is, dismissed with prejudice pursuant to the Stipulation of Dismissal submitted by all parties to this action.

DONE this 12TH day of September, 1997.



United States District Judge

Randall J. Snapp
CROWE & DUNLEVY
321 South Boston, Suite 500
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(918) 599-6335 - Fax
ATTORNEYS FOR DEFENDANT,
CONTINENTAL AIRLINES, INC.

128

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

FILED
SEP 15 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

FRED E. WASHINGTON
Petitioner,

vs.

TULSA COUNTY JAIL, DAMON
CANTRELL, CHAD GREER

Respondents.

Case No. 97-CV-84-B

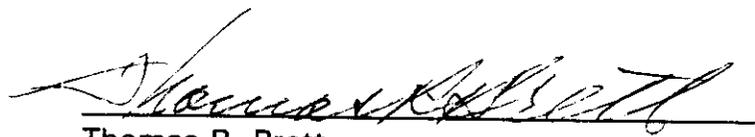
ENTERED ON DOCKET

DATE SEP 16 1997

ORDER

There being no objection, the Court adopts the Magistrate Judge's Report and Recommendation filed April 4, 1997. [Dkt. 4]. **THE COURT ORDERS THAT THIS CASE BE DISMISSED** as outlined in the Magistrate Judge's Report and Recommendation.

SO ORDERED this 15th day of September, 1997.



Thomas R. Brett
U.S. DISTRICT COURT SENIOR JUDGE

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

F I L E D

SEP 15 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DONALD E. SMITTLE,)
)
 Plaintiff,)
)
 vs.)
)
 AMERICAN AIRLINES, INC., a)
 Delaware Corporation,)
)
 Defendant.)

Case No. 96-CV-922-E

ENTERED ON DOCKET

DATE SEP 16 1997

**ORDER GRANTING
DEFENDANT AMERICAN AIRLINE, INC.'S
MOTION FOR SUMMARY JUDGMENT**

On the 5th day of September, 1997, the Motion for Summary Judgment filed by Defendant American Airlines, Inc. ("American") came on for hearing. Upon consideration of the pleadings, briefs and evidence submitted by the parties, as well as the arguments of counsel for American and the *pro se* Plaintiff, American's Motion for Summary Judgment should be and hereby is granted.

In this case, the *pro se* Plaintiff attempts to assert a claim for age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (the "ADEA"). By its Motion for Summary Judgment, American has asserted that it is entitled to summary judgment because: (1) Plaintiff has not and cannot demonstrate a *prima facie* case of age discrimination under the ADEA; (2) even assuming Plaintiff had or could establish a *prima facie* case, Plaintiff has not and cannot demonstrate that the legitimate, non-discriminatory reasons offered by American for its conduct are a pretext for age discrimination; and (3) Plaintiff's age discrimination claim is barred by virtue of Plaintiff's failure to file a timely charge of

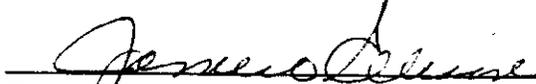
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discrimination with the Equal Employment Opportunity Commission (the "EEOC") and/or the Oklahoma Human Rights Commission (the "OHRC").

The Court has considered the parties' briefs, arguments and evidence presented in connection with American's Motion for Summary Judgment. The Court finds and concludes that, even if Plaintiff has demonstrated a *prima facie* case of age discrimination under the ADEA, Plaintiff has failed to produce evidence to rebut the legitimate, non-discriminatory reasons put forward by American as the basis for its conduct. In other words, Plaintiff has failed to demonstrate pretext for discrimination as required under the burden shifting method of proof set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-56, 101 S.Ct. 1089, 1093-95, 67 L.Ed.2d 207 (1981). Because Plaintiff has failed to carry his burden to demonstrate pretext under McDonnell Douglas and Burdine, the Court finds it unnecessary to reach the other issues raised by American, e. g. whether Plaintiff's claim is barred by virtue of not having filed a timely charge of discrimination with the EEOC and/or the OHRC.

IT IS THEREFORE ORDERED THAT the Defendant American Airlines, Inc's Motion for Summary Judgment is granted.

DATED this 12th day of September, 1997.


HONORABLE JAMES O. ELLISON
JUDGE OF THE DISTRICT COURT

Notice to be mailed to:

Mr. David R. Cordell
Mr. John A. Bugg
CONNER & WINTERS, P.C.
2400 First Place Tower
15 East Fifth Street
Tulsa, Oklahoma 74103-4391
Attorneys for Defendant

Donald E. Smittle
P.O. Box 54891
Tulsa, OK 74155-0891

Plaintiff, *Pro Se*

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

F I L E D

DONALD E. SMITTLE,)
)
 Plaintiff,)
)
 vs.)
)
 AMERICAN AIRLINES, INC., a)
 Delaware Corporation,)
)
 Defendant.)

SEP 15 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-922-E

**ORDER GRANTING
DEFENDANT AMERICAN AIRLINE, INC.'S
MOTION FOR SUMMARY JUDGMENT**

On the 5th day of September, 1997, the Motion for Summary Judgment filed by Defendant American Airlines, Inc. ("American") came on for hearing. Upon consideration of the pleadings, briefs and evidence submitted by the parties, as well as the arguments of counsel for American and the *pro se* Plaintiff, American's Motion for Summary Judgment should be and hereby is granted.

In this case, the *pro se* Plaintiff attempts to assert a claim for age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (the "ADEA"). By its Motion for Summary Judgment, American has asserted that it is entitled to summary judgment because: (1) Plaintiff has not and cannot demonstrate a *prima facie* case of age discrimination under the ADEA; (2) even assuming Plaintiff had or could establish a *prima facie* case, Plaintiff has not and cannot demonstrate that the legitimate, non-discriminatory reasons offered by American for its conduct are a pretext for age discrimination; and (3) Plaintiff's age discrimination claim is barred by virtue of Plaintiff's failure to file a timely charge of

discrimination with the Equal Employment Opportunity Commission (the "EEOC") and/or the Oklahoma Human Rights Commission (the "OHRC").

