

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

RICHARD W. FISER, Personal  
Representative of the Estate of  
WILLIAM WRIGHT, deceased,

Plaintiff,

v.

SHEARS, INC., L.P., a Kansas Limited  
Liability Partnership, and  
CHAD E. BUTTER, and KAREN  
BYNUM, Personal Representative of the  
Estate of KEVIN MARK WRIGHT,  
deceased,

Defendants.

ENTERED ON DOCKET

DATE 10-20-97

Case No. 97-C-814-H ✓

**FILED**

OCT 17 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

This matter comes before the Court on Defendant's petition for removal.<sup>1</sup> Plaintiff originally brought this action in the District Court for Creek County. Plaintiff's complaint alleges a cause of action for negligence arising out of an auto accident in Coffey County, Kansas, claiming damages in excess of \$10,000.<sup>2</sup> Defendant Shears Construction, L.P. filed a petition for

<sup>1</sup> In pertinent part, the statute governing "procedure for removal" states that:

[t]he United States district court in which [the notice for removal] is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require.

See also 28 U.S.C. § 1447(c) (procedure after removal) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.").

<sup>2</sup> In Oklahoma, the general rules of pleading require that:

[e]very pleading demanding relief for damages in money in excess of Ten Thousand Dollars (\$10,000.00) shall, without demanding any specific amount of

removal stating that removal is proper on the basis of diversity jurisdiction. Plaintiff filed a motion to remand the action (Docket # 6), contending that there was diversity of citizenship between the parties, that Defendant failed to offer any facts to support its allegation that the jurisdictional amount in controversy exceeded \$75,000, and that not all Defendants joined in the notice of removal.

The initial question for the Court is whether the jurisdictional amount is satisfied under 28 U.S.C. § 1332(a). Initially, the Court notes that federal courts are courts of limited jurisdiction. Further, “[d]efendant’s right to remove and plaintiff’s right to choose his forum are not on equal footing; for example, unlike the rules applied when plaintiff has filed suit in federal court with a claim that, on its face, satisfies the jurisdictional amount, removal statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand.” Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994).

In order for a federal court to have diversity jurisdiction, the amount in controversy must exceed \$75,000. 28 U.S.C. § 1332(a). The Tenth Circuit has clarified the analysis which a district court should undertake in determining whether an amount in controversy is greater than \$75,000. The Tenth Circuit stated:

[t]he amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal. (citation omitted). The burden is on the party requesting removal to set forth, in the notice of removal itself, the “underlying facts supporting [the] assertion that the amount in controversy exceeds \$[75,000].” (citation omitted) Moreover, there is a presumption against removal jurisdiction. (emphasis in original)

Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir.), cert. denied, 116 S. Ct. 174 (1995); e.g., W.L. Hughes & Lucille A. Hughes v. E-Z Serve Petroleum Marketing Co., No. 95-C-1240-H (N.D. Okla. 1996) (applying Laughlin and remanding case); Melissa F. Martin v. Missouri Pacific

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money, set forth only that the amount sought as damages is in excess of Ten Thousand Dollars (\$10,000.00), except in actions sounding in contract.

Okla. Stat. Ann. tit. 12, § 2008(2) (West 1993).

R.R. Co. d/b/a Union Pacific R.R. Co., No. 95-C-289-H (N.D. Okla. 1996) (same); Herber v. Wal-Mart Stores, 886 F. Supp. 19, 20 (D. Wyo. 1995) (same); Lawrence J. Homolka v. Hartford Ins. Group, Individually and d/b/a Hartford Underwriters Ins. Co., No. 95-C-727(H) (N.D. Okla. 1995) (same); Travis Johnson v. Wal-Mart Stores, Inc., No. 95-C-1176(H) (N.D. Okla. 1995) (same); Maxon v. Texaco Ref. & Marketing Inc., 905 F. Supp. 976 (N.D. Okla. 1995) (Holmes, J.) (same) .

In the instant case, neither the allegations in the petition nor the allegations in the removal documents establish the requisite jurisdictional amount. Thus, on its face, the petition does not establish that the amount in controversy is greater than \$75,000.00.

Where the face of the complaint does not affirmatively establish the requisite amount in controversy, the plain language of Laughlin requires a removing defendant to set forth, in the removal documents, not only the defendant's good faith belief that the amount in controversy exceeds \$75,000, but also facts underlying defendant's assertion. In other words, a removing defendant must set forth specific facts which form the basis of its belief that there is more than \$75,000 at issue in the case. The removing defendant bears the burden of establishing federal court jurisdiction at the time of removal, and not by supplemental submission. Laughlin, 50 F.3d at 873. See Herber, 886 F. Supp. at 20 (holding that the jurisdictional allegation is determined as of the time of the filing of the Notice of Removal). And the Tenth Circuit has clearly stated what is required to satisfy that burden.

As set out in Johnson v. Wal-Mart Stores, Inc., No. 95-C-1176(H) (N.D. Okla. 1995), if the face of the petition does not affirmatively establish that the amount in controversy exceeds \$75,000.00, then the rationale of Laughlin contemplates that the removing party will undertake to perform an economic analysis of the alleged damages with underlying facts. Defendant in this case has only addressed the amount of alleged damages in its response to Plaintiff's motion to remand. In that submission, Defendant stated that Kansas statutes provide for a maximum

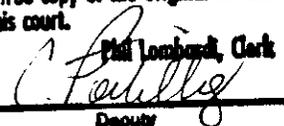
amount of \$100,000 in damages for non-pecuniary loss and a maximum of \$250,000 for pain and suffering in a wrongful death action. These statutes, however, merely set a maximum amount of recovery, not a minimum amount of damages sufficient to satisfy the jurisdictional amount. Furthermore, these allegations of damages came after, not at the time of, Defendant's notice of removal. Defendant in this case has failed to establish the federal jurisdictional amount of \$75,000 at the time of removal and, for this reason, this case must be remanded to the District Court of Creek County.

Since Plaintiff's motion to remand (Docket # 6) is hereby granted due to lack of the requisite amount in controversy, the Court finds it unnecessary to reach the other issues in Plaintiff's motion to remand. The Court hereby orders the Court Clerk to remand the case to the District Court of Creek County.

IT IS SO ORDERED.

This 17<sup>TH</sup> day of October, 1997.

  
Sven Erik Holmes  
United States District Judge

United States District Court }  
Northern District of Oklahoma } ss  
I hereby certify that the foregoing  
is a true copy of the original on file  
in this court.  
By  Phil Lombard, Clerk  
Deputy

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

DAKOTA FINANCIAL SERVICES,  
INC.

Plaintiff,

v.

PHILLIP STANLEY AND  
UNITED STATES POSTAL  
INSPECTION SERVICE,

Defendants.

No. 97-mc-29-H

ENTERED ON DOCKET

DATE 10-20-97

**FILED**

OCT 17 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ADMINISTRATIVE CLOSING ORDER**

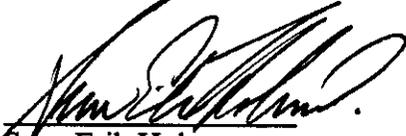
Plaintiff Dakota Financial Services, Inc. filed a Motion for Return of Property on June 26, 1997, to gain possession of a vehicle in which it claims it has a perfected security interest. The vehicle, owned by Defendant Phillip Stanley, was subject to possible forfeiture proceedings by Defendant United States Postal Inspection Service at the time Plaintiff's motion was filed. On July 2, 1997, Plaintiff filed a state action for replevin in the District Court of Tulsa County. On September 22, 1997, Defendant Stanley filed for bankruptcy protection. Plaintiff has now filed a status report with this Court stating that the replevin action has been stayed pending the outcome of the bankruptcy proceeding. It is likely that the bankruptcy proceeding or the replevin action will make proceedings in this Court moot.

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

this order and to reopen the action upon cause shown within 30 days after the resolution of the bankruptcy proceeding that further litigation in this Court is necessary.

IT IS SO ORDERED.

This 17<sup>TH</sup> day of October, 1997.

  
Sven Erik Holmes  
United States District Judge



UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

OCT 17 1997

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

CALVIN W. ADAMS,  
SSN: 444-44-6174,

PLAINTIFF,

vs.

CASE No. 96-CV-842-M

KENNETH S. APFEL,  
Commissioner of the Social  
Security Administration,<sup>1</sup>

DEFENDANT.

OCT 20 1997

**ORDER**

Plaintiff, Calvin W. Adams, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits. In accordance with 28 U.S.C. § 636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this Order will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less

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<sup>1</sup> Kenneth S. Apfel was sworn in as Commissioner of Social Security on September 29, 1997. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Kenneth S. Apfel should be substituted for John J. Callahan, Acting Commissioner, who was previously substituted 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).

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

Plaintiff was born December 4, 1945 and has a seventh grade education. [R. 32]. He last worked in November 1986 and claims to have been unable to work since then due to chest pain, difficulty breathing and lack of energy and stamina associated with severe coronary artery disease. [Plf's Brief, p. 1-2]. Plaintiff's initial application for disability benefits on December 5, 1986 was denied through the hearing level on February 5, 1988. The decision was denied review by the Appeals Council on April 13, 1988. The claim was not further pursued by Plaintiff.

Plaintiff then filed an application for disability insurance benefits on June 9, 1993, which was denied September 16, 1993. On February 24, 1994, the Social Security Administration notified Plaintiff that his claim had been reconsidered and that he currently met the criteria for disability but that the medical evidence did not show that his condition was severe enough to prevent him from working before the expiration of his insured status on December 31, 1991. The denial, therefore, was affirmed upon reconsideration. At Plaintiff's request, a hearing before an Administrative Law Judge (ALJ) was held March 15, 1995. By decision dated April

17, 1995, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on July 9, 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.

The ALJ determined that, during the period between February 5, 1988 and December 31, 1991, Plaintiff had severe coronary artery disease and chronic obstructive pulmonary disease and that he could not return to his past relevant work (PRW) as a route driver and oil truck driver.<sup>2</sup> He concluded that, during the relevant time period, Plaintiff had the residual functional capacity (RFC) to perform light work except for occasional lifting of more than 20 pounds, frequent lifting or carrying of objects weighing more than 10 pounds, standing/walking, off and on, for more than two hours in an 8-hour workday, and frequent bending and stooping. [R. 24]. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ applied incorrect legal standards in analyzing the medical records for the relevant period and that a medical advisor should have been consulted in order to determine the "onset" date. [Plf's Brief, p. 4].

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<sup>2</sup> The parties agree that the relevant time period is between the 1988 uncontested administrative determination that Plaintiff was not disabled and December 31, 1991, the date Plaintiff was last insured.

### Medical Evidence

Plaintiff's medical records commence with a hospitalization summary in February 1985 when Plaintiff was admitted to St. Francis Hospital. [R. 143-144]. Angiograms at that time revealed total occlusion of the radial and brachial arteries and he underwent a thrombectomy. He was discharged from the hospital with instructions to discontinue smoking as soon as possible. In March 1985, Plaintiff was readmitted to the hospital because of increasing distress in the right upper extremity. A Brachial angiogram indicated severe vasoarterial spastic disease of the upper extremity. [R. 160]. He was placed on vasodilators and Trental tablets and was "to be followed." *Id.*

On November 11, 1986, Plaintiff suffered a relatively large myocardial infarction and was hospitalized. [R. 162, 164, 182, 184]. A successful transluminal coronary angioplasty procedure was performed on November 25, 1986. [R. 175]. Plaintiff was discharged from the hospital on December 4, 1986 with a prescription for Coumadin and advised to follow up with Richard E. Martin, M.D. [R. 165, 181].

Plaintiff continued to have chest pain and, on December 30, 1986, he reported to the Emergency Room at Grand Valley Hospital in Pryor, Oklahoma, for an EKG. His dosage of Procardia was increased and he was advised to contact his cardiologist if the pain persisted. [R. 182]. On January 2, 1987, Plaintiff again reported to the emergency room with chest pain. [R. 184]. He was admitted and transferred to St. Francis Hospital in Tulsa, Oklahoma. [R. 186-187]. David A. Brewer, M.D. wrote in the discharge summary, dated January 10, 1987, that what was presumed to have

been distal disease must have been spasm. [R. 189-190]. A chest x-ray was read as showing infiltrates but Dr. Brewer opined that it was actually congestive heart failure. [R. 189]. Dr. Jim Bearden was consulted, who felt that Plaintiff's symptoms were related to spastic bowel syndrome. Plaintiff was discharged on "simplified medications" due to his financial problems. He was urged to contact Vocational Rehabilitation and to obtain psychiatric counseling for help with the depression he was experiencing. *Id.*

On January 12, 1987, Dr. Brewer wrote a letter "To Whom It May Concern." [R. 206]. In that letter, Dr. Brewer stated:

Mr. Adams had a large anteroseptal myocardial infarction that was successfully treated with an angioplasty that opened the LAD. He has had that vessel re-evaluated and it is nicely patent now. On the other hand, he has had a large area of damage and has had some congestive heart failure as a result of this. While he could return to some sort of light work, he will never be able to do heavy work as he has done before. Previously he has lifted heavy boxes and unloaded trucks. He has no training for other kinds of occupations. I feel he is disabled for his sort of work.

[R. 206]. On that same date, Dr. Brewer wrote Dr. Martin, reporting that Plaintiff's latest episode of chest pain had not been related to his heart and that he was profoundly depressed, largely because of his chronic problems with jobs, being laid off work, family problems, lack of money and being turned down for Social Security. Dr. Brewer reported that he had urged Plaintiff to contact Vocational Rehabilitation for some help. [R. 207].

On January 19, 1987, Dr. Brewer again wrote Dr. Martin, stating that Plaintiff had had a good result from his angioplasty but was in mild congestive heart failure and had a great deal of problems with depression. [R. 208].

Dr. Martin continued to treat Plaintiff through July 1987. [R. 225-226]. During this time, he noted that Plaintiff still had some chest pain and that he felt weak. His medications were monitored and adjusted. [R. 225].

On March 31, 1987, Plaintiff was examined for the Disability Determination Unit by Patrick L. Conley, D.O. [R. 212-214]. Dr. Conley reported Plaintiff's history and findings upon physical examination. He said:

This gentleman has multiple risk factors including family, smoking, young age, essential hypertension, and already having had an anterior MI with permanent damage. He is complicated by the fact that he has poor education and his ability to be retrained is minimal. He lives in an underdeveloped area where there are very few sedentary jobs; most all of the jobs in his area require physical activity. The patient obviously is also severely depressed and appears depressed and has a family history of suicide. I consider this gentleman a high risk and unemployable, and it would be very difficult to retrain him. Even if he was retrained in a sedentary job, I am not certain that he would be able to be able to continue any type of regular activities because of his progressive angina.

[R. 214].

On May 8, 1987, Ronald C. Passmore, M.D. reported that Plaintiff's "Situational depression" was resolving without medication and that he appeared to be doing well from that standpoint. [R. 216-217].

Dr. Martin noted on August 18, 1987 that Plaintiff was feeling some better but that he still had chest pain, "[h]e had some yesterday after walking across the road. It improved with NG" (Nitroglycerin). [R. 224].

In November 1989, Plaintiff was treated for upper gastrointestinal hemorrhage. [R. 334-348]. In the consultation report, David Jenkins, M.D. noted that Plaintiff could "not easily distinguish between the pain of the peptic type process and that related to coronary artery disease readily." [R. 347]. A chest x-ray taken on November 2, 1989 was essentially normal. [R. 349].

On August 19, 1990, Plaintiff appeared at the Grand Valley Hospital Emergency Room complaining of hemorrhoid pain. [R. 350]. He gave a history of chest pain but denied shortness of breath, diaphoria (profuse perspiration) or chest pain at the time of this examination. He had "stopped coumadin and changed to ASA" (aspirin). He was treated for the hemorrhoid problem and cardiac disease was noted as "asymptomatic." The notes of the examining physician are barely legible but appear to state: "Encouraged Pt to cont. cardiac meds & FU /c Family Doctor as (illegible) of pain can lead to myocardial injury & further inhance potential life threatening situation." [sic]. It was also noted that he needed "surgical consult." *Id.*

There is no further medical information in the record for the relevant time period. The next record is an August 20, 1993 report by David B. Dean, M.D. for the Disability Determination Unit that Plaintiff was under no medication because he was unable to afford it, that he continued to smoke one to two packs of cigarettes per day, that residual angina with both rest and exertion was under poor medical control

without the use of medication but there was no objective evidence for congestive heart failure. He had diminished grip strength in the left dominant hand by 50 percent and his peptic ulcer disease was also under poor medical control. [R. 351-357].

Records from Mease Medical Clinic, November 10, 1993 through August 4, 1994, document continuing problems with ulcers, chest pain, cold hands (Raynaud's syndrome), congested lungs, bronchitis, swollen feet and "spells" consisting of dizziness, weakness, and hard sweats. [R. 391-306].<sup>3</sup> Plaintiff was referred to V. Thomas Smith, M.D., at Pulmonary Medicine Associates, Inc. for chronic cough. [R. 368].

Dr. Smith reported on August 10, 1994 that Plaintiff had not seen Dr. Brewer since 1986 and "[s]ince that time, he has been considered disabled and unable to work." [R. 368-369]. His assessment was: organic heart disease, status post myocardial infarction with mild congestive heart failure on ACE inhibitors and diuretics and COPD (chronic obstructive pulmonary disease) exacerbated by possible infection and his mild heart failure. An echocardiogram on August 12, 1994 reported decreased left ventricular function with wall motion abnormalities. [R. 366]. On August 23, 1994, Dr. Smith reported to Dr. Mease that Plaintiff was not feeling much better on the medication that he had previously been given, that Dr. Smith was considering the possibility of recurring coronary disease and that, because Plaintiff hadn't been followed in about eight years for his known coronary disease, another

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<sup>3</sup> The Notice of Reconsideration from the Social Security Administration stating "[y]ou currently meet the criteria for disability..." is dated February 24, 1994.

evaluation would be advisable. Plaintiff was scheduled for a Thallium exercise test. [R. 387]. That test was performed on September 2, 1994. [R. 364]. The examiner reported that the exercise was stopped due to fatigue and dyspnea (difficult or labored breathing) but that no chest pain had occurred. *Id.*

#### The ALJ's Decision

As noted above, Plaintiff's first claim was denied in 1988 and Plaintiff did not contest the denial beyond the Appeals Council level. In that claim, the ALJ discussed the medical records of Plaintiff's hospitalizations in 1986 and 1987, Dr. Brewer's records, Dr. Martin's records and Dr. Conley's report. [R. 232-241]. He rejected the opinion of Dr. Conley that Plaintiff was unemployable and, based upon Dr. Brewer's statement on January 12, 1987 that Plaintiff could return to some sort of light work, as well as the testimony of a consulting physician, concluded that Plaintiff could perform the full range of light and sedentary work on a sustained basis. *Id.*

The evidence before the ALJ in this claim includes those medical records submitted in the prior claim with the addition of Dr. Brewer's November 1989 treatment records for upper gastrointestinal bleeding, [R. 334-349], the Grand Valley Hospital Emergency Room record for August 19, 1990, [R. 350], the DDU report by David B. Dean, M.D. of August 20, 1993, [R. 351-357], the Mease Medical Clinic notes, [R.391-396] and Dr. Smith's records from August 1994 [R. 362-369, 387].

The ALJ in the instant claim found the record "was persuasive" that the severity of Plaintiff's physical problems limited him to light work activity on or before December 31, 1991. [R. 20]. After a recitation of the medical evidence, the ALJ

stated: "the record contains no objective medical evidence of any cardiac problem that would have produced severe, disabling chest pain, on or before December 31, 1991. The record does not contain any documentation of medical treatment for cardiac problems from 1987 to 1993." [R. 22]. The ALJ concluded that, during the relevant time period, Plaintiff had the RFC to perform light work with limitations as to walking/standing and bending/stooping. [R. 24]. He found that, in light of all other evidence, Plaintiff's testimony as to his subjective complaints of pain and other symptoms is not sufficiently credible to support a finding of disability. [R. 22]. Citing examples of jobs listed by a vocational expert (VE) at the hearing, the ALJ concluded Plaintiff could have done other work which existed in the economy in significant numbers during the relevant time period. [R. 23].

#### Discussion

Plaintiff complains that the ALJ, by finding Plaintiff's testimony "not sufficiently credible to support a finding of disability" in light of the lack of a treating physician's opinion that "contradicts" his determination of Plaintiff's RFC, effectively shifted the burden back to Plaintiff to prove his disability at step five of the determination process, which is improper.

Plaintiff cites *Miller v. Chater*, 99 F.3d 972 (10th Cir. 1996) as "directly on point." It is true that in the *Miller* case, the Tenth Circuit found the ALJ had effectively shifted the burden back to the claimant to prove her disability at step five and reversed for failure to apply the correct legal framework. *Miller* is distinguishable from the instant case, however. In *Miller*, the ALJ found against the claimant on the

grounds that the medical evidence pertaining to claimant's insured period was "limited" or "insufficient." In doing so, the ALJ ignored a treating physician's report which indicated that Miller was unable to work. In the instant case, the ALJ has not discredited a treating physician's report, but rather, followed it. Dr. Brewer had written on January 12, 1987, that Plaintiff "could return to some sort of light work" and had been encouraged to obtain vocational rehabilitation. [R. 206, 207]. Treatment records of Dr. Martin in August 1987 indicated that Plaintiff's chest pain was improved with nitroglycerin. [R. 224]. A chest x-ray in November 1989 was "essentially normal." [R. 349]. Plaintiff had been treated at a hospital emergency room in August 1990 where his cardiac disease was described as "asymptomatic." [R. 350].

The ALJ acknowledged in his decision, his burden of proof at step five. [R. 23]. At step five, the Secretary bears the burden of proof to establish that, in light of Plaintiff's residual functional capacity (RFC), age, education and work experience, he could still perform other jobs existing in significant numbers in the national economy. *Ragland v. Shalala*, 992 F.2d 1056, 1057 (10th Cir. 1993). Social Security regulations define light work as "involv[ing] lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds." 20 C.F.R. § 404.1567(b). In addition, the regulations state:

Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of

light work, you must have the ability to do substantially all of these activities.

*Id.* The ALJ found that Plaintiff could do the lifting requirements of light work with limitations of no more than two hours in an 8-hour workday of walking/standing, off and on, and no frequent bending and stooping. The Court must determine whether substantial evidence supports that finding.

When a social security case comes before a district court, the court's review is limited to a determination of whether the record as a whole contains substantial evidence to support the agency's decision, and whether the agency applied the proper legal standards. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495, 1501 (10th Cir. 1992). Substantial evidence, while something less than the weight of the evidence, is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if different conclusions also might be supported by the evidence. *Kenworthy v. Conoco, Inc.*, 979 F.2d 1462, 1467 (10th Cir. 1992) citing *Gibraltar Sav. v. Ldbrinkman Corp.*, 860 F.2d 1275, 1297 (5th Cir. 1988), cert. denied, 490 U.S. 1091, 109 S.Ct. 2432, 104 L.Ed. 2d 988 (1989). This Court's limited scope of review precludes the reweighing of the evidence or substituting its judgment for that of the Commissioner. *Hargis*, p. 1486. As long as substantial evidence supports the ALJ's determination, the Commissioner's decision stands. *Hamilton*, p. 1500. If the Commissioner's decision denying Social Security disability benefits is supported by substantial evidence, the decision must be affirmed. *Casias v. Secretary of Health & Human Services*, 933 F.2d 799 (10th Cir. 1991).

Plaintiff's testimony is the only evidence in the record that he was unable to engage in any substantial gainful activity during the relevant time period which the ALJ found not credible. Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ noted the absence of medical documentation from 1987 to 1993 to indicate there had been any change in Plaintiff's condition prior to December 1991. [R. 22]. The Court finds that the ALJ's determination was based on the record as a whole, including the records and reports of Plaintiff's treating physicians, examining and consulting physicians, objective medical findings and the testimony of Plaintiff. The Court finds that Plaintiff's first allegation of error is without merit.

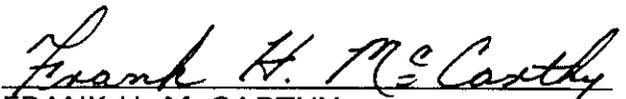
Plaintiff further asserts that this Court must review the evidence to determine whether the chosen date of disability is supported by substantial evidence. Plaintiff contends that, in order to establish the date of "onset of disability", the Commissioner was required to consult a medical advisor. [Plf's Brief, p. 4-5]. However, as discussed above, the date Plaintiff was last insured for the benefits he seeks is December 31, 1991. Disability must have been established by the evidence prior to that date. *Miller*, p. 975; *Henrie v. United States Dep't of Health & Human Servs.* 13 F.3d 359, 360 (10th Cir. 1993). Furthermore, consultative examinations are only necessary when the medical evidence in the record is inconclusive or somehow incomplete. *Thompson v. Sullivan*, 987 F.2d 1482, 1492 (10th Cir. 1993); 20 C.F.R. § 416.919a(b) (1994). If the medical evidence is ambiguous and a retroactive inference is necessary, SSR 83-20 requires the ALJ to call upon the services of a

medical advisor to insure that the determination of onset is based upon a "legitimate medical basis." SSR 83-20; *Delorme v. Sullivan*, 924 F.2d 841, 848 (9th Cir. 1991). The relevant analysis is whether the evidence is ambiguous regarding the possibility that the onset of Plaintiff's disability occurred before the expiration of his insured status. *Reid v. Chater*, 71 F.3d 372, 374 (10th Cir. 1995); *Potter v. Secretary of Health & Human Services*, 905 F.2d 1346 (10th Cir. 1990). Here, the medical evidence is not ambiguous. Plaintiff's treating physician assessed Plaintiff as able to do light work after his successful angioplasty in 1987. Plaintiff admits he did not seek or receive any medical treatment during the relevant time period for the condition which he contends rendered him disabled. The evidence in the record supports the determination that Plaintiff's condition did not change before December 1991 and that he was not precluded from engaging in any gainful activity when his insured status expired.

#### Conclusion

The ALJ's decision demonstrates that he considered all of the medical reports and other evidence in the record in making his determination that Plaintiff retained the capacity to do limited light work during the relevant time period. The record as a whole contains substantial evidence to support the determination of the ALJ that Plaintiff was not disabled prior to the expiration of his insured status. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

Dated this 17<sup>th</sup> day of OCT., 1997.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

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

JOHN STEPHEN ROUTT, )  
)  
Petitioner, )  
)  
vs. )  
)  
GREG PROVINCE, et al., )  
)  
Respondents. )

Case No. 96-CV-902-K ✓

**FILED**

OCT 17 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

Petitioner, a state prisoner appearing *pro se* and *in forma pauperis*, commenced this action pursuant to 28 U.S.C. § 2254. Respondent has filed a motion to dismiss for failure to exhaust state remedies (Docket #10). Petitioner has filed an objection to Respondent's motion to dismiss. For the reasons discussed herein, the Court concludes that Respondent's motion should be granted.

***BACKGROUND***

Based on documents provided by Respondent, the procedural history of Petitioner's case can be summarized as follows:

1. On October 18, 1994, Petitioner pled nolo contendere to possession of a controlled substance in Tulsa County District Court ("TCDC"), Case No. CRF-94-2204, and received a ten (10) year sentence.
2. Petitioner failed to file a timely motion to withdraw his plea. However, he claims that he attempted to contact his attorney in writing<sup>1</sup> during the ten (10) day period to inform the attorney of his desire to withdraw his plea but received no response.
3. According to Petitioner, he sent a motion to withdraw guilty plea and motion to

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<sup>1</sup>A copy of a letter, dated October 24, 1994, from Petitioner to attorney Cameron Martin, indicating Petitioner's desire to withdraw his plea, is part of the record provided by Respondent.

appoint counsel to TCDC on November 7, 1994. He received no response.

4. Petitioner also claims he sent another motion for appointment of counsel to TCDC on December 16, 1994. Again, he apparently received no response from the court.

5. On February 22, 1995, Petitioner filed an "application for post-conviction relief and appeal out-of-time" in Tulsa County District Court.<sup>2</sup>

6. Petitioner claims he received no response from TCDC following the submission of his application for post-conviction relief. As a result, on April 17, 1995, Petitioner filed a "petition in error and extraordinary relief" in the Oklahoma Court of Criminal Appeals ("OCCA").

7. On May 16, 1995, the OCCA issued a writ of mandamus directing TCDC to take action within thirty (30) days on Petitioner's application for post-conviction relief.

8. On August 22, 1995, after apparently receiving no response from the TCDC within the prescribed time period, the OCCA issued a second writ of mandamus directing TCDC to file a status report within fifteen (15) days.

9. On September 22, 1995, Petitioner filed a motion to compel in the OCCA. At that time, the TCDC Clerk indicated that the matter had been set for hearing on September 29, 1995. The OCCA then found Petitioner's motion to compel moot.

10. Apparently, a hearing on Petitioner's motion to withdraw guilty plea was held in TCDC on October 6, 1995.<sup>3</sup> Petitioner complains that at the hearing, the district court "forced" trial

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<sup>2</sup>In the record provided to this Court by Respondent, there is a file-stamped copy of Petitioner's application for post-conviction relief. However, there is no order from TCDC disposing of the February 22, 1995 application.

<sup>3</sup> This conclusion is based on references found in other documents since the record presently before this Court is void of an order or a transcript from the October 6, 1995 hearing.

counsel to represent Petitioner which created a conflict of interest since Petitioner was contending that trial counsel was ineffective during trial and sentencing stages of his criminal proceedings. In his instant habeas corpus petition, Petitioner states his motion was denied and that he informed his counsel of his desire to appeal the denial. However, no notice of intent to appeal was timely filed.

11. On February 16, 1996, Petitioner filed an "application for certiorari and/or appeal out-of-time" in the OCCA. The OCCA dismissed the application pursuant to an order filed April 4, 1996, which provided as follows:

On February 16, 1996, Petitioner filed in this Court an application for certiorari and/or appeal out of time. He was attempting to appeal from an order of the District court of Tulsa County, apparently entered October 6, 1996, [sic]<sup>4</sup> denying his motion to withdraw nolo contendere plea in Case No. CRF-94-2204.

A party desiring to appeal to this Court from the denial of a motion to withdraw nolo contendere plea shall file a notice of intent to appeal, together with the designation of record, in the trial court within ten (10) days from the date the application to withdraw the nolo contendere plea is denied. 22 O.S. 1991, § 1051; Rules of the Oklahoma Court of Criminal Appeals, 22 O.S. Supp. 1995, Ch. 18, App., Rule 4.2(D). Petitioner did not meet these requirements and is not now entitled to a certiorari appeal in this Court.

In addition, Petitioner has not properly sought an appeal out of time from the denial of his motion to withdraw nolo contendere plea. When a defendant seeks an appeal out of time, an application for post-conviction relief must be filed in the trial court, where findings of fact and conclusions of law can be made as to whether the defendant was denied an appeal through no fault of his own. 22 O.S. 1991, §§ 1080 et seq.; Smith v. State, 611 P.2d 276, 277 (Okl. Cr. 1980). Therefore, Petitioner's application for certiorari and/or appeal out of time should be, and is hereby, DISMISSED.

12. On April 25, 1996, Petitioner sought reconsideration of the dismissal but, on June 25, 1996, the OCCA denied the motion pursuant to Rules of the Oklahoma Court of Criminal Appeals,

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<sup>4</sup>The date of any pronouncement from TCDC was actually October 6, 1995. The OCCA corrected this error in its subsequent order dismissing Petitioner's motion to reconsider filed June 25, 1996.

22 O.S. SUPP. 1995, Ch. 18, App., Rule 5.4.

13. Petitioner filed the instant habeas corpus action on October 2, 1996, alleging that (1) he was denied the right to effective assistance of counsel during the trial and sentencing stages of his charge, (2) he was denied the right to effective counsel on appeal, and (3) he was denied the right to swift and effective remedy in which to address the state courts on the unconstitutional conviction in violation of the Fourteenth Amendment to the United States Constitution.

14. Respondent filed a motion to dismiss for failure to exhaust state remedies (Docket #10) alleging that because the OCCA has never had the opportunity to evaluate these claims on the merits, the petition must be dismissed. Respondent urges that Petitioner has an available state court remedy, i.e., he may seek an appeal out of time from the denial of his motion to withdraw his plea of nolo contendere in TCDC.

15. In his objection to Respondent's motion to dismiss, Petitioner states that he "has tried several times in which to present to the state courts his unconstitutional conviction and has been unsuccessful in doing so . . . The grounds raised in this petition has (sic) been brought before the court of crminal (sic) appeals and that court has refused to pass upon the issues of that appeal." (Docket #12, at 6).

#### *ANALYSIS*

When deciding issues relevant to a petition for habeas corpus, the Court must first determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by either (a) showing the state's appellate court had an opportunity to rule on the same claim presented in federal

court, or (b) that at the time he filed his federal petition, he had no available means for pursuing a review of his conviction in state court. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). The exhaustion doctrine is "principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." Harris v. Champion, 15 F.3d 1538, 1554 (10th Cir. 1994) (quoting Rose v. Lundy, 455 U.S. 509, 518 (1982)).

In this case, the Court concludes that Petitioner has not met the exhaustion requirements of 28 U.S.C. § 2254(b)(1) and (c). The OCCA has not had the opportunity to address the merits of Petitioner's claims. Furthermore, the Court finds that an available procedure exists by which Petitioner may raise his claims before the state courts.

Although the OCCA dismissed as untimely Petitioner's appeal of the apparent denial of his motion to withdraw guilty plea, Petitioner may seek an appeal out of time by filing an application for post-conviction relief in TCDC demonstrating that he was denied an appeal of the denial of his motion to withdraw plea of nolo contendere through no fault of his own. As explained by the OCCA in its Order of April 4, 1996, "[w]hen a defendant seeks an appeal out of time, an application for post-conviction relief must be filed in the trial court, where findings of fact and conclusions of law can be made as to whether the defendant was denied an appeal through no fault of his own." (citing 22 O.S. 1991, §§ 1080 et seq.; Smith v. State, 611 P.2d 276, 277 (Okla. Cr. 1980)). Therefore, because an available remedy exists whereby the state appellate court could review Petitioner's claims on the merits, requiring Petitioner to exhaust would not be futile and the petition for writ of habeas corpus should be dismissed without prejudice. In addition, the Court notes that if the State courts do not

grant Petitioner the relief he seeks (after he files a motion for appeal out of time in TCDC and has appealed any denial to the OCCA), he will be free to refile his petition in this Court. See White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988).

**CONCLUSION**

After carefully reviewing the record in this case, the Court concludes that the Petitioner has failed to exhaust available state remedies. Therefore, Respondent's motion to dismiss should be granted and this action dismissed without prejudice.

**ACCORDINGLY, IT IS HEREBY ORDERED that:**

- (1) Respondent's motion to dismiss for failure to exhaust state remedies (Docket #10) is **granted.**
- (2) The petition for a writ of habeas corpus **dismissed without prejudice.**

SO ORDERED THIS 17 day of October, 1997.

  
TERRY C. KERN, Chief Judge  
UNITED STATES DISTRICT COURT

DATE 10-20-97

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

**F I L E D**

OCT 17 1997 *10*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

HARBOR'S VIEW MARINA )

Plaintiff, )

v. )

FIBERGLASS ENGINEERING d/b/a,  
COBALT BOATS )

Defendant. )

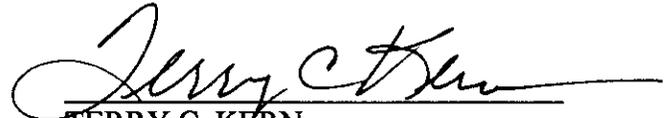
No. 96-CV-1148-K ✓

**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 17 day of October, 1997.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

*16*

DATE 10-20-97

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

**F I L E D**

OCT 17 1997 *PL*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

TINA BRESEE

Plaintiff,

v.

BAYLINER MARINE CORPORATION,

Defendant.

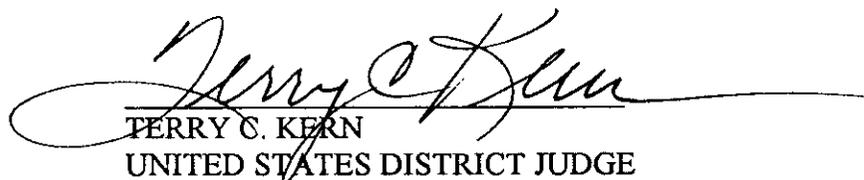
No. 97-CV-81-K ✓

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ORDERED this 17 day of October, 1997.

  
PERRY C. KERN  
UNITED STATES DISTRICT JUDGE

*Jan*

ENTERED ON DOCKET

DATE 10-30-97

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

**FILED**

OCT 17 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

BETTY M. DeVILBISS,	)
	)
Plaintiff,	)
	)
vs.	)
	)
DAN DeVILBISS,	)
	)
Defendants.	)

Case No. 95-C-0026-K

**STIPULATION OF DISMISSAL**

COME NOW the Plaintiff, Betty M. DeVilbiss, and Defendant, Dan DeVilbiss, by and through the undersigned attorneys, and pursuant to Rule 41 (a) (1) (ii) of the Federal Rules of Civil Procedure stipulate the following:

1. The parties and each of them have settled all matters in controversy or subject to the controversy encompassed by the above styled matter.
2. Plaintiff moves for an order dismissing the above titled action against Defendant Dan DeVilbiss, with prejudice.
3. Defendant filed an answer and counterclaim to the Complaint on March 10, 1995, and will not suffer prejudice by this dismissal.
4. Pursuant to the settlement between these parties, each shall bear his own costs of this action, including attorneys' fees.

Submitted by




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David A. Tracy, OBA# 10501  
 NAYLOR, WILLIAMS & TRACY, INC.  
 1701 South Boston Avenue  
 Tulsa, Oklahoma 74119  
 (918) 582-8000  
 (918) 583-1210 (facsimile)  
 Attorneys for Plaintiff

Approved as to form:

A handwritten signature in black ink, appearing to read 'A. Dalton', written over a horizontal line.

Andrew T. Dalton, Jr. OBA #2140  
Attorney for Defendant  
1437 S. Main, #302  
Tulsa, Oklahoma 74119  
(918) 742-0068  
(918) 585-3336 (facsimile)

dvlbs1.dat

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 16 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JUANITA JOHNSON,  
SS# 445-44-7602

Plaintiff,

v.

KENNETH S. APFEL, Commissioner  
of Social Security Administration,<sup>1/</sup>

Defendant.

No. 96-C-885-C(J)

ENTERED ON DOCKET

DATE OCT 20 1997

**REPORT & RECOMMENDATION**

Plaintiff, Juanita Johnson, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.<sup>2/</sup> Plaintiff asserts that the ALJ erred because (1) appropriate weight was not given to the opinions of and clinical evidence from Plaintiff's treating physicians, (2) the ALJ did not properly evaluate Plaintiff's complaints of pain, (3) the ALJ ignored evidence from the vocational expert, and (4) the ALJ did not consider all of the evidence. For the reasons discussed below, the United States Magistrate Judge recommends that the District Court affirm the Commissioner's decision.

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<sup>1/</sup> On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

<sup>2/</sup> Plaintiff filed an application for disability and supplemental security insurance benefits. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge R.J. Payne (hereafter, "ALJ") was held March 28, 1995. [R. at 154]. By order dated June 16, 1995, the ALJ determined that Plaintiff was not disabled. [R. at 136]. Plaintiff appealed the ALJ's decision to the Appeals Council. On August 6, 1996, the Appeals Council denied Plaintiff's request for review. [R. at 4].

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## I. PLAINTIFF'S BACKGROUND

Plaintiff was born September 7, 1945. [R. at 185]. At the time of the hearing before the ALJ, Plaintiff was 49 years old. [R. at 158]. Plaintiff testified that she completed the eighth grade but quit school before completing the ninth grade.

Plaintiff stated that she drives to church every day. According to Plaintiff, her daily activities primarily consist of going to church, washing and ironing, fixing breakfast and lunch, and reading the Bible. [R. at 163]. Plaintiff testified that the longest trip she had taken in the past year was to Alabama for a funeral. Plaintiff stated that she did not drive but rode in the car.<sup>3/</sup> [R. at 159-60].

Plaintiff asserts that she is disabled primarily due to low back pain. [R. at 160].

Plaintiff was initially injured on July 31, 1991 while she was standing on a chair cleaning blinds. [R. at 184]. Plaintiff stated that she experienced severe back pain. After a period of treatment, Plaintiff returned to work but was subsequently injured again on April 14, 1992, when she was cleaning a refrigerator vent. [R. at 291].