The Court has considered the parties' briefs, arguments and evidence presented in connection with American's Motion for Summary Judgment. The Court finds and concludes that, even if Plaintiff has demonstrated a *prima facie* case of age discrimination under the ADEA, Plaintiff has failed to produce evidence to rebut the legitimate, non-discriminatory reasons put forward by American as the basis for its conduct. In other words, Plaintiff has failed to demonstrate pretext for discrimination as required under the burden shifting method of proof set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-56, 101 S.Ct. 1089, 1093-95, 67 L.Ed.2d 207 (1981). Because Plaintiff has failed to carry his burden to demonstrate pretext under McDonnell Douglas and Burdine, the Court finds it unnecessary to reach the other issues raised by American, e. g. whether Plaintiff's claim is barred by virtue of not having filed a timely charge of discrimination with the EEOC and/or the OHRC.

IT IS THEREFORE ORDERED THAT the Defendant American Airlines, Inc's Motion for Summary Judgment is granted.

DATED this _____ day of September, 1997.

s/JAMES O. ELLISON

HONORABLE JAMES O. ELLISON
JUDGE OF THE DISTRICT COURT

Notice to be mailed to:

Mr. David R. Cordell
Mr. John A. Bugg
CONNER & WINTERS, P.C.
2400 First Place Tower
15 East Fifth Street
Tulsa, Oklahoma 74103-4391
Attorneys for Defendant

Donald E. Smittle
P.O. Box 54891
Tulsa, OK 74155-0891

Plaintiff, *Pro Se*

F I L E D

SEP 15 1997 *PL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

DONALD E. SMITTLE,)
)
Plaintiff,)
)
vs.)
)
AMERICAN AIRLINES, INC., a Delaware)
corporation,)
)
Defendant.)

Case No. 96-CV-922-E ✓

ENTERED ON DOCKET

DATE SEP 16 1997

J U D G M E N T

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, American Airlines, Inc., and against the Plaintiff, Donald E. Smittle. Plaintiff shall take nothing of his claim. Costs and attorney fees may be awarded upon proper application.

Dated, this 11th day of September, 1997.

James O. Ellison

 JAMES O. ELLISON, SENIOR JUDGE
 UNITED STATES DISTRICT COURT

18

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

ROBERT W. DEATON,)
)
 Plaintiff,)
)
 vs.)
)
 NAOMI J. TUTTLE,)
)
 Defendant.)

SEP 12 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. CJ 97-C-46-B

ENTERED ON DOCKET

DATE SEP 15 1997

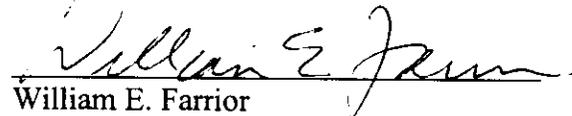
STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Robert W. Deaton, and Defendant, Naomi J. Tuttle, 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,

FRASIER, FRASIER & HICKMAN

By: 
Gary Brasel, OBA #1080
Attorney for Plaintiff
1700 Southwest Boulevard
P.O. Box 799
Tulsa, OK 74101-0799
918/584-4724

By: 
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918/584-1600
Attorney for Defendant

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

F I L E D

JOHN D. THARP,
Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY,
Defendant.

SEP 12 1997

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

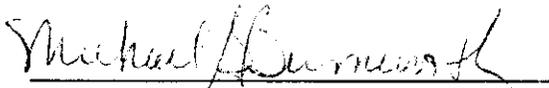
No. 96-CV-1020 K

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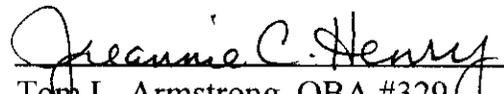
DATE 9-15-97

STIPULATION FOR DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff, John D. Tharp, and the Defendant, Union Pacific Railroad Company, by and through their attorneys of record and pursuant to Fed. R. Civ. Pro. 41, file this Stipulation for Dismissal dismissing with prejudice all claims raised by Plaintiff, John D. Tharp, against Union Pacific Railroad Company, in the case styled *John D. Tharp v. Union Pacific Railroad Company*, Case No.96-CV-1020 K, filed in the United States Court District Court for the Northern District of Oklahoma, for the reasons that the parties have compromised and settled all matters in controversy. Each party is to bear their own respective costs, attorney fees and expenses.



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Kevin T. Gassaway MB

Kevin T. Gassaway
PIERCE, COUCH, HENDRICKSON,
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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

BRIAN WALLS, *et al.*,

Plaintiffs,

-vs-

THE AMERICAN TOBACCO COMPANY,
INC., *et al.*,

Defendants.

ENTERED ON DOCKET

DATE SEP 15 1997

Civil Case No. 97-CV-218-H

FILED

SEP 12 1997

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

**STIPULATION OF
VOLUNTARY DISMISSAL WITHOUT PREJUDICE**

Plaintiffs and defendant UST Inc. stipulate to the voluntary dismissal of defendant UST Inc.,
without prejudice, pursuant to Fed. R. Civ. P. 41.

Respectfully submitted,

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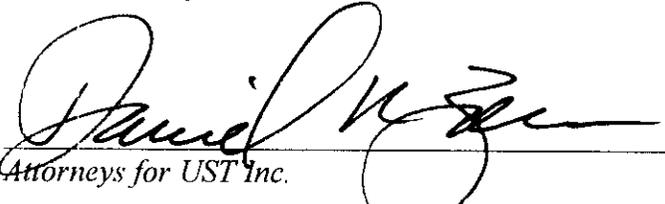
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Attorneys for UST Inc.

Certificate of Service

The undersigned, one of the attorneys for the defendant herein, hereby certifies that a true and correct copy of the above and foregoing document was mailed, by United States mail, postage prepaid, on this 11th day of September, 1997, to the following:

Richard C. Ford
Leanne Burnett
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Ronald L. Walker
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-and-

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and Philip Morris Companies, Inc.*

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*Attorneys for Defendants Lorillard Tobacco Co., Lorrillard, Inc. and
Loews Corporation*

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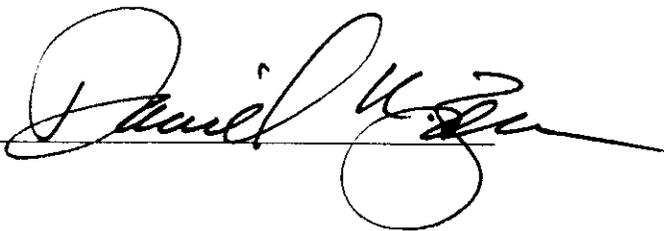
Attorneys for Defendant The Tobacco Institute, Inc.