One of Plaintiff's treating physicians, Jeanne Edwards, M.D., noted that she first saw Plaintiff in August of 1992 after Plaintiff's first injury. Dr. Edwards noted that Plaintiff complained of pain in her upper extremities and back. Dr. Edwards reported that a myelogram on September 14, 1992 was normal showing no stenosis or defects. [R. at 10, 288, 303]. Dr. Edwards prescribed Elavil for Plaintiff and noted that as of December 1, 1992, one tablet per day was effective in controlling Plaintiff's pain. [R.

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<sup>3/</sup> Plaintiff indicated in her disability report that she was unable to sit in a car for a long time. [R. at 254, 257].

at 10]. By March 4, 1993, Plaintiff was taking 25 mg of Elavil in the morning and 50 mg at night and "reported that she seem[ed] to be doing better." Dr. Edwards concluded that "[i]f Ms. Johnson does indeed work with a significant amount of stretching, bending, and heavy lifting, I would recommend that she not return to work. Any time [sic] the patient is tempted to increase her level of activity, it has apparently exacerbated her pain. I feel she has a chronic back problem. It could be that a workhardening program would be indicated, and, as stated, I'm also recommending a work reduction program." [R. at 10].

On August 25, 1993, an Electromyography and Nerve Conduction Studies Report revealed no significant abnormality, no radiculopathy, plexopathy, or neuropathic changes. [R. at 17]. On September 15, 1993, an MRI of the Lumbar Spine was reported as "essentially normal exam with only mild diffuse bulging of the disc at the 3-4 level noted." [R. at 20]. Plaintiff's knee X-rays on October 25, 1995 were reported as unchanged. [R. at 48].

On September 15, 1993, Dr. Edwards noted that a myelogram from the prior year "showed nothing." Dr. Edwards additionally commented that "I will obtain an MRI but at this time I can find no neurologic etiology for this patient's pain." [R. at 75].

Plaintiff was examined by William R. Grubb, M.D., on March 29, 1993. Dr. Grubb noted that Plaintiff was 5'4" and weighed 198½ pounds. He reported Plaintiff's range of motion of her lumbosacral spine as "limited by her complaints of pain but it appeared likely that given her body habitus, age and weight, that she

probably could have approached 100 degrees as normal for her lumbosacral and hip flexion, 20 to 25 degrees as normal for a lumbosacral extension and lateral bending." [R. at 326]. According to Dr. Grubb, Plaintiff's gait was "intact" and "reasonable [in] terms of speed, stability and safety." [R. at 326]. Dr. Grubb's conclusions were: (1) bilateral knee pain, probably secondary to osteoarthritis, (2) exogenous obesity, (3) hypertension, on no medications, and (4) low back pain possibly secondary to degenerative disease of the lumbosacral spine. [R. at 326].

On February 7, 1995, Joseph Grillo, M.D., examined Plaintiff. He noted that the examination revealed no effused joints, and that Plaintiff had no limitation of her range of motion. [R. at 349]. "There is no objective evidence of disease." [R. at 349]. Dr. Grillo also completed a "Medical Assessment of Ability to do Work-Related Activities (Physical)." Dr. Grillo appears to base his assessments on Plaintiff's statements. He noted that Plaintiff could sit for only ten minutes, stand for only ten minutes and walk for only ten minutes at a time. In addition, Plaintiff's abilities to lift and carry were reported as extremely limited. [R. at 350]. The doctor notes that "no" medical findings supported these statements.

Plaintiff's records from Ellen I. Zanetakis, M.D., dated February 21, 1994, note that Dr. Zanetakis "encouraged [Plaintiff] to walk. She did ask for a handicapped parking sticker but I do not think this is appropriate. She really needs to walk as much as she can. I have advised her not to walk stairs, of course. Flat, level ground would be ideal." On May 3, 1994, Dr. Zanetakis noted that Plaintiff complains of upper extremity pain "but there is no sign of any active joint disease, synovitis, swelling,

tenderness, warmth, nodules, or signs of rheumatoid or other inflammatory changes." [R. at 332]. On January 9, 1995, Dr. Zanetakis recorded that she had discussed Plaintiff's exercise needs and had given Plaintiff several ideas to fulfill her exercise requirements including "water exercise, stationary bike, walking, joining the YMCA, etc." and that Plaintiff indicated that she will try to exercise. [R. at 361].

A letter by Dr. Zanetakis, dated March 7, 1995, notes that Plaintiff is being treated for problems related to fibromyalgia, osteoarthritis and chronic low back pain which are complicated by obesity.<sup>4/</sup> "At the current time fibromyalgia is not considered a disabling condition. She has had a normal MRI of the lumbosacral spine and I cannot consider her disabled."<sup>5/</sup>

A Residual Physical Functional Capacity Assessment Form, completed by Thurma Fiegel, M.D., on March 3, 1993, notes that Plaintiff can lift 50 pounds occasionally, 25 pounds frequently, stand or walk approximately six hours (in an eight hour day), sit approximately six hours (in an eight hour day) and push/pull an unlimited

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<sup>4/</sup> Plaintiff's medical records indicate that she weighed as much as 222 pounds (October 21, 1993) and was attempting to lose weight. [R. at 339]. At the hearing (June 1995), Plaintiff stated that she weighed 120 pounds. [R. at 158]. The ALJ noted that one of Plaintiff's listed medical conditions was "obesity." [R. at 141]. Dr. Zanetakis noted on May 3, 1994, that Plaintiff currently weighed 186 pounds and had lost 36 pounds. [R. at 333]. No further significant weight loss is emphasized in the record. Neither party suggests that the hearing transcript is incorrect.

<sup>5/</sup> The ultimate opinion of a treating physician with respect to whether or not an individual is "disabled" is not controlling. The determination of whether or not an individual is disabled is left to the ALJ. In this case, Plaintiff's doctor appears to be responding to a letter written by a University of Tulsa law student. The law student wrote to Plaintiff and stated that a copy of the medical listings were being enclosed with the letter. The student informed Plaintiff that she should take the listings to her doctor and ask her doctor to determine if Plaintiff had "any disabilities." Therefore, the letter appears to be in response to a question posed by the law student as to whether or not Plaintiff met a Listing.

amount. [R. at 190]. A second Residual Physical Functional Capacity Assessment Form, completed on April 14, 1994 reports similar findings. [R. at 215].

## II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.<sup>6/</sup> 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).

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<sup>6/</sup> 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).

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 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<sup>7/</sup> 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

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<sup>7/</sup> 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."

is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

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

### **III. THE ALJ'S DECISION**

In this case, the ALJ determined that Plaintiff could not return to her past relevant work as a cook. Based on the medical record, testimony of the Plaintiff, and the testimony of the vocational expert, however, the ALJ concluded that Plaintiff could perform some light work and some sedentary work. The ALJ found that Plaintiff was not disabled at Step Five of the sequential evaluation.

### **IV. REVIEW**

#### **Treating Physicians**

Plaintiff initially asserts that the ALJ erred by not giving sufficient weight to the opinions and clinical findings of Plaintiff's treating physicians.

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).

Contrary to Plaintiff's assertion, the ALJ's opinion does not indicate that the opinions and/or clinical evidence from Plaintiff's treating physicians were given insufficient weight. The ALJ summarized Plaintiff's physicians' reports and clinical findings. The ALJ noted that

Objective medical evidence shows that the claimant has obesity, hypertension, fibromyalgia, and osteoarthritis. Physical examinations have revealed multiple tender trigger points, but the claimant has always had good range of motion and negative straight-leg-raising. The claimant's joints have never shown any sign of active joint disease, synovitis, swelling, tenderness, warmth, nodules, or had signs of rheumatoid or other inflammatory changes. MRI,

X-rays, bone scan, CT scan, EMG, and nerve conduction studies have all been unremarkable.

[R. at 142]. The ALJ's conclusions are supported by the medical record.

Plaintiff's September 14, 1992 myelogram was normal. [R. at 10, 288, 303]. An August 25, 1994 Electromyography and Nerve Conduction Studies Report indicated no significant abnormality, radiculopathy or neuropathic changes. [R. at 17]. A September 15, 1993 MRI of the Lumbar Spine was "essentially normal." [R. at 20]. Plaintiff's October 25, 1995 knee X-rays were unchanged. [R. at 48].

Dr. Edwards, who treated Plaintiff noted that Plaintiff should not return to work if she is required to do a significant amount of stretching, bending, and heavy lifting. [R. at 10]. Dr. Zanetakis, who treated Plaintiff, noted that Plaintiff needed to walk as much as she could, that Plaintiff should not receive a handicapped parking sticker, and that Plaintiff exhibited no signs of active joint disease, synovitis, swelling or other inflammatory changes.

Plaintiff additionally asserts that the ALJ incorrectly evaluated the reports of Dr. Grubb and Dr. Grillo. Initially, the Magistrate Judge observes that Drs. Grubb and Grillo are examining physicians with the Social Security Disability Unit. Dr. Grubb noted that Plaintiff's gait was intact and reasonable. He concluded that Plaintiff had knee pain, was obese, had hypertension, and low back pain. [R. at 236].

In addition, Plaintiff was examined by Dr. Grillo. Dr. Grillo emphasized that Plaintiff's complaints were supported by no objective evidence. [R. at 349]. Although Dr. Grillo noted that Plaintiff could perform only very limited physical activities, the

doctor noted that no medical findings supported the limitations. The doctor's conclusions appear to be based solely on Plaintiff's complaints. The reports of Drs. Grubb and Grillo are not inconsistent with the conclusions of the ALJ.

The Magistrate Judge concludes that the record reflects that the ALJ adequately considered the clinical evidence and medical opinions of Plaintiff's treating and examining physicians.

### **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.").

Plaintiff asserts that the ALJ went to "great lengths" to discredit Plaintiff's credibility. Plaintiff contends that the ALJ stated, in his decision, that although Plaintiff testified at the hearing that pain "shoots" down her legs, that she has muscle spasms, that she has pain that "shoots" into her hands and that her knees "give out" that the record does not reveal that she has mentioned these complaints to her physicians. Plaintiff states that the ALJ's statement is incorrect, and Plaintiff cites to several places in the record where Plaintiff has stated, to her treating doctors, that she experiences pain.

Initially, Plaintiff's fault with the ALJ's reasoning is not the sole reason given by the ALJ for discounting Plaintiff's credibility with respect to her testimony concerning the pain she experiences. The ALJ noted that Plaintiff testified that she goes to

church, that she fixes breakfast and lunch, that she washes and irons "some," that she does water aerobics, that she visits with her grandchildren, and that she drives to church. The ALJ observed that Plaintiff stated she can walk approximately one mile, stand for twenty minutes, sit for approximately one hour, and lift approximately one gallon of milk. The ALJ specifically noted that although the record indicates that Plaintiff fell on one occasion, nothing indicates that Plaintiff's legs "give out" on occasion. The ALJ also noted that Plaintiff was able to ride to Alabama although Plaintiff had indicated in a disability report that she could not ride long distances. The ALJ reports that Plaintiff's doctors had suggested she seek lighter employment, that she had been denied a handicapped parking sticker, that Plaintiff had been encouraged to exercise, and that Plaintiff seemed "pain focused." Plaintiff does not discuss any of these "findings" by the ALJ.

Plaintiff is correct that her records do reflect that she has complained of pain to her doctors. Plaintiff has, on occasion, complained of back pain, of pain radiating to her legs, of upper extremity pain, of intermittent back pain, of occasional pain radiating down her leg, of diffuse back pain and of "some low back pain but no other joint pain." [R. at 296, 298, 336, 306, 310, 331-335, 361-63]. The ALJ's blanket statement that Plaintiff has never mentioned any such complaints to her treating physicians is not supported by the record. However, the ALJ relied on numerous other factors in assessing Plaintiff's credibility. In addition, the ALJ did not conclude that Plaintiff experienced no pain. Rather, the ALJ determined that Plaintiff's pain was not

as extensive as Plaintiff testified<sup>8/</sup> and that the pain she experienced would not preclude her from working. The ALJ's findings with respect to credibility are given great deference on review. Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995) ("Credibility determinations are peculiarly within the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence."); Musgrave v. Sullivan, 966 F.2d 1371, 1374 (10th Cir. 1992). Under the facts and circumstances of this case, the Magistrate Judge concludes that the ALJ's findings with respect to Plaintiff's credibility should not be disturbed.

#### **"Severe Disabling Pain"**

Plaintiff objects to the ALJ's statement that Plaintiff "has alleged severe disabling pain." Plaintiff argues that she has never alleged severe disabling pain, but that Plaintiff alleges that she has pain of sufficient degree to preclude her from performing work on a sustained basis.

An ALJ should consider all relevant evidence which supports the plaintiff's allegations of pain.

[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.

Luna at 164. However, the mere existence of pain is insufficient to support a finding of disability; the pain must be "disabling." Gosset v. Bowen, 862 F.2d 802, 807

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<sup>8/</sup> Plaintiff testified that her pain on a daily basis was approximately "8" on a scale of "1 to 10" with a "10" representing the pain experienced if one held a hand in an open flame. The ALJ discounts Plaintiff's testimony that she experienced this degree of pain on a daily basis.

(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.").

Plaintiff is correct that the legal standard is whether or not the pain experienced by Plaintiff was sufficient to preclude Plaintiff from performing substantial gainful activity. However, the record indicates that the ALJ followed this legal standard. The case law and the regulations frequently refer to the legal standard identified by Plaintiff in terms of "disabling pain." In addition, in his opinion, the ALJ clearly notes that the "conclusion of the Administrative Law Judge that the pain experienced by the claimant is limiting but, when compared with the total evidence, not severe enough to preclude all types of work. The issue is not the existence of pain, but whether the pain experienced by the claimant is of sufficient severity as to preclude her from engaging in all types of work activity." [R. at 142]. The ALJ followed the correct legal standard.

#### **Hypothetical Question/Vocational Expert**

Plaintiff asserts without elaboration that the ALJ failed to provide some limitations in a hypothetical to the vocational expert. Plaintiff additionally argues that providing additional limitations probably would have been futile because "the ALJ totally ignored the VE's statements to the effect that Plaintiff could not perform under any of the conditions proffered." Plaintiff's Brief at 3.

An ALJ is not required to accept all of a plaintiff's testimony with respect to restrictions as true, but may pose such restrictions to the vocational expert which are

accepted as true by the ALJ, and which the ALJ finds are properly established by the evidence. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). Considering Plaintiff's medical record and the ALJ's determinations, the hypothetical posed by the ALJ adequately included Plaintiff's restrictions.

The ALJ's hypothetical included an individual who is 49 years old, has an eighth grade education, is capable of performing sedentary and light work but can only occasionally bend, twist, stoop, crouch, kneel, crawl, or climb, cannot climb ladders, ropes, or scaffolds, and cannot perform repetitive overhead reaching with the right arm. The ALJ added that the individual required a low stress job and that the person experienced pain but would be able to remain reasonably alert. The vocational expert concluded that such an individual could work as a hand packager (400 positions in Oklahoma at the sedentary level and 2,000 positions at the light level), a presser (1,200 jobs in Oklahoma), and a telephone solicitor (500 jobs in Oklahoma). When the ALJ added a restriction for alternate sitting and standing, that vocational expert noted that the sedentary positions as a hand packager and telephone solicitor would be available for such a person.

#### **The ALJ's "Admissions"**

Plaintiff states that the ALJ "by his own admission" finds that objective medical evidence supports Plaintiff's claims of obesity, hypertension, fibromyalgia, and osteoarthritis. Plaintiff's Brief at 4. Plaintiff concludes that "it is obvious that the rationale provided by the ALJ is not consistent with the medical evidence of record and

resulted in a finding . . . which is not supported by the evidence." Plaintiff's Brief at 4. Plaintiff provides no further explanation for his assertion.

The ALJ does conclude that Plaintiff has obesity, hypertension, fibromyalgia, and osteoarthritis. However, such a conclusion does not automatically dictate a finding of disabled. An individual is disabled only if the limitations from the impairments that the individual has prohibit the individual from working. The ALJ concluded that although Plaintiff had some impairments, the limitations from those impairments did not render Plaintiff disabled. The ALJ's conclusion is supported by substantial evidence.

#### **RECOMMENDATION**

The United States Magistrate Judge recommends that the decision of the Secretary be **AFFIRMED**.

#### **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 the 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 the Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b).



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

OCT 17 1997 *PLW*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**WILLIAM E. POYNDEXTER,**

**Plaintiff,**

vs.

**INDEPENDENT SCHOOL DISTRICT  
NO. 9,**

**Defendant.**

Case No. 96 CV 793B ✓

ENTERED ON DOCKET

DATE OCT 20 1997

**STIPULATION OF DISMISSAL WITH PREJUDICE**

By virtue of a settlement reached in the case, the parties, through their attorneys, hereby stipulate to a dismissal of the above-captioned case with prejudice, with each side agreeing to pay their own attorney fees and costs.

*Iris A. Lopez*  
\_\_\_\_\_  
Iris A. Lopez, OBA #15154  
616 S. Main St., Suite 308  
Tulsa, OK 74119

Attorney for Plaintiff

*Jerry A. Richardson*  
\_\_\_\_\_  
Jerry A. Richardson, OBA#10455  
ROSENSTEIN, FIST & RINGOLD  
525 S. Main, Suite 700  
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(918) 585-9211

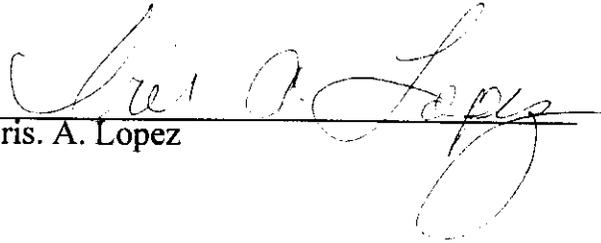
Attorneys for Defendant

*ST*

**CERTIFICATE OF MAILING**

I certify that on <sup>October</sup>~~September~~ 17, 1997, I served a copy of the foregoing **Stipulation of Dismissal With Prejudice** via the United States mails with first class postage prepaid upon:

Jerry A. Richardson  
Rosenstein, Fist & Ringold  
525 S. Main, Suite 700  
Tulsa, OK 74103-4500

  
Iris. A. Lopez

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

BECKY L. THOMAS, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 KENNETH S. APFEL, )  
 Commissioner of the Social Security )  
 Administration, )  
 )  
 Defendant. )

CASE NO. 96-CV-506-M

**F I L E D**  
OCT 15 1997  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON CLERK  
OCT 17 1997

**JUDGMENT**

Judgment is hereby entered for Defendant and against Plaintiff. Dated  
this 15<sup>th</sup> day of OCT., 1997.

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



that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991).

Plaintiff was 35 years old at the time of the hearing, has an eighth grade education and has obtained a GED. [R. 25]. She claims to be unable to work due to arthritis pain in her hands, shoulders, elbows, hips, knees, ankles, back and all her joints. [R. 27-28]. The ALJ determined that Plaintiff is impaired by various arthralgias but that she retains the residual functional capacity (RFC) to perform a full range of sedentary work, that her RFC is not reduced by any nonexertional impairments and that she is able to perform her past relevant work (PRW) as a data entry word processor clerk. The case was thus decided at step four of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the Commissioner's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ failed to properly consider the treating physician's opinion, that he should have posed a hypothetical

question to the vocational expert, that he improperly assessed Plaintiff's nonexertional subjective impairments and that he failed to assess Plaintiff's inability to work on a sustained reasonably regular basis.

At step four of the sequential evaluation process used to analyze disability claims, claimant bears the ultimate burden of proving a disability that prevents her from engaging in her past work activity. *Henrie v. United States Department of Health & Human Services*, 13 F.3d 359, 360 (10th Cir. 1993); *Channel v. Heckler*, 747 F.2d 577, 579 (10th Cir. 1984). The ALJ's decision indicates that he determined Plaintiff had not met this burden. The Court agrees.

Plaintiff's medical records consist of general treatment notes from P.E. Washburn, M.D. from February 23, 1991 through October 31, 1994. [R. 86-92, 105-107, 111-114]. There are also X-ray reports of Plaintiff's back on October 1, 1993 and Plaintiff's hands on March 15, 1994. The back X-ray report indicated straightening of normal cervical lordosis suggestive of paraspinous muscle spasm and mild arthritic changes C5-6 and minimal narrowing of C5-6 intervertebral disc space. [R. 94]. The X-ray report on Plaintiff's hands indicated osteoporosis and probable early manifestation of Rheumatoid arthritis. [R. 93]. The record also contains a Rheumatoid Factor Screen test which is positive at 43 (0-40 being negative). [R. 96].