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Tulsa, OK 74105

Attorneys for Defendant Chebon Enterprises, Inc.

Lester D. Henderson
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Attorney for Standard Tobacco Co.



A handwritten signature in cursive script, appearing to read "Daniel Henderson", is written over a horizontal line. The signature is fluid and stylized, with a large initial 'D' and a long, sweeping tail.

IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 12 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

EKL EQUIPMENT COMPANY, an)
Oklahoma Corporation,)
)
Plaintiff,)
)
vs.)
)
JOHN A. RUPE, COLT INTERNATIONAL)
and COLT INVESTMENTS,)
)
Defendants.)

CASE NO. 97 CV 531 H(M)

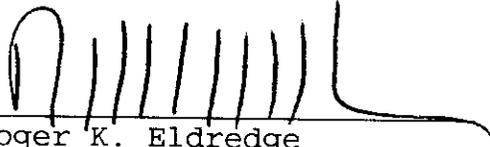
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OFFICE SEP 15 1997

DISMISSAL OF COUNTER CLAIMS WITH PREJUDICE

Comes now the Defendant, John A. Rupe, and hereby dismisses
his counter claims in the above styled case with prejudice.

NORMAN & WOHLGEMUTH

BY: _____


Roger K. Eldredge
2900 Mid-Continent Tower
Tulsa, Ok 73103-4023
Attorneys for Defendant Rupe

7

15

ENTERED ON DOCKET

DATE 9-15-97

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

F I L E D

IMOGENE H. HARRIS,)
)
Plaintiff,)
)
v.)
)
THE CITY OF TULSA, OKLAHOMA,)
)
a municipal corporation; TULSA)
AIRPORT AUTHORITY, a charter)
agency of the CITY OF TULSA; and)
TULSA AIRPORTS IMPROVEMENT)
TRUST, a public trust,)
)
Defendants.)

SEP 11 1997 12

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-C-230-H

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff and Defendants Tulsa Airport Authority ("TAA") and City of Tulsa ("COT"), by and through their respective attorneys, jointly stipulate that all of Plaintiff's claims herein should be dismissed with prejudice with each side to bear its own costs and attorneys fees.

DATED this 11 day of August, 1997.

Respectfully submitted,

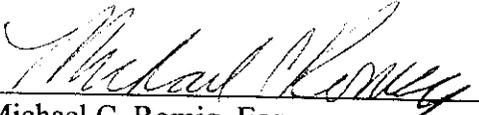
FRASIER, FRASIER & HICKMAN

By: [Signature]
Steven R. Hickman, Esq.
1700 Southwest Boulevard, Suite 100
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Tulsa, Oklahoma 74101-0799
(918) 584-4724

ATTORNEYS FOR PLAINTIFF

THE CITY OF TULSA AND TULSA AIRPORT
AUTHORITY

By:



Michael C. Romig, Esq.
200 Civic Center, Room 316
Tulsa, Oklahoma 74103
(918) 596-7717

ATTORNEY FOR CITY OF TULSA AND
TULSA AIRPORT AUTHORITY

DATE 9-15-97

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

FILED

SEP 11 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDY ANN RICE d/b/a Tulsa	}
Time Trucking and JAMES E.	}
RICE, JR.,	}
	}
Plaintiffs,	}
	}
v.	}
	}
CLAREDON AMERICA, INC.,	}
	}
Defendants.	}

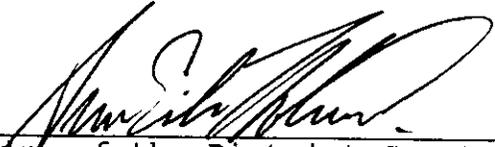
Case No.: 97-CV0106H

ORDER OF DISMISSAL WITHOUT PREJUDICE

NOW on this 10TH day of SEPTEMBER, 1997, this matter comes before the Court for hearing on Plaintiffs' Motion to Dismiss Without Prejudice. After being fully apprised of the premises, this Court finds as follows:

1. Plaintiffs have requested a dismissal without prejudice of the above-styled action.
2. Plaintiffs will not file any action, in any court, alleging breach of contract or bad faith breach of contract by reason of alleged acts or omissions through the date of dismissal and based on acts or omissions of: Clarendon American Insurance Company; Les Caldwell & Associates, Inc.; or Allan Mett, which acts or omissions are alleged to be or alleged to have been in existence at the time of the requested dismissal.
3. Defendant has no objection to a dismissal at this time with the stipulation in paragraph number two, above.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-styled action is hereby dismissed without prejudice, subject to the stipulation of the parties in Paragraph Number 2, above.



Judge of the District Court
Northern District of Oklahoma

APPROVED AS TO FORM:



Clifford R. Magee
Attorney for Plaintiffs



John DesBarres
Attorney for Defendants

ENTERED ON DOCKET

DATE 9-15-97

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

SEP 11 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BILLY FLOYD SIMPSON,)
)
 Plaintiff,)
)
 v.)
)
 STATE OF OKLAHOMA, et al.,)
)
 Defendants.)

Case No. 97-CV-95-H

ORDER

This matter comes before the Court on the Report and Recommendation of the United States Magistrate Judge (Docket # 3). No objections to the Report and Recommendation have been filed.

The trial court's consideration of a Report and Recommendation is governed by Rule 72(b) of the Federal Rules of Civil Procedure which provides in pertinent part that:

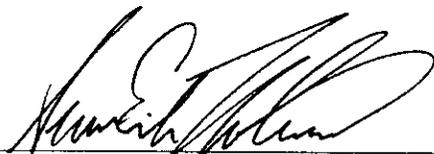
[t]he district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommendation decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Fed. R. Civ. P. 72(b).

Based on a review of the Report and Recommendation of the Magistrate Judge, the Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge. Plaintiff's action is hereby dismissed without prejudice for his failure to prosecute.

IT IS SO ORDERED.

This 10TH day of September, 1997.


Sven Erik Holmes
United States District Judge

ENTERED ON DOCKET
DATE 9-15-97

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

FILED

SEP 11 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JASON DOUGLAS FULTON,
Plaintiff,
v.
RICHARD CLARK, et al.,
Defendants.

Case No. 97-CV-98-H

ORDER

Before the Court for consideration is the Report and Recommendation of the United States Magistrate Judge (Docket # 9). There are no objections to the Report and Recommendation.

When there is before the Court a report and recommendation of a Magistrate Judge, Rule 72(b) of the Federal Rules of Civil Procedure provides in pertinent part that:

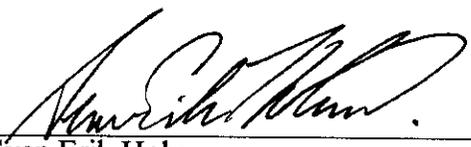
[t]he district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommendation decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Fed. R. Civ. P. 72(b).

Based on a review of the Report and Recommendation of the Magistrate Judge, the Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge. Plaintiff's action is hereby dismissed without prejudice for his failure to pay the partial filing fee.

IT IS SO ORDERED.

This 10TH day of September, 1997.


Sven Erik Holmes
United States District Judge

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

RENARD ELVIS NELSON,)
)
Plaintiff,)
)
vs.)
)
Dr. JOHNSON, Tulsa Co.)
Medical Doctor; RON ISAACS,)
Medical Administrator,)
)
Defendants.)

ENTERED ON DOCKET

DATE 9-12-97

Case No. 95-CV-1145-H ✓
Base File

FILED

SEP 11 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff, a state prisoner appearing *pro se* and *in forma pauperis*, brings this action pursuant to 42 U.S.C. § 1983, alleging inadequate medical care. In his original complaint, Plaintiff failed to name individual defendants.¹ As a result, he was ordered to amend his complaint. Plaintiff complied with the Court's order and on December 19, 1995, filed his amended complaint (#4). Subsequently, Plaintiff attempted to file a second amended complaint. The Court construed this second amended complaint as a separate civil rights action, directed the Clerk to open a separate case,² and then consolidated the new case with

¹The original complaint was brought against Tulsa County Jail and Tulsa Co. Medical Department without naming Ron Isaacs, Dr. Johnson, or Sheriff Glanz within the body of the complaint or caption. Plaintiff was allowed to amend. In his amended complaint, Plaintiff named only Dr. Johnson and Ron Isaacs as defendants. Accordingly, the Court did not direct issue of summons as to Sheriff Stanley Glanz since Plaintiff did not name Glanz in either the original or amended complaint. Plaintiff subsequently filed a separate civil rights action against Sheriff Glanz in case no. 95-CV-994-H.

²Filed June 6, 1996, and assigned Case No. 96-C-577-H.

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the instant case. Defendants have now jointly moved to dismiss Plaintiff's complaint for failure to state a claim upon which relief may be granted (#19). Additionally, Defendant Johnson filed a motion (#12) and supplemental motion (#22) for summary judgment. Plaintiff has responded to each motion, objecting to the relief requested. For the reasons stated below, the Court concludes Defendants' motions should be granted, and Plaintiff's civil rights complaint dismissed.

BACKGROUND

At the time Plaintiff originally filed this action on November 17, 1995, he was a pretrial detainee in the Tulsa City-County Jail ("TCCJ"), having been transferred from the federal correctional facility at El Reno, Oklahoma. Customary booking procedure at TCCJ included completion of a health maintenance record, problem list, medical systems screening and history; review of en route progress notes as well as a physical examination by medical care personnel. Plaintiff's medical screening and history specifically noted high blood pressure, gastric problems, situational depression, back problems, and colon surgery in 1989 necessary to repair a stab wound. He had no known drug allergies but was allergic to milk and fruit. Plaintiff's previously-prescribed medications were delivered to the TCCJ medical staff. His treatment record revealed he was taking Procardia,³ 10 mg, one capsule 3x daily;

³Calcium ion influx inhibitor for treatment of high blood pressure.

Indomethacin,⁴ 25 mg, ½ capsule 3x daily with food; Hyoscyamine sulfate,⁵ 0.125 mg, one in a.m. and one in p.m.; Dicyclomine,⁶ 20 mg, ½ tab twice daily, in addition to a prescribed bland diet.

Initially, Plaintiff was seen on February 15, 1995 by a licensed practical nurse. On February 16, 1995, a prison doctor prescribed the following medications: Tagamet,⁷ 350 mg; Procardia, 10 mg; instructed that Plaintiff's blood pressure should be checked 4 times a day for the next 5 days and that Plaintiff's name should be placed on the "to see doctor" list. (Ex. A, #13). Based on TCCJ records (Ex. A, #13) and the affidavit of Dr. Johnson (Ex. B, #13), the course of Plaintiff's medical treatment at TCCJ is summarized as follows:

February 15, 1995	Intake examination by LPN
February 16, 1995	Physician reviewed medications
February 19, 1995	Seen by nurse re: sore throat
February 19, 1995	Received 500 mg Keflex, ⁸ 2x day for 1 week
February 25, 1995	Medical staff informed kitchen re: bland diet
March 14, 1995	Dr. Johnson renewed BP medication- Procardia
March 18, 1995	Plaintiff requested renewal of medication, specifically

⁴Non-steroid anti-inflammatory agent for treatment of arthritic conditions.

⁵Reduces spasms of digestive system.

⁶Reduces spasms of digestive system.

⁷Inhibitor of both daytime and nocturnal basal gastric acid secretions.

⁸Antibiotic.

Zantac,⁹ Procardia and Motrin¹⁰; requested appointment with neurologist or orthopedic specialist.

March 19, 1995 Plaintiff requested to be seen by specialist.

March 21, 1995 Plaintiff evaluated by staff mental health professional and referred to Dr. Trombka, TCCJ psychiatrist, for evaluation.

March 22, 1995 Plaintiff's medication change request received by TCCJ medical staff; again Plaintiff requested to be seen by gastro-specialist.

March 23, 1995 Plaintiff requested Donnatal, Indoncine, and Procardia specifically, and requested appointment with doctor.

March 24, 1995 Plaintiff was seen by TCCJ physician; Tagamet renewed for additional 30 days.