Dr. Washburn's treatment notes of June 14, 1994 state:

Becky has arthralgias and myalgias. She has had complete workups with no etiology ever being found. She has even been referred to a rheumatologist with no etiology being found. Complains of muscle spasms in her forearms and upper arms at night - states she wakes up and is "all drawn

up." Exam today is completely unremarkable. Will just go with symptomatic treatment.

[R. 87].

Plaintiff's primary complaint concerns the March 13, 1995 report of Dr. Washburn to Plaintiff's attorney which was presented to the ALJ at the commencement of the hearing on March 31, 1995. [R. 24, 108-110]. In that report, Dr. Washburn stated that Plaintiff is unable to stand or sit for any period of time without becoming uncomfortable and that she cannot sit for more than 20-30 minutes at a time without developing foot pain. Dr. Washburn felt that Plaintiff could not sit for more than 5-6 hours in any given 8 hour day, stand for more than 10-15 minutes, walk more than 20-30 minutes at a time with no more than 2-3 hours of walking in an 8 hour day. He reported that she could frequently lift up to 5 pounds, occasionally lift 6-10 pounds, infrequently lift 11-20 pounds, occasionally carry up to 10 pounds but never carry more than 11 pounds at any one time. Dr. Washburn limited Plaintiff's use of her feet for repetitive movements and totally restricted her from being at unprotected heights or around moving machinery due to her analgesics and muscle relaxers. He thought she could occasionally bend and squat and probably frequently reach but never crawl or climb. [R. 109]. Dr. Washburn went on to say that he had reviewed the Social Security Regulations and felt that Plaintiff's condition met or exceeded the criteria for disability. [R. 110].

Plaintiff asserts that the ALJ did not give sufficient weight to her treating physician's opinion that her "condition meets or exceeds criteria for disability." It is

well established that the Secretary must give controlling weight to the opinion of a treating physician if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record, 20 C.F.R. §§ 404.1527 (d)(1) and (2); *Kemp v. Bowen*, 816 F.2d 1469 (10th Cir. 1987). A treating physician's opinion may be rejected if it is brief, conclusory and unsupported by medical evidence. *Castellano v. Secretary of Health and Human Services*, 26 F.3d 1027 (10th Cir. 1994). Moreover, a treating physician's opinion that a claimant is totally disabled is not dispositive because final responsibility for determining the ultimate issue of disability is reserved to the Secretary. *Id.*

Based upon the specific limitations imposed by her treating physician, the ALJ assessed Plaintiff's residual functional capacity (RFC) as limited to sedentary work not further reduced by nonexertional impairment.

[Sedentary work] involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

20 C.F.R. §§ 404.1567(a) and 416.967(a). The Dictionary of Occupational Titles ("DOT") defines "occasionally" as an activity existing *up to* 1/3 of the time.

The ALJ found that Plaintiff was being treated for her symptoms, based only on her complaints and not on objective medical findings. He determined that Plaintiff's past relevant work as a data entry word processor clerk is sedentary in

nature and is, therefore, within the range of her ability. Plaintiff has not presented any evidence, other than her own testimony which the ALJ found not credible, to refute this finding. [R. 15]. The ALJ stated:

After such due considerations, the primary reasons that I find claimant's allegations to not be fully credible are, but are not limited to, the objective findings, or the lack thereof, 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 that [sic] the hearing.

[R. 14]. Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ'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 sedentary 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.

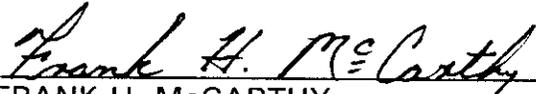
Plaintiff's assertion that the evidence failed to establish that Plaintiff was able to perform work on a sustained basis is without merit. Again, Plaintiff relies upon a portion of Dr. Washburn's report to support her claim that she is "never completely free of pain" and that "[t]here are times when she is totally incapacitated because of joint pain in the hips and hands." [Plf's Brief, p. 12]. While these statements do appear in Dr. Washburn's letter of March 13, 1995, they are clearly recitations of

Plaintiff's complaints and not reports of objective medical findings. [R. 108]. The ALJ may discount subjective complaints of pain if there are inconsistencies in the record as a whole. *Gaddis v. Chater*, 76 F.3d 893, p. 895 (8th Cir. 1996). Furthermore, even if the ALJ finds the claimant to be credible, the mere existence of pain is insufficient to support a finding of disability. Claimant's 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." *Id.* The ALJ reached the last step of the *Luna* analysis by considering Plaintiff's subjective complaints of pain. The ALJ concluded, however, that Plaintiff's allegations of disabling pain were not credible. This conclusion shall be affirmed on appeal if it is supported by substantial evidence. *Thompson v. Sullivan*, 987 F.2d 1482 (10th Cir. 1993).

Plaintiff further asserts that the ALJ asked no questions of the vocational expert (VE) and, therefore, did not fully develop the record. The record shows, however, that the ALJ did ask the VE questions regarding the nature of Plaintiff's past relevant work. [R. 33]. The ALJ was not required to use a vocational expert's testimony as to Plaintiff's ability to perform other jobs as this case was decided at Step Four. *Glenn v. Shalala*, 21 F.3d 983, 988 (10th Cir. 1994) (ALJ was not required to obtain testimony of vocational expert, where ALJ determined that social security disability claimant could return to her former work activities).

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 decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

SO ORDERED this 15<sup>th</sup> day of OCT., 1997.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

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

**FILED**

OCT 14 1997

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

ROBERT LOUIS WIRTZ, Jr., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 LINDA LAZELLE, ET AL., )  
 )  
 Defendants. )

Case No. 93-C-1143-BU H ✓

ENTERED ON DOCKET

DATE 10-16-97

STIPIULATION OF DISMISSAL WITH PREJUDICE

COME NOW Defendants and hereby stipulate that they are in agreement with Plaintiff's Dismissal With Prejudice of the present action filed contemporaneously with this stipulation. (copy of Plaintiff's Dismissal With Prejudice attached as Exhibit "A").

Respectfully submitted,

W. A. DREW EDMONDSON  
ATTORNEY GENERAL OF OKLAHOMA



GREG ELDRIDGE, OBA #14950  
ASSISTANT ATTORNEY GENERAL  
LITIGATION DIVISION  
4545 North Lincoln - Suite 260  
Oklahoma City, OK 73105-3498  
(405) 521-4274  
Attorney for Defendants

110

CERTIFICATE OF MAILING

On this 13<sup>th</sup> day of October, 1997, a true and correct copy of the foregoing was filed and mailed, postage prepaid to:

Robert Louis Wirtz, Jr.  
90344 T. Don Hutto C.C.  
P.O. Box 1063  
Taylor, TX 76574

  
\_\_\_\_\_  
GREG ELDRIDGE



CERTIFICATE OF MAILING

On this 13<sup>th</sup> day of October, 1997, a true and correct copy of the foregoing was filed and mailed, postage prepaid to:

Robert Louis Wirtz, Jr.  
90344 T. Don Hutto C.C.  
P.O. Box 1063  
Taylor, TX 76574

  
\_\_\_\_\_  
GREG ELDRIDGE

APL  
10-10-97

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

AVTECH, INC., an Oklahoma Corporation, and DONALD A. MCCANCE, Plaintiffs,

v.

APL INTERNATIONAL, INC. formerly APL Sales, Inc., DONALD L. BOSHEARS, an individual, RICK BOSHEARS, an individual, FAMBO, INC., an Oklahoma corporation, LOVE BOX COMPANY, INC., a Corporation, BERNARD L. ROBINSON, an individual, HOMESTEAD TOOL & DIE, INC., a corporation, and HOMESTEAD TOOL AND MACHINE, INC., a corporation, Defendants.

**FILED**

OCT 15 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Civil Action No. 94-C-506-BU

OCT 16 1997

JUDGMENT

Judgment is hereby entered in favor of the Plaintiffs, Avtech, Inc., and Donald A. McCance, and against Defendants, APL International, Inc., Fambo, Inc., and Rick Boshears, jointly and severally, in the principal sum of \$164,000.00, plus interest thereon at the U.S. Treasury Bill rate from May 30, 1995, compounding annually, until paid. Judgment against the Defendant, Donald L. Boshears, is reserved pending resolution by the Bankruptcy Court as to the Complaint Objecting to Discharge and Dischargeability pending in the United States Bankruptcy Court for the Northern District of Oklahoma, in the case styled IN RE: DONALD L.

ms

BOSHEARS and MARGARET D. BOSHEARS, DEBTORS, Chapter 7, Case No. 95-01968-R,  
AVTECH, INC., and DONALD A. McCANCE, PLAINTIFFS, vs. DONALD L. BOSHEARS,  
DEFENDANT, Adversary No. 95-0320-R.

It is further ordered that final judgment is hereby entered in favor of the Defendants  
Bernard L. Robinson and Homestead Tool and Machine, Inc. and that Plaintiffs Avtech, Inc. and  
Donald A. McCance shall take nothing from Defendants Bernard L. Robinson and Homestead  
Tool and Machine, Inc.

IT IS SO ORDERED.

DATED: October 15, 1997.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

Approved as to form:

  
\_\_\_\_\_  
BRIAN J. RAYMENT, OBA #7441  
KIVELL, RAYMENT AND FRANCIS  
7666 East 61<sup>st</sup> Street, Suite 240  
Tulsa, OK 74133-1138  
Telephone: (918) 254-0626  
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Attorneys for Plaintiff

  
\_\_\_\_\_  
OWEN E. PERRY  
CRAIG A. BALDWIN  
REISING, ETHINGTON, BARNARD & PERRY, L.L.P.  
P.O. Box 4390  
Troy, MI 48099  
Telephone: (248) 689-3500  
Facsimile: (248) 689-4071  
Attorneys for Defendants

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

**FILED**

OCT 15 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ALLEN RAY LIVINGSTON, )

Petitioner, )

vs. )

No. 96-CV-857-BU

RON WARD, )

ATTORNEY GENERAL of )

OKLAHOMA, )

Respondents. )

ENTERED ON DOCKET

OCT 16 1997

**ORDER**

Petitioner, a state inmate appearing *pro se*, paid the filing fee to commence this habeas corpus action filed pursuant to 28 U.S.C. § 2254. By Order of this Court, dated October 8, 1996, Respondent was directed to file a response to the petition. In that same Order, Petitioner was directed to file a reply brief within thirty (30) days after the filing of Respondent's response.

On November 13, 1996, Respondent filed his response (Docket #3). However, Petitioner did not file a reply within 30 days as directed by the October 8, 1996 Order. On August 20, 1997, Petitioner was again ordered to reply to Respondent's response. The August 20, 1997 Order provided that:

Petitioner may file a **reply brief** within fifteen (15) days from the entry of this Order, or by September 5, 1997. Failure to respond may result in the automatic dismissal of this action. See Local Rule 7.1 for the Northern District of Oklahoma.

As of the date of entry of this Order, Petitioner has not complied with the August 20, 1997 Order.

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He has not filed a reply to Respondent's response. Therefore, the Court finds that this action should be dismissed without prejudice for failure to prosecute.

**ACCORDINGLY, IT IS HEREBY ORDERED** that the petition for writ of habeas corpus is **dismissed without prejudice** for failure to prosecute.

SO ORDERED THIS 15<sup>th</sup> day of October, 1997.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

**FILED**

OCT 15 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

RENARD ELVIS NELSON, )

Plaintiff, )

vs. )

STANLEY GLANZ, et al., )

Defendants. )

Case No. 96-CV-747-BU

ENVELOPE OCT 15 1997  
OCT 16 1997

**ORDER**

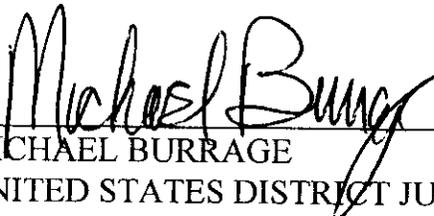
On September 11, 1997, this Court filed its Order requiring Plaintiff to supplement his motion to proceed in forma pauperis by providing a certified copy of his trust fund account statement, signed by an authorized prison official, as required by 28 U.S.C. § 1915(a)(2). In addition, based on Plaintiff's "leave for motion to amend supplemental pleading," liberally construed to be a motion for leave to amend complaint, the Court also directed Plaintiff to submit a "Fourth Amended Civil Rights Complaint." The September 11, 1997 Order provided that Plaintiff was to submit the additional materials by September 29, 1997. Plaintiff was advised that "failure to comply with this Order could result in the dismissal of this cause without prejudice and without notice."

As of the date of entry of this Order, Plaintiff has not complied with the requirements of the September 11, 1997 Order. He has submitted neither the required trust fund account statement nor an amended complaint. Therefore, the Court finds that this action should be dismissed without prejudice for failure to prosecute.

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**ACCORDINGLY, IT IS HEREBY ORDERED** that this action is **dismissed**  
**without prejudice** for failure to prosecute.

SO ORDERED this 15<sup>th</sup> day of October, 1997.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

10-16-97

ENTERED ON DOCKET

DATE 10-16-97

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

OCT 15 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff

v.

DONNA L. COX,

Defendant.

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

Civil Action No. 97CV 204K ✓

DEFAULT JUDGMENT

This matter comes on for consideration this 15 day of October, 1997, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Donna L. Cox, appearing not.

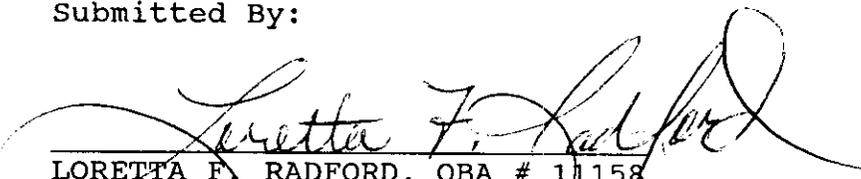
The Court being fully advised and having examined the court file finds that Defendant, Donna L. Cox, was served with Summons and Complaint on April 22, 1997. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Donna L. Cox, for the principal amount of \$311.98, plus accrued interest of \$376.07, plus administrative charges in the amount of \$87.00, plus interest thereafter at the rate of 7 percent per annum until

judgment, a surcharge of 10% of the amount of the debt in connection with the recovery of the debt to cover the cost of processing and handling the litigation and enforcement of the claim for this debt as provided by 28 U.S.C. § 3011, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.49 percent per annum until paid, plus costs of this action.

  
United States District Judge

Submitted By:

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

ENTERED ON DOCKET  
DATE 10-16-97

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

JEFFREY STRAUBEL, d/b/a  
STRAUBEL INVESTMENTS, an individual and  
H. WILLIAM MOTT, M.D.,  
an individual

Plaintiffs,

v.

CORPORATE AVAITION SERVICES INC.,  
an Oklahoma corporation

Defendant.

**F I L E D**

OCT 15 1997 *P*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 97-CV-207-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 October, 1997.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE





ENTERED ON DOCKET  
DATE 10-16-97

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

KIRK DOUGLAS BYRD, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 RITA MAXWELL, )  
 )  
 Respondent. )

Case No. 96-CV-869-K ✓

**F I L E D**  
OCT 15 1997 *M*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

Petitioner, a state prisoner appearing *pro se* and *in forma pauperis*, commenced this action pursuant to 28 U.S.C. § 2254. Respondent has filed a motion to dismiss for failure to exhaust state remedies (Docket #5). Petitioner has filed an objection to Respondent's motion to dismiss.

**I. BACKGROUND**

Petitioner first contends that at a prison disciplinary hearing, Respondent deprived him of 2348 earned credits without affording due process in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. Specifically, Petitioner alleges that Oklahoma Department of Corrections ("ODOC") officials failed to comply with ODOC policies and procedures during the disciplinary hearing process resulting from his escape misconduct charge. Petitioner also alleges that ODOC's denial of restoration of his lost credits violates the *ex post facto* clause of the United States Constitution. Petitioner states that he has "exhausted all available administrative remedies" (Brief in Support of Application for Writ of Habeas Corpus, p. 2) and "the State of Oklahoma will not review the misconduct within their court system" (citing Canady v. Reynolds, 880 P.2d 391 (Okla. Crim. App. 1994)). After citing previous rulings

by the Oklahoma Court of Criminal Appeals in other cases, Petitioner concludes that "[f]urther filings in the state courts would be meaningless and do nothing further but tax judicial economy." (Brief in Support, p. 3). In his prayer for relief, Petitioner states that he is "entitled to have the misconduct held as void and the lost earned credits restored." (Brief in Support, p. 10).

In her motion to dismiss, Respondent urges the Court to dismiss this action for failure to exhaust state remedies. Also relying on the authority of Canady, Respondent argues that Petitioner has an available state remedy, a writ of mandamus. For the reasons discussed herein, the Court agrees with Respondent.

## II. ANALYSIS

### A. *Exhaustion*

A federal court is prohibited from issuing a writ of habeas corpus on behalf of a prisoner in state custody unless the prisoner demonstrates either (1) that he "has exhausted the remedies available in the courts of the State," (2) that "there is an absence of available State corrective process," or (3) that "circumstances exist that render such process ineffective to protect the rights of the [prisoner]." 28 U.S.C. § 2254(b)(1)(A) and (B). A prisoner "shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). See Picard v. Conner, 404 U.S. 270 (1971) (discussing § 2254's exhaustion requirement).

The exhaustion requirement is designed to give states the initial opportunity to address and correct their own alleged violations of federal law and is satisfied only when the prisoner seeking habeas relief has "fairly presented" the facts and the legal theory (i.e., the "substance") supporting his

federal claims to the state's highest court. Picard, 404 U.S. at 275-76. See also, Coleman v. Thompson, 501 U.S. 772 (1991); Rose v. Lundy, 455 U.S. 508 (1982); Duckworth v. Serrano, 454 U.S. 1 (1981); Darr v. Burford, 339 U.S. 200 (1950). Exhaustion in a state court is not required if the state provides absolutely no opportunity to obtain redress or if the opportunity actually provided by the state is so clearly deficient as to render futile any effort to obtain relief. See 28 U.S.C. § 2254.

***B. Oklahoma Law Provides an Available and Adequate Remedy***

Petitioner argues that he has exhausted his administrative remedies and that, pursuant to Canady, he has no available remedy under Oklahoma law. The Court finds that Petitioner's interpretation of Canady is wrong. According to Canady, at 400, "the inmate has the writ of mandamus to force prison officials to provide him with constitutional procedural due process, including proper notice and a hearing before revoking credits after they have been previously earned." (citing Waldon v. Evans, 861 P.2d 311, 313 (Okla. Crim. App. 1993). See also Johnson v. Department of Corrections, 916 P.2d 264, 265 (Okla. Crim. App. 1996). In addition, "[t]he inmate also has a complaint at such time as he or she is entitled to immediate release; and this Court has held the [state] writ of habeas corpus is appropriate in that instance." Canady, at 400 (citing Waldon, at 313; Ekstrand v. State, 791 P.2d 92, 95 (Okla. Crim. App. 1990)). Also, an inmate raising an *ex post facto* challenge to policies resulting in the loss of earned credits may bring the claim before the Oklahoma courts via a writ of mandamus or, if entitled to immediate release if the disputed earned credits were restored, a writ of habeas corpus. See Ekstrand, 791 P.2d at 95 (discussing *ex post facto* challenge brought in petition for writ of habeas corpus); Waldon, 861 P.2d at 313-314 (abrogating the Ekstrand requirement of demonstrating entitlement to immediate release).

In the instant case, Petitioner alleges that (1) proper procedures were not followed in his prison disciplinary proceeding resulting in the loss of earned sentence credits, and (2) the punishment imposed as a result of the finding of misconduct violated the constitutional prohibition against *ex post facto* laws. As Petitioner's first claim is grounded on the argument that prison officials failed to provide him with minimum due process at his prison disciplinary hearing, his claim is precisely the type appropriately brought before the Oklahoma Courts in a petition for writ of mandamus. If Petitioner would be entitled to immediate release if his earned credits are restored, his available state remedy is a petition for writ of habeas corpus. As to Petitioner's *ex post facto* claim, again the State of Oklahoma provides a remedy in the form of mandamus or, if Petitioner would be entitled to immediate release, habeas corpus.

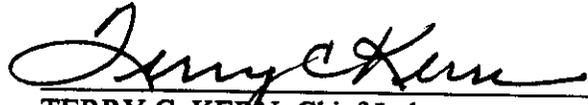
Because Petitioner has an available state remedy, he must first exhaust that remedy before seeking relief in this Court. 28 U.S.C. § 2254(b)(1)(A) and (c).