March 30, 1995 Plaintiff evaluated by member of TCCJ psychiatric staff; prescribed Atarax,¹¹ 25 mg, daily in the A.M., and 50 mg, nightly, for a period of 3 weeks.

April 4, 1995 Plaintiff requested dental appoint for tooth extraction.

⁹Inhibitor of both daytime and nocturnal basal gastric acid secretions.

¹⁰Non-steroid anti-inflammatory agent for treatment of arthritic conditions.

¹¹For symptomatic relief of anxiety and tension.

April 6, 1995	TCCJ medical staff received dental request. Plaintiff was placed on list for dental care.
April 11, 1995	Plaintiff seen by Dr. Johnson, re: pain in "lateral forearm and elbow"; received 2 tablets Ecotrin, ¹² 2x day, for 1 week; prescribed analgesic balm, 2x day, for 1 week.
April 15, 1995	Tooth extraction.
April 18, 1995	Plaintiff requested dental appointment.
April 19, 1995	Dental request received by TCCJ staff; Plaintiff's name placed on "To see Dentist" list.
April 21, 1995	Plaintiff requested Tagamet prescription renewal.
April 25, 1995	Twice Plaintiff requested Tagamet renewal.
April 25, 1995	TCCJ staff received Tagamet renewal request.
April 26, 1995	Plaintiff seen by Dr. Johnson; received 300 mg Tagamet, 2x daily, for 30 days.
May 25, 1995	Tagamet, 300 mg, once daily, renewed for 30 more days.
June 5, 1995	Tagamet, 300 mg, changed to 2x daily for 30 days.
June 12, 1995	Plaintiff seen by TCCJ mental health staff re: complaint of anxiety, renewal of Atarax medication.
June 19, 1995	Plaintiff seen by TCCJ psychiatrist, diagnosed with

¹²Coated aspirin to prevent injury to stomach lining.

recurrence of anxiety; received Atarax, 25 mg, each morning, and 50 mg, each evening, for 30 days.

June 30, 1995 Prescribed Procardia, 10 mg, 2xday; Tagamet, 300 mg, 2xday, for 90 days.

July 22, 1995 Plaintiff seen by nurse re: headache

Consultation with Dr. Johnson, ordered Plaintiff's blood pressure monitored.

July 30, 1995 Plaintiff's medication reviewed; to receive Procardia XL, 30 mg, once daily, for 30 days.

July 31, 1995 TCCJ physician ordered Plaintiff's blood pressure checked weekly.

August 20, 1995 Plaintiff's medication reviewed; to receive 90 mg, Procardia XL, once daily, for 30 days.

December 5, 1995 Plaintiff's medication reviewed; to receive 90 mg, Procardia XL, once daily; 300 mg, Tagamet, 2xday, for 30 days.

December 13, 1995 Plaintiff requested foot powder.

December 16, 1995 Plaintiff seen by nurse re: foot pain.

Consultation with Dr. Johnson, ordered Plaintiff to receive 400 mg, Erythromycin EES, 2xday, for 1 week; ordered Plaintiff receive Betadyne foot soaks, 2xday,

until infection healed.

December 18, 1995 Plaintiff seen by Dr. Johnson, blood pressure monitored, foot checked; Plaintiff demanded Tylenol immediately, that Tagamet be changed to Zantac; Explained that Tylenol was available from nurse's cart and that Zantac was not available. Plaintiff became angry and left clinic.

December 28, 1995 Plaintiff's medications reviewed; to receive 90 mg, Procardia XL, once daily, and 300 mg, Tagamet, 2xday for 60 days.

December 29, 1995 Plaintiff's condition reviewed by nursing staff.

January 11, 1996 Plaintiff seen by Dr. Johnson re: right hip region pain, alleged "fall," received Tagamet, 400 mg, once daily, for period of 30 days; Motrin, 400 mg, once daily, for 1 week; and Parafon Forte, 500 mg, once daily, for 1 week.

January 16, 1996 Plaintiff requested medication review.

January 17, 1996 TCCJ received medication review request.

January 17, 1996 Dr. Johnson ordered Plaintiff to receive Tagamet, 300 mg, 2xday, for 30 days, beginning 1/19/96, after regimen of Motrin and Parafon Forte was completed.

By affidavit, Defendant Johnson confirms that during the period between February 15, 1995, and January 17, 1996, Plaintiff was seen on at least 8 occasions by a staff nurse, at least 4

times by a mental health professional, and on at least 3 occasions by a physician. In her supplemental motion for summary judgment, Defendant Johnson updates Plaintiff's medical care and states that from February 14, 1996, to August 22, 1996, Plaintiff submitted at least 14 additional medical requests. Also, on March 14, 1996, Plaintiff was given an annual physical examination by a TCCJ medical staff personnel. The medical conclusion was "health stable" and "no problems with current medications." (Ex. C, #23).

In general, Plaintiff complains that Defendants have failed to obtain and review properly his previous medical records. In particular, Plaintiff complains that Defendants have substituted other medications for the previously-prescribed medications, such as Tagamet instead of Donnatal, or Motrin instead of Tylenol 3, and eliminated other medications, such as Flexeril. Plaintiff states that Defendants have failed to contact his doctors in California to "gain knowledge" of his past medical history, that Defendants have not permitted Plaintiff to be treated by a "gastrointestinal specialist" or a "neuro specialist" and that he is entitled to "treatment without negligence such as in my case." (#20). Plaintiff prays for "the right medication and medical care just as [he] had while in the custody with the federal government" (#4, amended complaint).¹³

Plaintiff also alleges that during the period March 1, 1995 to March 26, 1995, Dr. Johnson, in concert with TCCJ medical staff, exposed him to tuberculosis. According to

¹³The Court notes that Plaintiff did not sign the Declaration Under Penalty of Perjury in the original Complaint (#1) nor on the amended Complaint (#4), although he did sign before a notary the attachments to his original Complaint.

Plaintiff, an inmate, Allen Blossom, was housed in the general population after testing positive to tuberculosis.

ANALYSIS

As a preliminary matter, although *pro se* pleadings are construed liberally, a litigant such as Plaintiff still must follow basic rules of civil procedure governing all litigations. Brown v. Zavaras, 63 F.3d 967, 971-72 (10th Cir. 1995). Plaintiff did not present his facts in opposition "by affidavit, declaration under penalty of perjury, and/or relevant portions of pleadings, depositions, answers to interrogatories and responses to requests for admissions." Fed.R.Civ.P. 56. It is possible to treat a complaint "as an affidavit" if the complaint "alleges facts based on the plaintiff's personal knowledge and has been sworn under penalty of perjury." Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991); see Green v. Branson, 108 F.3d 1296, 1301, n. 1 (10th Cir. 1997). Nelson, however, did not attest to the original complaint or the amended complaint, although the amended complaint was "executed"¹⁴ by Plaintiff as indicated on the yellow tablet, handwritten sheet inserted between the typed pages of the original complaint. Because the complaint is dismissed on other grounds, the Court, for purposes of summary judgment, will not address the obvious defect in Plaintiff's failure to attest under penalty of perjury. See Fed.R.Civ.P. 56; see also N.D. LR 56B.

¹⁴Plaintiff's signature was "subscribed and sworn to before...Michael L. L..." on April 9, 1995. The commission expiration date of the notary public is October 25, 1998.

A. Dismissal for Failure to State a Claim

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade v. Grubbs, 841 F.2d 1512, 1526 (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, *pro se* complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110.

Initially, the Court notes that the Fourteenth Amendment Due Process Clause, and not the Eighth Amendment Cruel and Unusual Punishment Clause, applies to a pretrial detainee such as Plaintiff. Bell v. Wolfish, 441 U.S. 520, 535-36 (1979). Accordingly, Plaintiff's Eighth Amendment claims must be dismissed for failure to state a claim and Plaintiff's complaint should be liberally construed, in accordance with his *pro se* status, to allege a violation of his Fourteenth Amendment rights.

Defendants contend that in both the original and subsequent amended complaint Plaintiff's allegations amount to "nothing more than a disagreement with the course of treatment he received while incarcerated," wanting one medication instead of another or

wanting to be examined by a particular specialist rather than the TCCJ health care personnel. Defendants submit, and the Court agrees, that even though Plaintiff may have wanted different care or medication, Plaintiff's medical negligence claim does not rise to the level of constitutional violation cognizable under § 1983.

In addition, Ron Isaacs, medical administrator at TCCJ, has moved to dismiss for failure to state a claim. He argues that Plaintiff's allegations against him "sound in negligence," a claim not cognizable under § 1983. Again, the Court agrees. Furthermore, even reading Plaintiff's complaint liberally, and construing all allegations in Plaintiff's favor, the Court finds no allegation to show the personal involvement of Defendant Isaacs. Ruark v. Solano, 928 F.2d 947 (10th Cir. 1991) (personal involvement in the alleged constitutional deprivation is a prerequisite to section 1983 liability), nor the requisite culpable state of mind necessary to establish a constitutional violation. See Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285 (1976). Accordingly, Plaintiff's claim against Defendant Isaacs must be dismissed for failure to state a claim.

B. Dismissal as a Matter of Law (Summary Judgment)

Although Defendant Johnson also moved to dismiss for failure to state a claim, since matters outside the pleadings were presented to and not excluded by the Court, Defendant Johnson's motion shall be treated as one for summary judgment and incorporated with her summary judgment motion. See Fed. R. Civ. P. 12(b)(6).

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue

regarding any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law if the nonmoving party fails to make a sufficient showing of an essential element of the case for which the nonmoving party has the burden of proof. Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986). One of the principal purposes of summary judgment is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows this purpose to be accomplished. Id. At 323-24. The moving party must prove entitlement to summary judgment beyond a reasonable doubt. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

In order for a prisoner's Eighth Amendment claim to rise to the level of a constitutional violation, he must demonstrate that prison officials have shown deliberate indifference to his serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285 (1976). As previously stated, Plaintiff was a pretrial detainee and the Court liberally construes his Eighth Amendment claim as one brought under the Fourteenth Amendment. Significantly, however, the same level of constitutional violation is required -- "deliberate indifference to serious medical needs." Meade v. Grubbs, 841 F.2d 1512, 1530 (10th Cir. 1988); see also Garcia v. Salt Lake County, 768 F.2d 303, 307 (10th Cir. 1985). "Deliberate indifference" is defined as knowing and disregarding an excessive risk to an inmate's health or safety. Farmer v. Brennan, 511 U.S. 825, 827, 114 S.Ct. 1970 (1994). In Wilson v. Seiter, 501 U.S. 294, 111 S.Ct. 2321 (1991), the Supreme Court clarified that the deliberate indifference standard under Estelle has two components: (1) an objective requirement that

the pain or deprivation be sufficiently serious; and (2) a subjective requirement that the offending officials act with a sufficiently culpable state of mind. *Id.* At 298-99.

1. General Medical Issues

Defendant Johnson's uncontroverted facts establish that from February 15, 1995 through August 22, 1996, Plaintiff saw medical personnel or received medical treatment related to his stomach/colon problems, back pain, and blood pressure approximately 47 times. Even though Plaintiff may have requested "something beside" antacids [sic] and generic Tylenol or "something more effective and closer to prescribed medication of Flexrill [sic] or codien [sic] three" or "medication stronger than Advil for back pain," Plaintiff was never refused treatment nor denied access to medical personnel capable of treating his problems.

Furthermore, there is no evidence before the Court to demonstrate any deliberate indifference resulting in substantial harm. At most, the evidence demonstrates that Plaintiff disagreed with the medical treatment, specifically the medications, he received or, as the situation may be, did not receive. Disagreement with medical treatment does not rise to the level of a constitutional violation. *See Estelle*, 429 U.S. at 106 ("[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth [Fourteenth] Amendment...Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."); *Olson v. Stotts*, 9 F.3d 1475, 1477 (10th Cir. 1993) ("At most, plaintiff differs with the medical judgment of the prison doctor...Such a difference of opinion does not

support a claim of cruel and unusual punishment.”). Nor does a delay in providing care to an inmate constitute cruel and unusual punishment unless there has been deliberate indifference resulting in substantial harm. *Id.* at 1476-77. See also *Hyde v. McGinnis*, 429 F.2d 864, 867-68 (2d Cir. 1970) (explaining that prisoner’s disagreement over doctor’s failure to prescribe a pill version of tranquilizer was a matter of medical judgment and did not state a claim under § 1983); *Williams v. Keane*, 940 F.Supp. 566, 570-72 (S.D.N.Y. 1996) (stating that there is “no constitutional interest in being treated . . . by a specific physician”) (citation omitted); *Alston v. Howard*, 925 F.Supp. 1034, 1040 (S.D.N.Y. 1996) (“[D]isagreement as to the appropriate course of treatment [does not] create a constitutional claim.”) (citation omitted). Therefore, Plaintiff’s inadequate treatment and/or medical negligence claims must fail. The Court concludes that Defendant Johnson’s motion for summary judgment should be granted.