### III. CONCLUSION

Petitioner must exhaust his available state remedy before seeking habeas relief in federal court. Oklahoma courts will review both Petitioner's due process and *ex post facto* claims via either a petition for writ of mandamus or, if Petitioner alleges he would be entitled to immediate release, a petition for writ of habeas corpus. The Court finds that Respondent's motion to dismiss should be granted and this action dismissed without prejudice for failure to exhaust state remedies.

**ACCORDINGLY, IT IS HEREBY ORDERED** that Respondent's motion to dismiss (Docket #5) is **granted**. This action is **dismissed without prejudice** for failure to exhaust state remedies.

SO ORDERED THIS 15 day of October, 1997.



TERRY C. KEEN, Chief Judge  
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 10-16-97

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

GALINO LOPEZ, )  
)  
Petitioner, )  
)  
vs. )  
)  
RON CHAMPION, Warden, )  
)  
Respondent. )

Case No. 97-CV-7-K(J)

**FILED**

OCT 15 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

The Court has for consideration the Report and Recommendation (the "Report") of the United States Magistrate Judge (Docket #14) filed on September 25, 1997, in this habeas corpus action pursuant to 28 U.S.C. § 2254. The Magistrate Judge recommends that the petition for writ of habeas corpus be dismissed without prejudice for failure to exhaust available state remedies. On October 8, 1997, Petitioner filed his objection to the Report.

In accordance with Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed de novo those portions of the Report to which the Petitioner has objected, and has concluded that, for the reasons discussed below, the Report should be adopted and affirmed.

**BACKGROUND**

While incarcerated at the Dick Conners Correctional Center in Hominy, Oklahoma, Petitioner was charged with and found guilty of inappropriate sexual activity. As a result of the finding of misconduct, Petitioner was sentenced to 30 days of disciplinary segregation and lost 180 days of previously-earned good time credits. In the instant habeas corpus action, Petitioner alleges that he was not afforded minimum due process during the disciplinary proceedings as required by the

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Fourteenth Amendment to the United States Constitution. He seeks expungement of the misconduct conviction from his prison record and the restoration of the revoked earned credits.

Respondent urges that this action must be dismissed because Petitioner has not exhausted his available state remedies as required by 28 U.S.C. § 2254(b)(1)(A). Petitioner, relying on the authority of Canady v. Reynolds, 880 P.2d 391 (Okla. Crim. App. 1994), argues that Oklahoma does not provide an adequate remedy in this type of case, and that, as a result, the exhaustion requirement of § 2254 does not apply. In the Report, the Magistrate Judge recommended because Petitioner does have an adequate and unexhausted state remedy, *mandamus*, this case should be dismissed without prejudice. Petitioner has objected to the Report, and asserts for the first time that he now will be entitled to be released from custody as of November 4, 1997,<sup>1</sup> and that, therefore, *mandamus* is not an appropriate remedy.

### *DISCUSSION*

As explained by the Magistrate Judge in the Report, a federal court is prohibited from issuing a writ of habeas corpus on behalf of a prisoner in state custody unless the prisoner demonstrates either (1) that he "has exhausted the remedies available in the courts of the State," (2) that "there is an absence of available State corrective process," or (3) that "circumstances exist that render such process ineffective to protect the rights of the [prisoner]." 28 U.S.C. § 2254(b)(1)(A) and (B). A prisoner "shall not be deemed to have exhausted the remedies available in the courts of the State...if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). See Picard v. Conner, 404 U.S. 270 (1971) (discussing § 2254's

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<sup>1</sup>The Court notes that in his "reply to supplemental response" filed on March 21, 1997, Petitioner stated that he "would not be entitled to immediate [release] if the earned credits in question were restored." (Docket # 11, at 2) (emphasis added).

exhaustion requirement).

The exhaustion requirement is designed to give states the initial opportunity to address and correct their own alleged violations of federal law and is satisfied only when the prisoner seeking habeas relief has "fairly presented" the facts and the legal theory (i.e., the "substance") supporting his federal claims to the state's highest court. Picard, 404 U.S. at 275-76. See also, Coleman v. Thompson, 501 U.S. 772 (1991); Rose v. Lundy, 455 U.S. 508 (1982); Duckworth v. Serrano, 454 U.S. 1 (1981); Darr v. Burford, 339 U.S. 200 (1950). Exhaustion in a state court is not required if the state provides absolutely no opportunity to obtain redress or if the opportunity actually provided by the state is so clearly deficient as to render futile any effort to obtain relief. See 28 U.S.C. § 2254.

In the instant case, Petitioner argues that, pursuant to Canady v. Reynolds, 880 P.2d 391 (Okla. Crim. App. 1994), he has no available remedy under Oklahoma law. The Court finds that Petitioner's interpretation of Canady is wrong. According to Canady, at 400, "the inmate has the writ of mandamus to force prison officials to provide him with constitutional procedural due process, including proper notice and a hearing before revoking credits after they have been previously earned." (citing Waldon v. Evans, 861 P.2d 311, 313 (Okla. Crim. App. 1993)). See also Johnson v. Department of Corrections, 916 P.2d 264, 265 (Okla. Crim. App. 1996). In addition, "[t]he inmate also has a complaint at such time as he or she is entitled to immediate release; and this Court has held the [state] writ of habeas corpus is appropriate in that instance." Canady, at 400 (citing Waldon, at 313; Ekstrand v. State, 791 P.2d 92, 95 (Okla. Crim. App. 1990)).

As Petitioner's claim in this case is grounded on the argument that prison officials failed to provide him with minimum due process at his prison disciplinary hearing, his claim is precisely the type appropriately brought before the Oklahoma Courts in a petition for writ of mandamus. In

addition, since Petitioner now claims he will be entitled to immediate release as of November 4, 1997, his available state remedy is a state petition for writ of habeas corpus.

Because Petitioner has an available state remedy, he must first exhaust that remedy before seeking relief in this Court. 28 U.S.C. § 2254(b)(1)(A) and (c).

### *CONCLUSION*

Petitioner must exhaust his available state remedy before seeking habeas relief in federal court. Oklahoma courts will review Petitioner's due process claim via a petition for writ of mandamus or, since Petitioner now alleges he would be entitled to immediate release, a petition for writ of habeas corpus. The Court concludes that the Report and Recommendation should be adopted and this action dismissed without prejudice for failure to exhaust state remedies.

### **ACCORDINGLY, IT IS HEREBY ORDERED that**

1. The Report and Recommendation of the United States Magistrate Judge (Docket #14) is **adopted and affirmed**.
2. This action is **dismissed without prejudice** for failure to exhaust state remedies.

SO ORDERED THIS 15 day of October, 1997.

  
TERRY C. KERN, Chief Judge  
UNITED STATES DISTRICT COURT

FILED ON DOCKET  
DATE 10-16-97

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

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

Plaintiff,

v.

MICHAEL G. BARBER, et al.,

Defendants.

**F I L E D**

OCT 15 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

) CIVIL ACTION NO. 96-CV-1198-K

**CLERK'S ENTRY OF DEFAULT**

It appearing from the files and records of this Court as of Oct 15, 1997 and the declaration of Phil Pinnell, Assistant United States Attorney, that the Defendants, Michael G. Barber aka Mike Barber; Chris Barber aka Christine Linda Barber aka Christine Barber Shocklee aka Christine Linda Shocklee; Brown, Bloyed & Associates, Inc.; and Mary Frazho, against whom judgment for affirmative relief is sought in this action have failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

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

Dated at Tulsa, Oklahoma, this 15 day of October, 1997.

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

By J. Schwelke  
Deputy



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

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

RON LANCASTER,  
Plaintiff,  
vs.

Case No. 96-C-337-BU

INDEPENDENT SCHOOL DISTRICT  
NO. 5 OF TULSA COUNTY,  
OKLAHOMA, a/k/a JENKS  
PUBLIC SCHOOLS; KIRBY LEHMAN,  
individually and in his  
official capacity as  
superintendent of the Jenks  
Public Schools; BILLIE MILLS,  
TERRI ALMON, MARK SHARP,  
MIKE BAAB AND BEN MAPLES,  
individually and in their  
official capacities as  
members of the Jenks Public  
Schools Board of Education,  
Defendants.

ENTERED ON DOCKET  
DATE OCT 16 1997

**ORDER**

On August 11, 1997, United States Magistrate Judge Frank H. McCarthy entered an Order granting Defendants' Motion for Attorneys Fees and ordering Plaintiff to pay \$3,773.00 to Defendants as the attorneys fees reasonably incurred by Plaintiff's failure to appear at his properly noticed deposition, and the associated motion practice.

This matter now comes before the Court upon the timely objection of Plaintiff to Magistrate Judge McCarthy's Order. In his objection, Plaintiff asserts four reasons why Magistrate Judge McCarthy's Order should be vacated and Defendants' Motion for Attorneys Fees denied. First, Plaintiff asserts that Defendants waived their claim for attorneys fees under Rule 37(d), Fed. R.

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Civ. P., by failing to file an application for such fees prior to judgment. Second, Plaintiff asserts that Magistrate Judge McCarthy lacked jurisdiction to act upon Defendants' motion based upon the notice of appeal filed in this case on March 24, 1997. Third, Plaintiff asserts that Magistrate Judge McCarthy lacked jurisdiction to modify his November 18, 1996 Minute Order to award attorneys fees for the associated motion practice. Fourth, Plaintiff asserts that the attorneys fees awarded by Magistrate Judge McCarthy are excessive.

Upon review, the Court declines to vacate Magistrate Judge McCarthy's Order as it is neither clearly erroneous nor contrary to law. The Court finds that Defendants did not waive their Rule 37 attorneys fees. Rule 37 does not specify the time during which a Rule 37(d) motion must be filed. Chemical Engineering Corp. v. Essef Industries, Inc., 795 F.2d 1565, 1574 (Fed.Cir. 1986); 7 Moore's Federal Practice, § 37.99 (3rd ed. 1997). In addition, neither Mercy v. Suffolk County, New York, 748 F.2d 52 (2d Cir. 1984) nor Earl Realty, Inc. v. Leonetti, 49 B.R. 333 (E.D. Pa. 1985), recognizes a flat prohibition upon Rule 37 motions post-judgment. Furthermore, the factual circumstances in Popeil Brothers, Inc. v. Schick Electric, Inc., 516 F.2d 772, 778 (7<sup>th</sup> Cir. 1975), are clearly distinguishable from this case. The Court concludes that Defendants' motion, which was filed within the time specified by N.D. LR 54.2 for filing a motion for attorney fees, was timely and not waived.

In addition, the Court finds that Magistrate Judge McCarthy

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

**F I L E D**

OCT 15 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CLARA LOUISE CANADY, individually, )  
and as Personal Representative of the )  
Estate of WESLEY HARDEN CANADY, )  
deceased, )

Plaintiff, )

vs. )

CASE NO. 97CV 52B

THE CITY OF TULSA, BUDDY VISSER, )  
JIM CLARK, RON PALMER, BOARD )  
COUNTY COMMISSIONERS FOR )  
ROGERS COUNTY, and BUCK )  
JOHNSON, )

Defendants. )

ENTERED ON DOCKET

DATE OCT 16 1997

**JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE**

COME NOW the Plaintiff and Defendants, City of Tulsa, Buddy Visser, Jim Clark, Ron Palmer, by and through their respective counsel of record, hereby stipulate and agree that above captioned case may be, upon order of the court, dismissed with prejudice to further litigation pertaining to all matters involved therein as to the City of Tulsa, Buddy Visser, Jim Clark, and Ron Palmer.

Clara Canady  
Clara Louis Canady, Individually, and  
as Personal Representative of the  
Estate of Wesley Harden Canady,  
Deceased

Michael A. Abel  
Michael A. Abel  
Attorney for Plaintiff

Mark H. Newbold  
Mark H. Newbold  
Attorney for Defendants, City of Tulsa,  
Buddy Visser, Jim Clark and Ron  
Palmer

14

0405

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

**FILED**

OCT 15 1997

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

LINDSEY K. SPRINGER, et al.,  
Plaintiffs,

vs.

UNITED STATES OF AMERICA, et al.,

Defendants.

Case No.96-CV-838-H

ENTERED ON DOCKET

DATE 10-16-97

**REPORT AND RECOMMENDATION**

The United States' MOTION FOR SUMMARY JUDGMENT ON ITS COUNTERCLAIM AGAINST PLAINTIFFS [Dkt. 68] has been referred to the undersigned United States Magistrate Judge for report and recommendation.

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, 91 L.Ed.2d 265 (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, 91 L.Ed.2d 202 (1986). To survive a motion for summary judgment, the nonmoving 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, 89 L.Ed.2d 538 (1986). Conclusory allegations are insufficient to establish a genuine issue of fact. *McKibben v. Chubb*, 840 F.2d 1525, 1528 (10th Cir. 1988).

The United States of America has asserted a counterclaim under 26 U.S.C. § 6673(b)(1) against each of the plaintiffs in this action. Section 6673(b)(1) provides:

**Claims under section 7433.**--Whenever it appears to the court that the taxpayer's position in the proceedings before the court instituted or maintained by such taxpayer under section 7433 is frivolous or groundless the court may require the taxpayer to pay to the United States a penalty not in excess of \$10,000.

Section 6673(b)(1) thus establishes two prerequisites that must be met before any penalty may be imposed: (1) an action must have been instituted or maintained under 26 U.S.C. § 7433; and (2) the action must be groundless or frivolous. Unquestionably both requirements are met in this case.

Plaintiffs attempted to invoke the jurisdiction of this Court pursuant to 26 U.S.C. § 7433. [Dkt. 1, p. 4]. In their response to Defendant's motion to dismiss, the plaintiffs clarified that: "Plaintiffs' [sic] filed this action pursuant to 26 U.S.C. § 7433 and 28 U.S.C. § 1340 and **NOT** as the Defendants Attorney attempts to confuse this court by initiating "refunds" (25 U.S.C. 7422) into this action." [Dkt. 38, p.7, ¶ 20].

A suit is frivolous if "it lacks an arguable basis in either law or fact." *Neitzke v. Williams*, 490 U.S. 319, 325, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989); *Olson v. Hart*, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." *Denton v. Hernandez*, 504 U.S. 25, 112 S. Ct. 1728, 1733, 118 L.Ed.2d 340 (1992) (quoting *Neitzke*, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." *Id.*

Section 7433 authorizes suits only where an IRS agent has violated the Internal Revenue Code or regulations "in connection with any **collection** of a Federal tax." Plaintiffs failed to allege any violation in connection with the collection of a Federal tax and sought to maintain their action absent any authority or cogent argument as to how their claims fit within § 7433. In addition, Plaintiffs asserted their § 7433 action against individual officers and employees of the Internal Revenue Service, despite the fact that the language of § 7433 unambiguously establishes that the United States is the proper party. In its March 14, 1997, report and recommendation, the Court determined that "the very premise of Plaintiffs' suit has been unambiguously rejected by the courts." [Dkt. 60, p. 11]. In other words, Plaintiffs' claims were based on an indisputably meritless legal theory. They were, in short, frivolous.

Having determined that the prerequisites for assessment of a penalty under § 6673 have been met, it remains for the Court to determine the appropriate amount of such a penalty. The text of § 6673 offers no guidance as to how the appropriate amount should be determined. Except for asking for the maximum \$10,000 penalty against Mr. Springer, the United States has not requested that any particular amount be imposed. Plaintiffs' response fails to address the issue in relevant terms, and the Court has found no particular guidance from the opinions of other courts. Therefore, this Court is left to fashion its own justification for the amount of penalty imposed.

Although Lindsey K. Springer is not an attorney, he is the self-styled spokesperson for the plaintiffs. The papers filed all bear what appears to be an original signature by Mr. Springer. Except for the signatures appended to the complaint, the signatures of the other

plaintiffs are obviously photocopies. In addition, Mr. Springer stepped forward as the spokesperson and presented oral argument to the Court at the status hearing held January 8, 1997. Based on this information, the Court concludes that Mr. Springer had personal knowledge of the contents of all the papers filed on behalf of the plaintiffs and that the papers were, for lack of better term, the work-product of Lindsey K. Springer.

Lindsey K. Springer was also the lead plaintiff/spokesperson in an earlier case filed in this district, *Springer, et al. v. IRS, et al.*, 94-CV-350-Bu., 1995 WL 434333 (N.D. Okla.). Similar claims were asserted in that case. The Court ruled that the United States of America, not the individual agents named, was the proper party to the action. *Id.* at \*2. The Court dismissed the action because it found it did not have subject matter jurisdiction over Plaintiffs' claims because they had failed to exhaust administrative remedies. In addition, the Court ruled:

Even if the Court were to find that the plaintiffs did exhaust their administrative remedies, the Court concludes that the plaintiffs' complaint fails to state a claim for which relief may be granted under section 7433. Section 7433 applies to acts of officers and employees of the Internal Revenue Service "in connection with any collection of Federal tax. . . ." the plaintiffs' complaint does not allege that collection procedures were instigated or activated by the Internal Revenue Service. The allegations reveal that the plaintiffs paid the federal taxes at issue. Because no collection activities were instigated by the Internal Revenue Service, the Court finds that the plaintiffs do not state a claim for relief under section 7433. *V-1 Oil v. U.S.*, 813 F.Supp 730, 731 (D.Idaho 1992) (Section 7433's waiver of sovereign immunity limited to actions involving wrongful conduct during collection of federal taxes).

*Id.* at \*2-3. The Tenth Circuit affirmed the district court decision and imposed a \$2,000 sanction on Lindsey K. Springer for his frivolous appeals, thus placing him on a heightened notice that claims asserted must have some merit.

Despite having been unambiguously informed by the district court and the Tenth Circuit that actions brought under Section 7433 may only be prosecuted against the United States of America,<sup>1</sup> Plaintiffs, including Lindsey K. Springer and 46 other persons who were parties to the previous suit, brought the present action against a number of individual IRS agents and employees, rather than against the United States of America. Also, despite having been told by the district court in the previous case that actions may be brought under section 7433 only for collection activities, the plaintiffs in this case brought the present action without alleging improper *collection* activities. Based on their involvement in the previous case, the Court concludes that Lindsey K. Springer and the 46 other persons who were parties to the previous suit had actual knowledge that their claims were frivolous and should therefore be assessed more than a minimal penalty.

The remaining plaintiffs, who were not parties to the previous suit, should also be assessed some penalty. Although Lindsey K. Springer acted as their spokesperson, and they did not personally sign all papers filed with the court on their behalf, their names all

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<sup>1</sup> The Tenth Circuit said: "It is clear that the district court was correct in substituting the United States of America as the proper defendant with respect to these claims. 26 U.S.C. § 7422(f)(2) and 7433(a). *Springer v. IRS*, 96-1 USTC ¶ 50,219, 1996 WL 164459 (10th Cir. (Okla.)).

The appeal to the Tenth Circuit proceeded only as to Lindsey K. Springer because none of the other pro se parties signed the brief, and because Lindsey K. Springer is not a member of the bar, he was precluded from representing the other parties. However, the appeal caption contained the names of all of the plaintiffs in that suit so this Court presumes they received notice of the Tenth Circuit opinion. However, regardless of whether these parties received a copy of the Tenth Circuit decision, copies of that opinion have been appended to papers filed by the United States in this case. The certificates of service reflect that these plaintiffs have been served with copies of papers filed in this case by the defendants.

appear on the certificates of service appended to the papers filed by the United States. Through receipt of the papers filed by the United States, these parties were apprised of the vast extent of the law contrary to their position, the possibility that a section 6673 penalty could be assessed for their continued pursuit of their frivolous claims, and the adverse decisions rendered against the plaintiffs who were parties to the earlier action. The Court concludes, therefore, that these Plaintiffs are not without fault for the maintenance of frivolous claims and finds that the assessment of a section 6673 penalty is appropriate.

The undersigned United States Magistrate Judge RECOMMENDS that summary judgment be GRANTED for the United States of America on its counterclaim against plaintiffs. [Dkt. 68], and that penalties be assessed in the following amounts:

Lindsey K. Springer should be assessed a section 6673 penalty of \$4,000, double the amount assessed by the Tenth Circuit, because it appears he personally drafted the frivolous pleadings, personally signed them, and had actual knowledge that they were frivolous.

The following list of plaintiffs should be assessed a section 6673 penalty of \$1,000 because it appears they had actual knowledge that the pleadings were frivolous by virtue of having been plaintiffs in Case No: 94-C-350-Bu:

- |                        |                             |                          |
|------------------------|-----------------------------|--------------------------|
| (1) Wanda J. Waggoner  | (17) Dennis Dean Dazey      | (33) Judy E. Hathaway    |
| (2) Jim Waggoner;      | (18) Carol D. Dazey         | (34) Melvin D. Whitham   |
| (3) Harold D. Boos     | (19) Jim A. Spargur         | (35) Reta M. Whitham     |
| (4) John N. Teel       | (20) Russell L. Dark        | (36) Richard M. LaBat    |
| (5) Gayle Hall Teel    | (21) Paul A. Bischoff, M.D. | (37) Rebecca J. LaBat    |
| (6) Jeffrey A. Robbins | (22) LeeElla J. Bischoff    | (38) Rodney K. Williams  |
| (7) Cynthia K. Robbins | (23) Vernon L. Noah         | (39) Annetta L. Williams |
| (8) Barbara J. Sparks  | (24) Marlene D. Noah        | (40) James R. Timmons    |
| (9) Tom D. Davenport   | (25) William D. Perry       | (41) Sandra W. Snitker   |
| (10) Ronald Wayne Buck | (26) Georgia M. Perry       | (42) Gaylord D. Snitker  |
| (11) Suzanne Buck      | (27) Timothy F. Goddard     | (43) Lawrence M. Buckner |
| (12) James E. Turner   | (28) Young Ja Goddard       | (44) Barbara J. Buckner  |
| (13) Marsha R. Turner  | (29) Michelle D. Brashier   | (45) David Wollman       |
| (14) Kenton D. Whitham | (30) Robert L. Huffman      | (46) Aline Wollman       |
| (15) Jean D. Whitham   | (31) Norma W. Huffman       |                          |
| (16) James L. Lambert  | (32) Charles D. Hathaway    |                          |

The remaining Plaintiffs, listed below, should be assessed a penalty under section 6673 in the amount of \$500 for having maintained the present frivolous and groundless action under section 7433:

- |                            |                           |                          |
|----------------------------|---------------------------|--------------------------|
| (1) Clemmie Buckner        | (10) John Jackson         | (19) James Lamb          |
| (2) Terry Hackler          | (11) Howard M. Boos       | (20) Rhea Lamb           |
| (3) Joan Hackler           | (12) Daniel J. Sanders    | (21) Richard D. Hembree  |
| (4) Dowell N. Buckner      | (13) Johnnie Sanders      | (22) Ralph E. Bailey     |
| (5) Stephan R. Germany     | (14) Vachel Boswell       | (23) Sharon K. Bailey    |
| (6) Richard E. Hackler     | (15) Ina Boswell          | (24) John P. Krueger     |
| (7) Terry Roskum           | (16) Bruce Lowell Higgins | (25) Charlene R. Reddick |
| (8) Monica Roskum          | (17) Michael Arthur Beach | (26) Tamitha Timmons     |
| (9) Linda Jeanne Davenport | (18) Donna Kay Beach      |                          |

The plaintiffs are advised that 26 U.S.C. § 6673(b)(2) provides that "any monetary sanctions, penalties, or costs awarded by the court to the United States may be assessed by the Secretary and, upon notice and demand, may be collected in the same manner as a tax." Plaintiffs are strongly cautioned to keep that information in mind in making the decision whether to permit Lindsey K. Springer or any other unlicensed person to file papers in federal court on their behalf.

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).

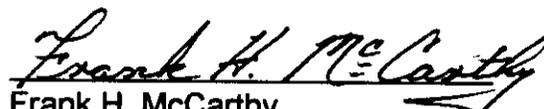
DATED this 15<sup>th</sup> day of October, 1997.

**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

15<sup>th</sup> Day of October, 1997.

Frank H. McCarthy, Deputy Clerk

  
 Frank H. McCarthy  
 UNITED STATES MAGISTRATE JUDGE

SAC

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

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

UNITED STATES OF AMERICA, )  
)  
Petitioner, )  
)  
v. )  
)  
SAMSON INVESTMENT COMPANY, )  
)  
Respondent. )  
\_\_\_\_\_ )

Miscellaneous No. 97 MC 11 H ✓

ENTERED ON DOCKET

DATE 10-16-97

**JOINT STIPULATION FOR DISMISSAL AND ENTRY OF JUDGMENT**

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties herein stipulate that the above styled case shall be, and it is hereby, dismissed without prejudice.

Dated: October 15, 1997

Respectfully Submitted,

STEPHEN C. LEWIS  
United States Attorney  
PHIL PINNELL  
Assistant United States Attorney  
Office of the U.S. Attorney  
333 W. 4<sup>th</sup> Street, Suite 3460  
Tulsa, Oklahoma 74103-3809  
(918) 581-7463

  
STRATTON TAYLOR, OBA #10142  
Taylor, Burrage, Foster & Singhal  
225 S. Brady Street, Suite 300  
P.O. Box 309  
Claremore, Oklahoma 74108

LOIS J. SCHIFFER

10

CF

Assistant Attorney General

Attorneys for Samson Investment, Co.



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ANN D. NAVARO

Pennsylvania Bar # 64047

Attorney

U.S. Department of Justice

Environment & Natural Resources

Division

P.O. Box. 663

Washington, D.C. 20044-0663

(202) 305-0462

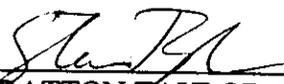
Attorneys for United States

**CERTIFICATE OF MAILING**

I hereby certify that I mailed a true and correct copy of the above and foregoing Joint Stipulation For Dismissal And Entry of Judgement this 15th day of October, 1996 by depositing same in the U.S. Mail, postage prepaid and addressed to:

STEPHEN C. LEWIS  
United States Attorney  
PHIL PINNELL  
Assistant United States Attorney  
Office of the U.S. Attorney  
333 W. 4th Street, Suite 3460  
Tulsa, Oklahoma 74103-3809  
(918) 581-7463

ANN D. NAVARO  
Pennsylvania Bar #64047  
Attorney  
U.S. Department of Justice  
Environment & Natural Resources Division  
P.O. Box 663  
Washington, D.C. 20044-0663  
(202) 305-0462

  
\_\_\_\_\_  
STRATTON TAYLOR, OBA #10142  
Taylor, Burrage, Foster & Singhal  
225 S. Brady Street  
P.O. Box 309  
Claremore, OK 74018

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

**FILED**  
OCT 14 1997

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

ROBERT LOUIS WIRTZ, JR. )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
LINDA LAZELLE, ET AL., )  
 )  
Defendants. )

Case No. 93-C-1143-BU H ✓

ENTERED ON DOCKET

DATE 10-16-97

DISMISSAL WITH PREJUDICE

Plaintiff hereby dismisses with prejudice the above captioned case.

Respectfully submitted,

*[Handwritten Signature]*  
ROBERT LOUIS WIRTZ, JR.  
90344 T. Don Hutto C.C.  
P.O. Box 1063  
Taylor, TX 76574  
PLAINTIFF PRO SE

SUBSCRIBED AND SWORN to before me this 24<sup>th</sup> day of July, 1997.

*[Handwritten Signature]*  
NOTARY PUBLIC

My Commission Expires:  
4/8/2000

CARLA S. ESSAY  
NOTARY PUBLIC  
STATE OF COLORADO  
My Commission Expires 04/08/2000

109

mail  
C/S  
mwr HT

CERTIFICATE OF MAILING

On this 13<sup>th</sup> day of October, 1997, a true and correct copy of the foregoing was filed and mailed, postage prepaid to:

Robert Louis Wirtz, Jr.  
90344 T. Don Hutto C.C.  
P.O. Box 1063  
Taylor, TX 76574

  
\_\_\_\_\_  
GREG ELDRIDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

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

Plaintiff,

v.

PHILLIP A. BEATY  
aka Phillip Anthony Beaty aka Phillip Beaty;  
THE UNKNOWN HEIRS, EXECUTORS,  
ADMINISTRATORS, DEVISEES,  
TRUSTEES, SUCCESSORS AND ASSIGNS  
OF CHERYL BEATY aka Cheryl R. Beaty  
aka Cheryl Roberta Beaty, Deceased;  
ROBERT BEATY;  
ANTHONY BEATY;  
TULSA DEVELOPMENT AUTHORITY;  
STATE OF OKLAHOMA ex rel.  
Oklahoma Tax Commission;  
COUNTY TREASURER, Tulsa County,  
Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County, Oklahoma,

Defendants.

**FILED**

OCT 10 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE 10-15-97

CIVIL ACTION NO. 96-CV-1195-H

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 8<sup>TH</sup> day of DECEMBER,

1997. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; that the Defendant, Tulsa Development Authority, appears by its attorney Darven L. Brown; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, appears by Kim D. Ashley, Assistant General Counsel; and the Defendants,

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Phillip A. Beaty aka Phillip Anthony Beaty aka Phillip Beaty; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Cheryl Beaty aka Cheryl R. Beaty aka Cheryl Roberta Beaty, Deceased; Robert Beaty; and Anthony Beaty, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Tulsa Development Authority, executed a Waiver of Service of Summons on January 7, 1997.

The Court further finds that the Defendants, Phillip A. Beaty aka Phillip Anthony Beaty aka Phillip Beaty; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Cheryl Beaty aka Cheryl R. Beaty aka Cheryl Roberta Beaty, Deceased; Robert Beaty; and Anthony Beaty, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning March 27, 1997, and continuing through May 1, 1997, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(C)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, Phillip A. Beaty aka Phillip Anthony Beaty aka Phillip Beaty; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Cheryl Beaty aka Cheryl R. Beaty aka Cheryl Roberta Beaty, Deceased; Robert Beaty; and Anthony Beaty, and service cannot be made upon said Defendants by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the

Defendants, Phillip A. Beaty aka Phillip Anthony Beaty aka Phillip Beaty; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Cheryl Beaty aka Cheryl R. Beaty aka Cheryl Roberta Beaty, Deceased; Robert Beaty; and Anthony Beaty. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on January 16, 1997; that the Defendant, Tulsa Development Authority, filed its Answer and Cross-Complaint on February 11, 1997; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Answer on February 5, 1997; and that the Defendants, Phillip A. Beaty aka Phillip Anthony Beaty aka Phillip Beaty; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Cheryl Beaty aka Cheryl R. Beaty aka Cheryl Roberta Beaty, Deceased; Robert Beaty; and Anthony Beaty, have failed to answer and their default has therefore been entered by the Clerk of this Court.

Defendants, Phillip A. Beaty aka Phillip Anthony Beaty aka Phillip Beaty; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Cheryl Beaty aka Cheryl R. Beaty aka Cheryl Roberta Beaty, Deceased; Robert Beaty; and Anthony Beaty. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on January 16, 1997; that the Defendant, Tulsa Development Authority, filed its Answer and Cross-Complaint on February 11, 1997; that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, filed its Answer on February 5, 1997; and that the Defendants, Phillip A. Beaty aka Phillip Anthony Beaty aka Phillip Beaty; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Cheryl Beaty aka Cheryl R. Beaty aka Cheryl Roberta Beaty, Deceased; Robert Beaty; and Anthony Beaty, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot Six (6), Block Forty-seven (47), VALLEY VIEW ACRES  
THIRD ADDITION to the City of Tulsa, Tulsa County, State of  
Oklahoma, according to the recorded Plat thereof.

The Court further finds that this a suit brought for the further purpose of judicially determining the death of Cheryl Beaty aka Cheryl R. Beaty aka Cheryl Roberta Beaty, judicially determining the heirs of Cheryl Beaty aka Cheryl R. Beaty aka Cheryl Roberta Beaty, and judicially terminating the joint tenancy of Phillip A. Beaty aka Phillip Anthony Beaty aka Phillip Beaty and Cheryl Beaty aka Cheryl R. Beaty aka Cheryl Roberta Beaty in the subject real property.

The Court further finds that Phillip A. Beaty aka Phillip Anthony Beaty aka Phillip Beaty (hereinafter referred to by any of these names) and Cheryl Beaty aka Cheryl R. Beaty aka Cheryl Roberta Beaty (hereinafter referred to by any of these names) became the record owners of the real property involved in this action by virtue of that certain Warranty Deed dated September 19, 1974, from Richard L. Roudebush, Acting Administrator of Veterans Affairs, an Officer of the United States of America, to Phillip A. Beaty and Cheryl Beaty, brother and sister, as joint tenants, and not as tenants in common, with full right of survivorship, the whole of the estate to vest in the survivor in the event of the death of either, which Warranty Deed was filed of record on September 27, 1974, in Book 4138, Page 1393, in the records of the County Clerk of Tulsa County, Oklahoma.

The Court further finds that on September 20, 1974, Phillip A. Beaty and Cheryl Beaty executed and delivered to the United States of America, acting on behalf of the

Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of \$10,000.00, payable in monthly installments, with interest thereon at the rate of 9.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Phillip A. Beaty and Cheryl Beaty, brother and sister, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a real estate mortgage dated September 20, 1974, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on September 27, 1974, in Book 4138, Page 1405, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 7, 1989, Cheryl Roberta Beaty filed her voluntary petition in bankruptcy in Chapter 13 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 89-01992-C. The real property subject to this foreclosure action described below was a part of the bankruptcy estate as shown on the bankruptcy schedule. Case No. 89-01992-C, United States Bankruptcy Court for the Northern District of Oklahoma, was closed on August 4, 1994.

The Court further finds that Cheryl Roberta Beaty died on October 24, 1994. Upon the death of Cheryl Roberta Beaty, the subject property vested in her surviving joint tenant, Phillip A. Beaty, by operation of law. Certificate of Death No. 025246 issued by the Oklahoma Department of Health certifies Cheryl Roberta Beaty's death.

The Court further finds that on October 27, 1994, Phillip A. Beaty executed a Quit Claim Deed conveying all his interest in the subject real property to Cheryl Beaty. This

Quit Claim Deed was recorded on October 27, 1994, in Book 5667, Page 1186 in the records of Tulsa County, Oklahoma.

The Court further finds that on March 14, 1995, Phillip A. Beaty filed a Petition to Quiet Title, Case No. CJ 95 1184, District Court, Tulsa County, State of Oklahoma, alleging that the execution and filing of the above-described Quit Claim Deed was an error and that he was the owner of the title in fee simple to, and was in possession of the above-described real property.

The Court further finds that Phillip A. Beaty aka Phillip Anthony Beaty aka Phillip Beaty and Cheryl Beaty aka Cheryl R. Beaty aka Cheryl Roberta Beaty, now deceased, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the note and mortgage, after full credit for all payments made, the principal sum of \$6,396.08, plus administrative charges in the amount of \$475.00, plus penalty charges in the amount of \$31.98, plus accrued interest in the amount of \$443.61 as of June 20, 1996, plus interest accruing thereafter at the rate of 9.5 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$681.90 (\$334.90 fees for service by publication, \$75.00 evidentiary affidavit, \$264.00 abstracting fees; \$8.00 fee for recording Notice of Lis Pendens).

The Court further finds that Plaintiff, United States of America, is entitled to a judicial determination of the death of Cheryl Beaty aka Cheryl R. Beaty aka Cheryl Roberta Beaty, to a judicial determination of the heirs of Cheryl Beaty aka Cheryl R. Beaty aka Cheryl Roberta Beaty, and to a judicial termination of the joint tenancy of Phillip A. Beaty

aka Phillip Anthony Beaty aka Phillip Beaty and Cheryl Beaty aka Cheryl R. Beaty aka Cheryl Roberta Beaty.

The Court further finds that the Defendant, Tulsa Development Authority, has a lien on the property which is the subject matter of this action in the amount of \$2,925.00, together with a reasonable sum for attorney's fees and costs, by virtue of an Assignment of Mortgage, dated April 20, 1992, and recorded on April 23, 1992, in Book 5399, Page 0931 in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, State of Oklahoma *ex rel.* Oklahoma Tax Commission, has a lien on the property which is the subject matter of this action in the amount of \$137.53, together with interest and penalty according to law, by virtue of Tax Warrant No. ITI9200541300, dated March 26, 1992, and recorded on April 6, 1992, in Book 5394, Page 1509 in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has liens on the property which is the subject matter of this action by virtue of the following personal property taxes:

Personal Property Taxes	Tax Year	Amount	Date--Lien Docket
93-02-2813050	1993	\$ 5.00	06/23/94
92-02-2809390	1992	\$ 2.00	06/25/93
91-03-2807850	1991	\$17.00	06/26/92
89-03-2756480	1989	\$ 2.00	07/02/90

Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, Board of County Commissioners, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendants, Phillip A. Beaty aka Phillip Anthony Beaty aka Phillip Beaty; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Cheryl Beaty aka Cheryl R. Beaty aka Cheryl Roberta Beaty, Deceased; Robert Beaty; and Anthony Beaty, are in default and therefore have no right, title or interest in the subject real property.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the death of Cheryl Beaty aka Cheryl R. Beaty aka Cheryl Roberta Beaty be and the same hereby is judicially determined to have occurred on October 24, 1994 in the City of Tulsa, Tulsa County, Oklahoma.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the joint tenancy of Phillip A. Beaty aka Phillip Anthony Beaty aka Phillip Beaty and Cheryl Beaty aka Cheryl R. Beaty aka Cheryl Roberta Beaty in the above-described real property be and the same is judicially terminated as of the date of the death of Cheryl Beaty aka Cheryl R. Beaty aka Cheryl Roberta Beaty on October 24, 1994.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the only known heirs of Cheryl Beaty aka Cheryl R. Beaty aka Cheryl Roberta Beaty, Deceased, are Phillip A. Beaty aka Phillip Anthony Beaty aka Phillip Beaty, Robert Beaty, and Anthony Beaty and that despite the exercise of due diligence by Plaintiff and its counsel, no other known heirs of Cheryl Beaty aka Cheryl R. Beaty aka Cheryl Roberta Beaty, Deceased, have been discovered and it is hereby judicially determined that Phillip A. Beaty aka Phillip Anthony Beaty aka Phillip Beaty, Robert Beaty, and Anthony Beaty are the only known heirs of Cheryl Beaty aka Cheryl R. Beaty aka Cheryl Roberta Beaty, Deceased, and that Cheryl Beaty aka Cheryl R. Beaty aka Cheryl Roberta Beaty, Deceased, has no other known heirs,

executors, administrators, devisees, trustees, successors and assigns; and the Court approves the Certificate of Publication and Mailing filed on May 19, 1997 regarding said heirs.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment **in rem** against Defendant, Phillip A. Beaty aka Phillip Anthony Beaty aka Phillip Beaty, in the principal sum of \$6,396.08, plus administrative charges in the amount of \$475.00, plus penalty charges in the amount of \$31.98, plus accrued interest in the amount of \$443.61 as of June 20, 1996, plus interest accruing thereafter at the rate of 9.5 percent per annum until judgment, plus interest thereafter at the current legal rate of \_\_\_\_\_ percent until fully paid, plus the costs of this action in the amount of \$681.90 (\$334.90 fees for service by publication, \$75.00 evidentiary affidavit, \$264.00 abstracting fees; \$8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property, plus any other advances.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, Tulsa Development Authority, have and recover judgment in the amount of \$2,925.00, together with a reasonable sum for attorney's fees and costs, by virtue of an Assignment of Mortgage, dated April 20, 1992, and recorded on April 23, 1992, in Book 5399, Page 0931 in the records of Tulsa County, Oklahoma.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, State of Oklahoma **ex rel.** Oklahoma Tax Commission, have and recover judgment **in rem** in the amount of \$137.53, together with interest and penalty according to

law, by virtue of Tax Warrant No. ITI9200541300, dated March 26, 1992, and recorded on April 6, 1992, in Book 5394, Page 1509 in the records of Tulsa County, Oklahoma

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the total amount of \$26.00, plus penalties and interest, by virtue of the above-described personal property taxes.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, Phillip A. Beaty aka Phillip Anthony Beaty aka Phillip Beaty; The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Cheryl Beaty aka Cheryl R. Beaty aka Cheryl Roberta Beaty, Deceased; Robert Beaty; Anthony Beaty; and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

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

**First:**

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

**Second:**

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

**Third:**

In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Tulsa, Oklahoma, for 1989 personal property taxes;

**Fourth:**

In payment of the judgment rendered herein in favor of the Defendant, State of Oklahoma *ex rel.* Oklahoma Tax Commission;

**Fifth:**

In payment of the judgment rendered herein in favor of the Defendant, Tulsa Development Authority;

**Sixth:**

In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Tulsa, Oklahoma, for 1991, 1992, and 1993 personal property taxes.