2. *Tuberculosis Issue*

Tuberculosis infection is caused by an airborne bacteria which is coughed up and out into the air by an infected person and breathed in by anyone in close enough proximity. *DeGidio v. Pung*, 704 F. Supp. 922, 924 (D. Minn. 1989). There is a distinction between tuberculosis infection and disease. Tuberculosis infection exists when tubercle bacilli have become established in the body, but are dormant. *Id.* In contrast, tuberculosis disease, or "active" tuberculosis, develops when the infection breaks down into active disease and becomes established in the lungs. *Id.*

Several courts have recognized that unreasonable exposure to a serious,

communicable disease, such as tuberculosis, is actionable under the Eighth Amendment, since it could constitute both harm to the serious medical needs of an inmate and demonstrate prison officials' deliberate indifference to this harm. See Reischmann v. Lewis, No. 92-15890, 1993 WL 26995, at *2 (9th Cir. Feb. 5, 1993) (unpublished opinion); Karlovetz v. Baker, 872 F. Supp. 465, 467 (N.D. Ohio 1994); Triggs v. Marshall, 1994 WL 109748, at *3 (N.D. Cal. Mar. 21, 1994) (unpublished opinion); Spivey v. Doria, 1994 WL 97756, at *6 (N.D. Ill. Mar. 24, 1994) (unpublished opinion); Wright v. Baker, 849 F. Supp. 569, 573 (N.D. Ohio 1994). However, "[a]n unsubstantiated fear of contracting a serious disease is not a basis for a constitutional claim." Quarles v. DeLa Cuesta, 1993 WL 86460, at *1 (E.D. Pa. Mar. 23, 1993) (unpublished opinion) (collecting cases and finding that where undisputed medical evidence established that on the date plaintiff was ordered back to his cell, his cell mate did not have active tuberculosis and had already begun taking the antibiotic isoniazid to prevent his infection from becoming active, no triable issue of fact existed as to plaintiff's claim of injury).

The issues raised by Plaintiff's tuberculosis allegation are whether Defendants deliberately exposed him to at least one inmate (Allen Blossom) with active tuberculosis during the period 3/1/95 to 3/26/95 while incarcerated at the TCCJ, and whether their actions created an unreasonable risk of harm to his health. See Reischmann, 1993 WL 26995, at *2 (remanding the case to permit the prisoner to present evidence on the level and degree of exposure to tuberculosis and on whether the degree of exposure was sufficient to create an unreasonable risk of harm to his health where the prisoner had alleged deliberate exposure

to tuberculosis as well as inadequate medical care).

To demonstrate an unreasonable exposure to tuberculosis in violation of the Eighth Amendment, Plaintiff must establish that Defendants in fact were aware that his incarceration at TCCJ subjected him to an excessive or substantial risk of contracting tuberculosis and that they nevertheless failed to act on that knowledge in violation of Plaintiff's constitutional rights. Defendant Johnson, by affidavit, affirmatively states that no active case of tuberculosis was present at the time of Plaintiff's incarceration. She states that the last diagnosis of active tuberculosis at TCCJ occurred in March of 1994. She also specifically denies that inmate Allen Blossom had active tuberculosis and states that he was not contagious at any time during his incarceration at TCCJ in 1995. (Ex. B, #13). The Court finds inadequate Plaintiff's conclusory allegations that he was housed in general population with an inmate "known" to have active tuberculosis. "[T]he nonmoving party may not rest on [his] pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which [he] carries the burden of proof." Applied Genetics Int'l, Inc., 912 F.2d 1238, 1241 (10th Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)). Conclusory or self-serving affidavits are not sufficient. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Therefore, the Court concludes there is no genuine issue of material fact as to the tuberculosis issue and Defendant Johnson is entitled to judgment as a matter of law on this issue also.

CONCLUSION

Plaintiff has failed to state a claim upon which relief can be granted against Defendant Isaacs. Plaintiff's claims against Defendant Johnson fail because there is no genuine issue as to any material fact and Defendant Johnson is entitled to judgment as a matter of law.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Defendant Isaac's motion to dismiss (#19) is granted.
2. Defendant Johnson's motion for summary judgment (#12, as supplemented by #22) is granted.
3. Plaintiff's § 1983 Complaint is dismissed with prejudice.

IT IS SO ORDERED.

This 10TH day of September, 1997.



Sven Erik Holmes
United States District Judge

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

COBBLESTONE APARTMENTS LIMITED)
PARTNERSHIP, by and through its)
general partner, MDC REALTY CORP.,)

Plaintiff,)

v.)

SHELL OIL COMPANY, a Delaware)
corporation, and HOECHST CELANESE)
CORPORATION, a Delaware corporation,)

Defendants.)

SEP 11 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-182-BU

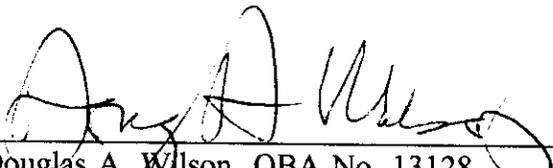
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SEP 12 1997

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff and Defendant Shell Oil Company, being all of the remaining parties in the action, and hereby stipulate to dismissal with prejudice hereof, and hereby dismiss with prejudice, the above captioned action pursuant to Fed.R.Civ.P. 41(a).