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

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

  
UNITED STATES DISTRICT JUDGE

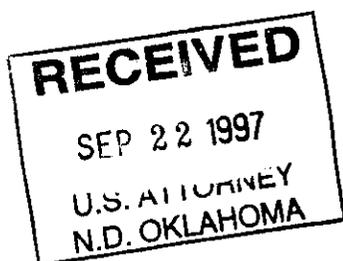
APPROVED:

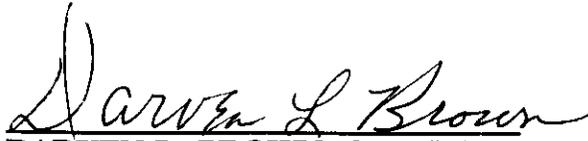
STEPHEN C. LEWIS  
United States Attorney

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

Judgment of Foreclosure  
Case No. 96-CV-1195-H (Bonty)





**DARVEN L. BROWN, OBA #1177**

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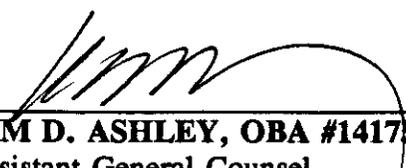
Attorney for Defendant,

Tulsa Development Authority

**Judgment of Foreclosure**

**Case No. 96-CV-1195-H (Beaty)**

RECEIVED  
SEP 29 1997  
U.S. ATTORNEY  
TULSA, OKLA

  
**KIM D. ASHLEY, OBA #14175**  
Assistant General Counsel  
P.O. Box 53248  
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Attorney for Defendant,  
State of Oklahoma ex rel. Oklahoma Tax Commission  
*17-97-61*

Judgment of Foreclosure  
Case No. 96-CV-1195-H (Beaty)

PP:cas

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

**FILED**  
OCT 10 1997  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

GEORGE W. MOODY, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 UNITED STATES OF AMERICA, )  
 )  
 Defendant. )

Case No. 97-C-256-H

ENTERED ON DOCKET

DATE 10-15-97

**ORDER**

This matter comes before the Court on Plaintiff's "Verified Complaint" (Docket # 1), Defendant's motion to dismiss (Docket # 3), and Plaintiff's "Verified Answer" to Defendant's motion to dismiss and motion for summary judgment (Docket # 5). Defendant requests that the Court dismiss all five of Plaintiff's causes of action against the Internal Revenue Service (the "Service").

To prevail on a motion to dismiss, a defendant must establish that there is no set of circumstances upon which the plaintiff would be entitled to relief. Jenkins v. McKeithen, 395 U.S. 411 (1969); Ash Creek Mining Co. v. Lujan, 969 F.2d 868, 870 (10th Cir. 1992). For the purposes of this analysis, the Court accepts as true all material allegations in the complaint. Ash Creek Mining, 969 F.2d at 870.

Plaintiff's first cause of action requests injunctive relief and damages for various allegations of wrongdoing by the Service, including aggressive collection actions and failure to give proper notice of a property levy as required by section 7429(a)(1) of the Internal Revenue Code (the "Code"). Plaintiff's action for injunctive relief, however, is barred by the Anti-Injunction Act, section 7421(a) of the Code. Section 7421 states in part that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." I.R.C. § 7421(a). Plaintiff's request for injunctive relief also does not meet any

1

applicable exception to this prohibition. See Bob Jones Univ. v. Simon, 416 U.S. 725, 742-46 (1974).

Plaintiff's claim for lack of proper notice under section 7429(a)(1) also is invalid. If the advance notice requirement is waived due to a determination that collection would be in jeopardy, this section requires notice to be given within five days after a levy is made. Since no jeopardy determination was made in this case, section 7429(a)(1) does not require such notice. Thus, Plaintiff's first cause of action is hereby dismissed.

The second cause of action is for economic damages under section 7433 for wrongful tax assessments, unnecessary liens, and the Service's breach of agreement with Plaintiff. I.R.C. Section 7433 provides in pertinent part as follows:

**(a) In general.** -- If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

I.R.C. § 7433. Section 7433 does not provide a cause of action for errors in the determination of taxes. Instead, it only provides a cause of action for errors in the collection of taxes. Shaw v. United States, 20 F.3d 182, 184 (5th Cir. 1994). Insofar as Plaintiff's second cause of action alleges a wrongful assessment of taxes, his claim is barred by section 7433.

In his third cause of action, Plaintiff seeks an accounting from the Service as he claims he no longer owes any debt. There is no statute, however, that authorizes an accounting by the Service. The Court further notes that insofar as Plaintiff seeks a refund of federal income tax wrongfully collected, the Court's jurisdiction is limited by 26 U.S.C. § 7422(a), which provides:

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according

to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

There is no evidence whatsoever in the record to suggest that Plaintiff has filed a proper claim for refund with the Secretary. Thus, the Court does not have jurisdiction over Plaintiff's claim for an accounting in connection with his request for a tax refund.

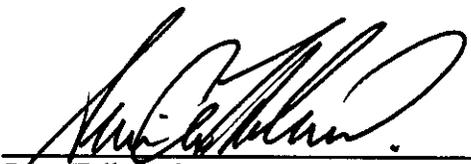
Plaintiff's fourth cause of action seeks damages for slander per se, while his fifth cause of action claims damages for intentional interference with economic relationships by the Service. A plaintiff may bring a suit against the federal government or a federal agency only when the government has explicitly waived its sovereign immunity. See 28 U.S.C. § 1346. The Federal Tort Claims Act ("FTCA") is a limited waiver of sovereign immunity which renders the federal government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment. The provisions of the FTCA must be strictly construed. Pipkin v. United States Postal Serv., 951 F.2d 272 (10th Cir. 1991).

Plaintiff is barred from asserting his fourth and fifth causes of action under the FTCA. The FTCA bars "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h). Under this statute, Plaintiff is clearly barred from asserting common law tort claims for slander per se and intentional interference with economic relationships. Thus, Plaintiff's fourth and fifth causes of action are also hereby dismissed.

In summary, Defendant's motion to dismiss (Docket # 3) is hereby granted. Accordingly, Plaintiff's request for an injunction (Docket # 1) and Plaintiff's motion for summary judgment (Docket # 5) are hereby denied.

IT IS SO ORDERED.

This 8<sup>TH</sup> day of October, 1997.

  
Sven Erik Holmes  
United States District Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

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

Plaintiff,

v.

GLENN S. AKINS;  
MARIAN P. AKINS;  
CURTIS W. DICESARE;  
CINDY S. DICESARE;  
COUNTY TREASURER, Tulsa County,  
Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County, Oklahoma,

Defendants.

ENTERED ON DOCKET

DATE 10-15-97

**FILED**

OCT 10 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CIVIL ACTION NO. 96-C-310-H

**ORDER FOR SUMMARY JUDGMENT**

Before the Court is the Plaintiff's Motion For Summary Judgment against the Defendants, Curtis W. Dicesare and Cindy S. Dicesare, for the amount set forth in the Complaint and for foreclosure because no genuine issue exists as to any material fact and the United States is entitled to a judgment as a matter of law.

Said Motion for Summary Judgment was filed March 3, 1997. Because no response was filed by Defendants Curtis W. Dicesare or Cindy S. Dicesare within fifteen days, nor has a response been filed by them to date, the Court, in accordance with N.D.Ok.

L.R. 7.1. C., hereby deems the Motion for Summary Judgment confessed and grants the Plaintiff's Motion For Summary Judgment, entitling the Plaintiff to judgment in the amount of \$23,515.75, plus administrative charges in the amount of \$445.00, plus penalty charges in the amount of \$56.80, plus accrued interest in the amount of \$623.14 as of November 24, 1995, plus interest accruing thereafter at the rate of 10.5 percent per annum until judgment, plus

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5/2  
10/14/97

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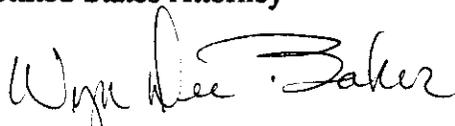
interest thereafter at the legal rate until fully paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during the foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property. The Court directs the Plaintiff to submit to the Court a Judgment of Foreclosure in accordance with this Order.

IT IS SO ORDERED, this 8<sup>TH</sup> day of October, 1997.

  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

**STEPHEN C. LEWIS**  
United States Attorney

  
**WYN DEE BAKER, OBA #465**  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

Order For Summary Judgment  
Civil Action No. 96-C-318-H (Alkins)

WDB:cm

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

OCT 10 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

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

Defendants.

ENTERED ON DOCKET

DATE 10-15-97

Civil Case No. 96-C-0240-H

**AMENDED  
JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 10<sup>th</sup> day of October,

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

SPC  
9/30/97

21

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Court further finds that the Defendants, Household Finance Corporation III; Leader Federal Bank For Savings formerly Leader Federal Savings & Loan Association; and City of Broken Arrow, Oklahoma, are in default and therefore have no right, title or interest in the subject real property, except so far as the City of Broken Arrow is the owner of certain easements which are shown on the plat of record.

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

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

The Court further finds that the Internal Revenue Service has a lien upon the property by virtue of a Notice of Federal Tax Lien dated October 17, 1995, and recorded on

October 24, 1995, in Book 5755, Page 1099 in the records of the Tulsa County Clerk, Tulsa County, Oklahoma. Inasmuch as government policy prohibits the joining of another federal agency as party defendant, the Internal Revenue Service is not made a party hereto; however, by agreement of the agencies the lien will be released at the time of sale should the property fail to yield an amount in excess of the debt to the Secretary of Housing and Urban Development.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against Defendants, Richard M. LaBat aka Richard Labat aka Richard Malcolm LaBat and Rebecca J. LaBat aka Rebecca Jo LaBat (Labat) fka Rebecca J. Lorello, in the principal sum of \$79,273.49, plus administrative charges in the amount of \$467.01, plus penalty charges in the amount of \$603.60, plus accrued interest in the amount of \$42,174.24 as of March 14, 1995, plus interest accruing thereafter at the rate of 10.5 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.49 percent per annum until fully paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

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

property, except so far as the City of Broken Arrow is the owner of certain easements which are shown on the plat of record.

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

**First:**

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

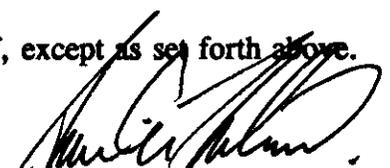
**Second:**

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

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

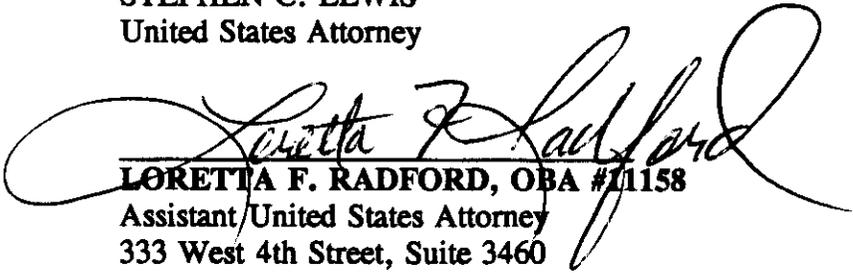
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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

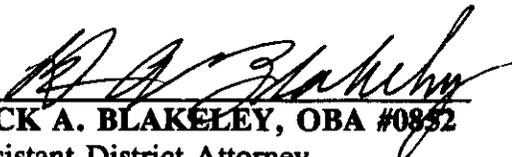
  
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney



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Attorney for Defendant,  
City of Broken Arrow, Oklahoma

*Amended*  
Judgment of Foreclosure  
Case No. 96-C-0240-H (LaBea)

LFR:cas

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

**FILED**

OCT 10 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

SUSAN ADAMS, )  
)  
Plaintiff, )  
)  
vs. )  
)  
AMERICAN AIRLINES, INC., )  
)  
Defendant. )

Case No. 94-C-1046-H

ENTERED ON DOCKET

DATE 10-15-97

**ORDER**

This matter comes before the Court on Defendant's motion for summary judgment (Docket # 77), Plaintiff's motion to settle the order granting partial summary judgment (Docket # 98), Defendant's renewed motion for summary judgment (Docket # 100) and Plaintiff's motion for partial summary judgment (Docket # 126).

In this action, Plaintiff has asserted four claims against Defendant American Airlines, Inc. ("American") as follows: (1) for sex discrimination under Title VII (the "discrimination claim"); (2) for retaliation under Title VII (the "retaliation claim"); (3) for breach of her employment contract allegedly arising from American's regulations and policies, as well as the Collective Bargaining Agreement (the "CBA") dated October 7, 1991, between American and Plaintiff's union, the Transport Workers Union of America, AFL-CIO (the "contract claim"); and (4) for intentional infliction of emotional distress.

Defendant sought summary judgment on the grounds that: (i) all of Plaintiff's claims are preempted by the Railway Labor Act, 45 U.S.C. § 151, et seq. (the "RLA"), and (ii) Plaintiff's cause of action for intentional infliction of emotional distress is insufficient because, as a matter of

132

law, the alleged conduct does not rise to the level required to support such a claim. For the reasons set forth below, Defendant's motion is granted in part and denied in part.

I

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

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

477 U.S. at 322.

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

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

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

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

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

## II

Generally, the RLA organizes disputes into two categories: (1) "major" disputes, which relate to the formation of collective bargaining agreements or efforts to secure them; and (2) "minor" disputes, which involve the interpretation of a collective bargaining agreement, the existence of which is not in dispute. Barnett v. United Airlines, Inc., 738 F.2d 358, 361 (10th Cir. 1984). The RLA specifically defines minor disputes as those "between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. § 153 First (i) & § 184.

With respect to minor disputes, the RLA contains compulsory dispute resolution provisions, i.e. binding arbitration before an adjustment board whose award is enforceable in the district courts. See 45 U.S.C. § 153 First (i)(m)(p) & § 184. As the Supreme Court has stated:

A minor dispute . . . is subject to compulsory and binding arbitration before the National Railroad Adjustment Board . . . or before an adjustment board established by the employer and the unions representing the employees . . . . The Board (as we shall refer to any adjustment board under the RLA) has exclusive jurisdiction over minor disputes.

Consolidated Rail Corp. v. Railway Labor Executives Ass'n, 491 U.S. 299, 303-04 (1989)

(emphasis added) (citing Railway Labor Act, §§ 3 & 3 Second, 45 U.S.C. §§ 153 & 153 Second).<sup>1</sup> Minor disputes "must be resolved only through the RLA mechanisms, including the carrier's internal dispute-resolution processes and an adjustment board established by the employer and the unions." Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252 (1994).<sup>2</sup>

Recently, the Tenth Circuit revisited the issue of RLA preemption in Fry v. Airline Pilots Ass'n, Int'l, 88 F.3d 831 (10th Cir. 1996). In Fry, nine nonstriking pilots for United Airlines

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<sup>1</sup> In the airline industry, there is no national adjustment board and minor disputes are resolved by an adjustment board established by the airline and the unions. Consolidated Rail Corp., 491 U.S. at 304 n.4.

<sup>2</sup> Where a contract contains an arbitration clause, there is a presumption the contract will be arbitrated in the sense that "[a]n order to arbitrate the particular grievance should not be denied 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute'" and "[d]oubts should be resolved in favor of coverage." Bridgestone/Firestone, Inc. v. Local Union No. 998, 4 F.3d 918, 921 (10th Cir. 1993) (citing AT & T Techs., Inc. v. Communications Workers of America, 475 U.S. 643, 648-50 (1986)). Although Bridgestone/Firestone involved arbitration under the Labor Management Relations Act, 29 U.S.C. § 141 et seq. ("LMRA"), the case for arbitration under the RLA is stronger than that under the LMRA. Andrews v. Louisville & Nashville R.R. Co., 406 U.S. 320, 323 (1972) ("[S]ince the compulsory character of the administrative remedy provided by the Railway Labor Act . . . stems not from any contractual undertaking between the parties but from the Act itself, the case for insisting on resort to those remedies is if anything stronger in cases arising under that Act than it is in cases arising under § 301 of the LMRA.")

brought suit against the airline and the Airline Pilots Association based on post-strike harassment of the nonstriking pilots. The district court granted the airline's summary judgment motion on all claims, including the intentional infliction claims, because the claims were either preempted by the RLA or barred by the exclusive remedy provisions of the Colorado Worker's Compensation Act.

Citing Norris, the Fry court defined minor disputes as "disputes arising over duties 'rooted firmly in the collective-bargaining agreement' so that 'any attempt to assess liability here inevitably will involve [labor] contract interpretation,' or as disputes that are dependent on the interpretation of CBAs." Fry, 88 F.3d at 835 (citing Norris, 512 U.S. at 260-61). The Fry court then discussed the impact of Norris on RLA preemption.

The Court's ruling in Norris did not change the fundamental fact that employment related "minor disputes" will continue to be subject to the exclusive and mandatory jurisdiction of the system boards of adjustment. Nor did Norris necessarily narrow the scope of federal preemption under the RLA as the plaintiffs contend. Norris expressly adopted the Lingle [v. Norge Div. of Magic Chef, Inc.], 486 U.S. 399 (1988) standard (used for determining § 301 of the Labor Management Relations Act ("§ 301") preemption claims) for resolving claims of RLA preemption. As indicated above, that standard requires preemption whenever a claim's resolution calls for interpretation of a CBA.

.....

Under both Norris and Lingle, the threshold question remains whether resolution of the federal and state law claims of the plaintiffs requires interpretation or application of the CBAs. Norris also confirmed labor law's longstanding recognition that a CBA is more than the sum of its parts. It comprises express provisions, industry standards, and "norm[s] that the parties have created but have omitted from the collective bargaining agreement's explicit language." Norris, \_\_\_ U.S. \_\_\_, 114 S. Ct. at 2250; see also Allis-Chalmers, 471 U.S. at 215-16, 105 S. Ct. at 1913-14 (CBAs may contain implied as well as express terms); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-69, 80 S. Ct. 1347, 1350-51, 4 L. Ed. 2d 1409 (1960) (CBAs are intended to cover the entire employment relationship). Thus, plaintiffs' claims are minor disputes if they depend not only on a right found in the CBAs, but also if they implicate practices, procedures, implied authority, or codes of conduct that are part of the working relationship.

Fry, 88 F.3d at 835-36 (footnotes omitted) (citations omitted). Thus, Fry held that preemption of minor disputes under the RLA extends to any suit that "is inextricably intertwined with consideration of the terms of the labor contract." Fry, 88 F.3d at 836.

Finally, the Fry court noted that it has previously rejected the practice of plaintiffs attempting to avoid federal jurisdiction by framing their complaints in terms of such diverse theories as wrongful discharge, intentional infliction of emotional distress, conspiracy, and misrepresentation. In that respect, "federal courts look beyond the allegations of the complaint . . . to determine whether the wrong complained of actually arises in some manner from a breach of the defendant's obligations under a collective bargaining agreement." Id. (quoting Mock v. T.G. & Y. Stores Co., 971 F.2d 522, 530 (10th Cir. 1992)). Under this reasoning, Fry held that the district court had properly granted summary judgment on all the claims asserted against the defendant airline.

A

Applying Norris and Fry to the instant case, it is clear from Plaintiff's allegations and her contentions herein that Plaintiff's discrimination claim is wholly founded upon assertions that American's actions violated the terms of the CBA. Consequently, Plaintiff's Title VII claim is preempted by the RLA since the claim cannot be determined without interpreting and applying the terms of the CBA.<sup>3</sup> This is true because the very evidence upon which Plaintiff relies to support her claim involves alleged violations of the CBA. The cornerstone of Plaintiff's discrimination

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<sup>3</sup> In so holding, the Court does not suggest that all Title VII claims are preempted by the RLA. Rather, Plaintiff's discrimination claim is preempted because, under the facts of this case, the jury would be required to interpret and apply the CBA in determining whether American's actions violated Title VII.

claim is her contention that American violated the terms of the CBA and its own regulations when two male mechanics, Elmer Gonzalo and Richard Eichelberger, were reassigned in June and July of 1993 to the Gyro Shop where Plaintiff was employed.

In recognition that the reassignment of the two mechanics and her subsequent layoff involved interpretation and application of the CBA, Plaintiff filed two different grievances pursuant to the terms of the CBA. In the first grievance, Plaintiff maintained that American violated the CBA because the subject employee (Gonzalo) was assigned without a qualifying test. In the second grievance, Plaintiff maintained that she should have not have been laid off because she was employed in a "red circle" shop which should have protected her from the seniority-based reduction in force. In both instances, Plaintiff's grievances contended that, under the CBA, American did not have the right to take the actions which ultimately resulted in her layoff. Thus, both grievances related to the interpretation and application of the CBA.