Respectfully submitted,

By: 
Douglas A. Wilson, OBA No. 13128
RIGGS, ABNEY, NEAL,
TURPEN, ORBISON & LEWIS
502 West Sixth Street
Tulsa, Oklahoma 74119-1010
ATTORNEYS FOR PLAINTIFF

By: 
Ronald N. Ricketts, OBA No. 7563
Michelle L. Gibbens, OBA No. 16654
GABLE GOTWALS MOCK
SCHWABE KIHLE GABERINO
2000 NationsBank Center
15 West Sixth Street
Tulsa, Oklahoma 74119-5447
ATTORNEYS FOR SHELL OIL COMPANY

(8)

ct

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

FILED

STEPHEN LEE BUTLER,

Plaintiff,

vs.

LARRY FUGATE, et al.,

Defendants.

)
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)
)
)
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Case No. 95-CV-441-BU ✓

SEP 11 1997

PROCLERK, Clerk
DISTRICT COURT

ENTERED ON DOCKET

DATE SEP 12 1997

JUDGMENT

This matter came before the Court upon Defendants' motion for summary judgment. The Court duly considered the issues and rendered a decision herein.

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

SO ORDERED THIS _____ day of _____, 1997.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

SEP 11 1997

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

PENNY M. TIPTON,)
)
)
Plaintiff,)
)
)
vs.)
)
TAP PHARMACEUTICALS, INC.,)
ET AL.,)
Defendants.)

Case No. 96-C-325-BU ✓

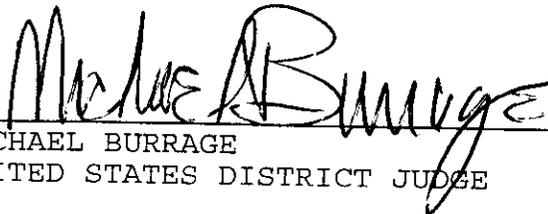
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SEP 12 1997

ADMINISTRATIVE CLOSING ORDER

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

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

Entered this _____ day of September, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

DATE 9-11-97

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

FILED

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

SEP 11 1997

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

REPORT AND RECOMMENDATION

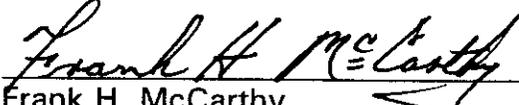
The motion for summary judgment filed December 26, 1996, [Dkt. 61] by Defendants Carl Sloan, Mike Gayman, Robert Carlile, and the Mayes County Jail is before the undersigned United States Magistrate Judge for report and recommendation.

Plaintiff's response [Dkt. 75] advises that the issues raised in the motion are moot with the submission of a proposed amended complaint. Plaintiff stated that the action against these defendants has been abandoned. Accordingly, the undersigned RECOMMENDS that the Defendants' motion for summary judgment [Dkt. 61] be GRANTED and the Defendants dismissed WITHOUT PREJUDICE.

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 11th day of September, 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

DATE 9-11-97
ENTERED ON DOCKET

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

FILED

SEP 11 1997

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

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

Plaintiff,

vs.

Case No.96-CV-91-K ✓

MAYES COUNTY JAIL, et al.,

Defendants.

REPORT AND RECOMMENDATION

The motion for summary judgment filed December 26, 1996, by Defendants Harold Berry, George Klatts, Janell Buckskin, Jason Thompson, and Shawn Cummings [Dkt. 63] is before the undersigned United States Magistrate Judge for report and recommendation.

Plaintiff's response [Dkt. 75] advises that most of the issues raised in the motion are moot with the submission of a proposed amended complaint. Plaintiff has stated that all damage claims against the individual defendants have been withdrawn in the second amended complaint. All claims asserted in the amended complaint are asserted solely against defendant Harold Berry in his official capacity as sheriff of Mayes County, Oklahoma. There remains an issue as to whether there are sufficient facts to find a Mayes County policy maker liable for any unconstitutional conditions. Plaintiff has asked that a ruling on this issue be deferred, pending further discovery and possible settlement proceedings. Defendant Berry has advised that he does not object to such a deferral. [Dkt. 79]. In this regard, the Court notes that the case has

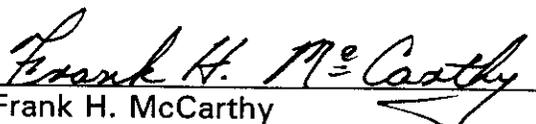
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been stayed until January 1, 1998, to enable Mayes county to hold a bond election for funding jail improvements.

The undersigned RECOMMENDS that the Defendants' motion for summary judgment [Dkt. 63] be GRANTED IN PART. Judgment should be granted to Defendants Berry, Klatts, Buckskin, Thompson, and Cummings in their individual capacities, and those defendants should be dismissed from this action, without prejudice. Plaintiff's request for deferral of ruling on the remaining issue concerning liability of any Mayes County policy maker for unconstitutional conditions at the Mayes County Jail [Dkt. 75] should be GRANTED.

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).

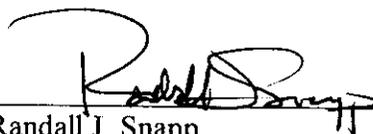
DATED this 11th day of September, 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was mailed, postage prepaid, this ~~5~~^{10th} day of September, 1997, to:

David R. Blades
6846 South Canton, Suite 430
Tulsa, OK 74136



Randall J. Snapp

DMB:gky

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

FILED

PRESTON JAMES COOK,)
)
 Plaintiff,)
)
 vs.)
)
 AVIS RENT-A-CAR SYSTEM, INC.,)
 a Delaware Corporation,)
)
 Defendant.)

SEP 10 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96CV1087H

RECEIVED CLERK'S OFFICE

SEP 11 1997

DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Preston James Cook, and dismisses the above-entitled cause with prejudice to the right of filing any further action against Defendant, Avis Rent-A-Car System, Inc., a Delaware Corporation, regarding the claims made in this lawsuit, all issues of law and fact having been fully compromised and settled as to the same.

By: Preston James Cook
Preston James Cook, Plaintiff

David Garrett
Mr. David Garrett
Attorney for Plaintiff
215 State Street, 10th Floor
P.O. Box 2969
Muskogee, OK 74401

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CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing document was deposited in the U.S. mail this 21 day of August, 1997, with proper postage thereon fully prepaid, addressed to:

James K. Secret, II
Douglas M. Borochoff
7134 S. Yale, Suite 900
Tulsa, OK 74136

David H. Jaw