As made clear by the statements of counsel and the record in this case, a Title VII gender discrimination claim dealing with the assignments or other workplace related activities necessarily requires a review of the CBA. The determination of Plaintiff's discrimination claim depends upon whether American properly interpreted and applied the terms of the CBA, or otherwise violated the implicit terms of the CBA which are a part of the working relationship. Under the preemption standard set forth in Norris and Ery, Plaintiff's discrimination claim is therefore "inextricably intertwined with consideration of the terms of the labor contract." Consequently, American is entitled to summary judgment on Plaintiff's discrimination claim on the basis of RLA preemption because, under the facts in this case, the claim will require interpretation and application of the CBA.

## B

Similarly, under the facts of this case, the Court concludes that Plaintiff's contract claim is a "minor" dispute subject to preemption under the RLA. In paragraph 22 of the Second Amended Complaint, Plaintiff alleges that "she had an employment contract with American by virtue of American's published Personnel Regulations, Policies, and Contract Agreement." This is the epitome of the type of claim that the RLA was intended to preempt, i.e. one founded upon an alleged violation of the CBA and its implicit terms. Pursuant to the RLA, the dispute is one between an employee and a carrier growing out of a grievance or out of the interpretation or application of agreements concerning rules or working conditions. See 45 U.S.C. § 153 First (i) & § 184. Because the dispute involves the very terms of the CBA and the other implicit terms of the labor contract, it may be conclusively resolved by interpreting the existing CBA. Davies, 971 F.2d at 465; Williams v. Air Wisconsin, Inc., 874 F. Supp. 710, 715 n.4 (E.D. Va. 1995), cert. denied, 116 S. Ct. 2553 (1996) (holding that the dispute in the action was a "minor" dispute under RLA where employee alleged breach of the existing collective bargaining agreement). Since Plaintiff's contract claim is preempted by the RLA, Defendant is entitled to summary judgment thereon as a matter of law.

## III

Plaintiff has also asserted claims of retaliation and intentional infliction of emotional distress. In order to sustain a cause of action for retaliation, a plaintiff must show that: "(1) she engaged in a protected opposition to Title VII discrimination or participated in a Title VII proceeding; (2) she suffered an adverse employment action contemporaneous with or subsequent to such opposition or participation; and (3) there is a causal connection between the protected

activity and the adverse employment action.” Cole v. Ruidoso Mun. Sch., 43 F.3d 1373, 1381 (10th Cir. 1994). In order to recover on a cause of action for intentional infliction of emotional distress, a plaintiff must establish: “(1) that the tortfeasor acted intentionally or recklessly; (2) that the tortfeasor’s conduct was extreme and outrageous; (3) that plaintiff actually experienced emotional distress; and (4) that the emotional distress was severe.” Daemi v. Church’s Fried Chicken, Inc., 931 F.2d 1379, 1387 (10th Cir. 1991).

The Court views Plaintiff’s claim for retaliation and claim for intentional infliction of emotional distress to be companion claims. The retaliation claim requires a nexus between the filing of Plaintiff’s gender-based discrimination suit and the alleged actions by the company that Plaintiff asserts were taken in retaliation for that filing. Similarly, an intentional infliction of emotional distress claim requires a higher level of outrageousness based upon that same set of facts, namely Defendant’s alleged intentional, gratuitous, and improper drug testing of Plaintiff.

Plaintiff claimed she was subject to more frequent drug testing than was proper under the circumstances and that the higher number of tests was due to retaliatory animus by Defendant. Defendant has moved for summary judgment, stating that the frequency and time of each test is computer-generated and thus completely random, and that Plaintiff was not subject to more frequent drug testing than other similarly situated employees.

The Court concludes that there are issues of material fact with respect to Plaintiff’s claims of retaliation and intentional infliction of emotional distress and therefore summary judgment is inappropriate at this time. Specifically, the Court finds there is an issue of material fact as to whether Plaintiff was tested more frequently from January 1996 to January 1997 than would be an employee, placed in the system at the same level, who unfailingly tests negative over the same

twelve-month period of time. Included in this issue is the uncontroverted fact that if an employee tests negative, she or he is rewarded by being moved to a higher level, i.e. by being tested less frequently. The information produced by Defendant is not responsive to this question since it does not set forth what would happen to such a hypothetical employee who entered the system at the same level and tested negative on each test over the same period of time.

The Court further finds there is an issue of material fact as to whether, if in fact Plaintiff was tested more frequently than would be such hypothetical employee, was such frequency attributable to retaliation and/or intentional wrongful conduct. Due to these issues of material fact, judgment as a matter of law on Plaintiff's claims for retaliation and intentional infliction of emotional distress is inappropriate.

In summary, Defendant's motion for summary judgment (Docket # 77) is hereby granted as to Plaintiff's Title VII and contract claims. Plaintiff's motion to settle the order granting summary judgment (Docket # 98) is hereby denied as moot. Defendant's renewed motion for summary judgment (Docket # 100) is hereby denied, and Plaintiff's motion for summary judgment is also hereby denied (Docket # 126).

IT IS SO ORDERED.

This 9<sup>TH</sup> day of October, 1997.

  
Sven Erik Holmes  
United States District Judge

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

OCT 10 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

REXAIR, INC. a Delaware corporation,  
Plaintiff,  
v.  
BRETT GARCIA,  
Defendant.

Case No. 97 CV 326 H (J)

ENTERED ON DOCKET

DATE 10-15-97

**JUDGMENT**

This matter comes on for hearing upon the Motion for Default Judgment of plaintiff and supporting Affidavit of one of the attorneys for plaintiff, both requesting that judgment by default be granted herein against defendant Brett Garcia. It appears that said defendant is in default and that the Clerk of this Court has previously searched the records and entered the default of said defendant. It further appears upon plaintiff's Affidavit that the activities of defendant, as alleged in the Complaint herein, have caused and are causing irreparable injury to plaintiff's trade, prestige, business reputation, and goodwill, that plaintiff has no adequate remedy at law, and that defendant's wrongful acts will continue unless restrained and enjoined by this Court. It further appears from plaintiff's Affidavit that defendant is not an infant or incompetent person, and is not in the active military service of the United States. The Court, having reviewed plaintiff's Motion and Affidavit and the arguments made by counsel for plaintiff and being fully advised in the premises, finds that judgment should be entered herein granting the relief requested by plaintiff in its Motion.

c/mvt

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED as follows:

1. That a permanent injunction is issued herewith enjoining and restraining defendant Brett Garcia, and his agents, servants, representatives, employees, and successors, and all persons and entities controlled by and/or in active concert or participation with any of them, from offering to buy, sell, repair, service, or inspect any new, used, or rebuilt Rainbow vacuum cleaner or Power Nozzle, or any other product manufactured by Rexair, Inc., or any imitation or copy thereof.

2. That a permanent injunction is issued enjoining and restraining defendant Brett Garcia and his agents, servants, representatives, employees, and successors, and all persons and entities controlled by and/or in active concert or participation with any of them from actually buying, selling, repairing, servicing, or inspecting any new, used, or rebuilt Rainbow vacuum cleaner or Power Nozzle, or any other product manufactured by Rexair, Inc., or any imitation or copy thereof.

3. That a permanent injunction is issued enjoining and restraining defendant Brett Garcia from ever using or mentioning any of the registered trademarks or common law trademarks of Rexair, Inc., in any publication or advertisement, or in any other way.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that defendant Brett Garcia is to impound all household vacuum cleaners and related accessories and parts manufactured by Rexair, Inc., which are in his possession, including, but not limited to, new, used, or rebuilt Rainbow vacuum cleaners, Power Nozzles, parts and accessories, and upon request of Rexair, Inc., and under appropriate supervision by a United States Marshal, to deliver

such impounded items to Rexair, Inc. or a person designated by it, pursuant to the Lanham Act, 15 U.S.C. §§ 1051 et seq.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiff Rexair, Inc., is granted recovery of the costs it has incurred herein in the amount of \$150 from defendant Brett Garcia.

Judgment rendered this 10<sup>th</sup> day of October, 1997.

  
UNITED STATES DISTRICT JUDGE

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

**F I L E D**

OCT 14 1997 *mw*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

WILLIAM B. MULDER )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 METROPOLITAN LIFE INS. CO. )  
 )  
 Defendant. )

Case No. 97-CV-637-B ✓

ENTERED ON DOCKET

DATE OCT 15 1997

ORDER

The Court has for decision Defendant Metropolitan Life Insurance Company's ("MetLife") Application to Compel Arbitration and Order to Stay Proceedings (Docket # 5). Plaintiff, William B. Mulder ("Mulder"), is a Financial Planner with MetLife and has been employed with MetLife since 1985. He initiated a state court action against MetLife after it conducted an investigation of a complaint against him for sexual harassment. The investigation was conducted by MetLife investigator Sharolyn Nance ("Nance") in September 1996. The investigation ultimately revealed no merit to the complaint. Mulder brings claims of defamation, invasion of privacy, tortious interference with business relations, breach of fiduciary relationship, misrepresentation, and intentional infliction of emotional distress against MetLife for the way in which the investigation was conducted. MetLife removed the state court action to this Court based on diversity of citizenship and the jurisdictional amount.

Mulder signed a Uniform Application for Securities Industry Regulation or Transfer Form ("U-4 Form") on February 6, 1986. The clause of the U-4 Form at issue states:

*12*

I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in item 10, as may be amended from time to time.

By signing the U-4 Form Mulder registered with the National Association of Securities Dealers ("NASD") and thus it is NASD's rules which govern the application of the U-4 Form arbitration clause.

At the time Mulder signed the U-4 Form the NASD code provided for the arbitration of "any dispute, claim or controversy arising out of or in connection with the business of any member of the Association ..." NASD Code, Part 1, § 1, NASD Manual (CCH) 3701 (1986). Section 8 of the NASD Code specifies which disputes are to be arbitrated. It provides that any such dispute

shall be arbitrated under this Code, at the instance of:

- (1) a member against another member;
- (2) a member against a person associated with a member or a person associated with a member against a member; and
- (3) a person associated with a member against a person associated with a member.

On October 1, 1993 the NASD amended the Code. Section 1 of the NASD code was changed to provide in pertinent part "for the arbitration of any dispute, claim or controversy arising out of or in connection with the business of any member of or arising out of the employment or termination of employment of associated person(s) with any member."

Mulder offers four propositions in support of this Court denying MetLife an order compelling arbitration and/or a stay of the proceedings.

First, Mulder maintains that the holding of the United States Supreme Court in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) does not apply to Mulder's situation. In Gilmer, a registered securities representative sued his employer for discriminatory termination under the Age

Discrimination in Employment Act (ADEA). The Court held that the plaintiff's ADEA claim was subject to the arbitration agreement he had entered into by signing the U-4 Form and registering with the NYSE. Mulder bases his argument on the fact that the plaintiff in Gilmer had registered with the New York Stock Exchange (NYSE) rather than the NASD, and that the rules governing arbitration in the NYSE code are sufficiently different from those in the NASD code to distinguish Mulder's case from Gilmer.

Mulder cites Farrand v. Lutheran Brotherhood, 993 F.2d 1253 (7th Cir. 1993), which concluded that "[b]ereft of interpretive assistance, ... § 1 of the NASD's Code does not authorize, and § 8 therefore does not require, the arbitration of an employment dispute between a member of the NASD and one of the member's registered representatives." 993 F.2d at 1255. However, as the court in Cremin v. Merrill Lynch Pierce Fenner & Smith, 957 F.Supp. 1460 (N.D. Ill. 1997) persuasively pointed out, both the cause of action and the lawsuit in Farrand arose before the October 1993 amendments to the NASD Code went into effect. 957 F.Supp. at 1475. In fact, Farrand was decided before the amendments went into effect, which naturally precluded the court from considering the revamped and clear language of the amendment to section 1 of the NASD Code. Indeed, the court in Farrand remarked in noteworthy dicta that "[a] change in the Code, rather than a strained interpretation of the current language, is the right way to proceed." 993 F.2d at 1256. The case at hand thus does not present the same interpretive problems as existed at the time Farrand was decided.

Furthermore, even if the NASD Code were still in its pre-October 1993 form, the 10th Circuit has expressed a commitment to interpret arbitration clauses broadly and in favor of arbitration. In Armijo v. Prudential Insurance Company of America, 72 F.3d 793 (10th Cir. 1995) three Hispanic

employees sued their employer for discriminatory termination. The NASD Code in effect when the alleged act of discrimination took place was the February 1992 version, which did not explicitly subject employment disputes to mandatory arbitration. Even though the court in Armijo found the February 1992 Code ambiguous as to employment disputes, it concluded that “to acknowledge the ambiguity is to resolve the issue, because all ambiguities must be resolved in favor of arbitrability.” 72 F.3d at 798. The Court finds that Gilmer does govern Mulder’s situation.

Mulder next claims that the NASD’s Code of Arbitration Proceedings does not compel arbitration in this case. Mulder argues that he did not knowingly forego statutory remedies when he signed the U-4 Form and thus cannot be compelled to arbitrate his claims. Mulder relies heavily on Prudential Insurance Co. of America v Lai, 42 F.3d 1299 (9th Cir. 1994) in which two sales representatives sued their employer for sexual harassment and discrimination. The court in Lai held “that a Title VII plaintiff may only be forced to forego her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration.” 42 F.3d at 1305.

The Court finds this argument unpersuasive. As MetLife correctly points out, Mulder has not alleged any statutory claims. In fact, not only is Mulder not claiming any statutory remedies, but the “prevailing view is that Lai is incompatible with the Supreme Court’s decision in Gilmer, [because it] ignores core principles of contract law, and inappropriately used legislative history to contradict plain statutory language.” Cremin, 957 F.Supp. at 1474. Even if the holding in Lai were not questionable, it applies only to the narrow category of employment discrimination suits, into which the case at issue here does not fall.

Mulder next claims that although the 1993 Amendment to the NASD Code of Arbitration Procedure explicitly subjects employment disputes to arbitration, it does not “retroactively apply” to

his claim, because he initially signed the U-4 Form in 1986. Mulder relies upon two Seventh Circuit cases to support this position.

In Kresock v. Bankers Trust Co., 21 F.3d 176 (7th Cir. 1994), the plaintiff sued defendant financial institution under Title VII for alleged gender discrimination. The court denied defendant's motion to compel arbitration under the NASD Code, because it found that the 1993 amendment did not retroactively apply to the plaintiff's claim. The court's rationale behind this decision was that "[c]ourts ... will not presume retroaction because it is unfair to hold private parties accountable for rules which were not in effect *at the time their relevant conduct took place.*" Id. at 179(emphasis added). The court in Kresock based its decision on the fact that the 1993 amendment went into effect "four years after Kresock signed the Form U-4, more than two years after Bankers Trust fired her, and nearly a year after Kresock filed ... [the] lawsuit." Id.

The Court, however, determines that "relevant conduct" refers to the action giving rise to the lawsuit or the filing of the lawsuit. In Cremin, the court defined "relevant conduct" as "either the discrimination giving rise to the suit, or filing the suit." Cremin, 957 F.Supp. at 1476. The court cited the holding in Wojcik v. Aetna Life Ins. & Annuity Co., 901 F.Supp. 1282, 1288-89 (N.D. Ill. 1995), that the U-4 clause requiring compliance with future amendments would have no meaning if 'relevant conduct' meant signing the U-4. Cremin, 957 F.Supp. at 1476. The facts in Kresock are thus clearly distinguishable from those of the present case. Whereas the plaintiff in Kresock allegedly suffered injury and brought suit before the amendment became effective, Mulder's alleged causes of action and filing of the suit both occurred afterwards.

In Farrand, the second case relied upon by Mulder to support his "non-retroactive" claim, a stockbroker brought an age discrimination suit against his former employer. Although the plaintiff

in Farrand had signed a U-4 Form and thereby agreed to abide by the NASD Code, the Seventh Circuit found that he could not be compelled to arbitrate his employment dispute. However, as noted above, Farrand is distinguishable from the case at bar on its facts: the alleged discrimination and the filing of the suit in Farrand both occurred prior to the enactment of the October 1993 amendments to the NASD Code.

Furthermore, in Armijo, the Tenth Circuit interpreted the pre-October 1993 NASD Code to include employment disputes between employers and sales representatives. In view of the completely unambiguous expression of this intent embodied in the 1993 amendment, the Court finds that the October 1993 amendments to the NASD Code govern this case.<sup>1</sup>

Mulder's final argument is that the arbitration clause of the U-4 Form is an unconscionable term of adhesion and therefore cannot be used to compel arbitration of his employment dispute. Mulder points to the number of other forms given to him coterminous with the signing of the U-4 Form and alleges that the U-4 form was not explained to him. He labels as "noteworthy" that the questions and statements throughout the U-4 Form are "generously spaced and separated" until the last page, and that the arbitration provision is "hidden in middle of the [last] page in extremely small print." Examination of the U-4 Form does not bear these complaints out. Prominently highlighted on the top of the last page above the section containing the arbitration provision are the words "THE APPLICANT MUST READ THE FOLLOWING CAREFULLY." The font size and paragraph spacing are no different from that employed throughout the entirety of the document. Mulder does

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<sup>1</sup>Although not essential to the holding in this case, it is relevant that in 1996 Mulder affirmed the U-4 Form he had initially signed on February 6, 1986. On January 10, 1996 Mulder signed a Registered Representative and Principal Certification Form whereby he affirmed his understanding and acceptance of MetLife's rules as well as federal, state, and NASD regulations.

not allege that he was under any form of duress or fraud when he signed the U-4 Form. It is also telling that one district court quite recently observed that "every court faced with the allegation that the U-4 is a contract of adhesion has rejected it." Cremin, 957 F.Supp. at 1470. The Court does not find the U-4 Form to be an adhesion contract.

MetLife requested an order compelling arbitration and that this Court either dismiss this case with prejudice or stay this action pending arbitration pursuant to 9 U.S.C. § 3. Title 9, section 3 of the United States Code states:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (1997). This statute does not preclude dismissal under the proper circumstances. "The weight of authority clearly supports dismissal of the case when all of the issues raised in the district court must be submitted to arbitration." Alford v. Dean Witter Reynolds, Inc. 975 F.2d 1161, 1164 (5th Cir. 1992). It is thus the discretion of this Court whether to dismiss Mulder's complaint. Id.

Since all of Mulder's claims are subject to mandatory arbitration, MetLife's Motion to Compel Arbitration is hereby granted and this case is dismissed, but Mulder may proceed in arbitration as stated.

IT IS SO ORDERED this 14<sup>th</sup> day of October, 1997.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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

**FILED**

OCT 14 1997 *PLW*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

BARBARA PORTILLO, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 NATIONAL AMERICAN INSURANCE )  
 COMPANY, )  
 )  
 Defendant. )

No. 97-CV-282B ✓

ENTERED ON DOCKET

DATE OCT 15 1997

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 14<sup>th</sup> day of October, 1997, it appearing to the Court that this matter has been compromised and settled, this case is herewith dismissed with prejudice to the refileing of a future action.

*Thomas M. Britt*  
United States District Judge

//

**FILED**  
OCT 14 1997  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

RICHARD B. CRAY, et al., )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
DELOITTE, HASKINS & SELLS, et al., )  
 )  
Defendants. )

Case No. 90-C-682-E

ENTERED ON DOCKET  
OCT 15 1997  
DATE \_\_\_\_\_

STIPULATION AND ORDER OF DISMISSAL WITH PREJUDICE

IT IS HEREBY STIPULATED AND AGREED by and among the undersigned, the attorneys of record for Plaintiffs and Deloitte & Touche USA LLP, formerly known as Deloitte & Touche and Deloitte Haskins & Sells ("Deloitte"), as follows:

1. That no party hereto is an infant or incompetent person for whom a committee has been appointed and no person not a party has an interest in the subject matter of the above-captioned action.
2. That all pending motions by the parties are hereby withdrawn.
3. That the above-captioned action be, and the same hereby is, discontinued with prejudice as to Deloitte and as to

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counterclaim defendants Edwin Hawes ("Hawes") and Robert Riss ("Riss"), without costs to any party as against the others.

4. Neither this Stipulation and Order, nor the fact of its execution, nor the settlement agreement between the parties nor any of the negotiations or proceedings related thereto, nor any action taken to carry out or enforce this Stipulation and Order, shall be construed as, or be deemed to be evidence of, an admission or concession on the part of Deloitte of any fault, liability, or any wrongdoing whatsoever, or of any damages having been incurred by Plaintiffs. Deloitte has denied each and all of the claims and allegations asserted by Plaintiffs in the above-captioned action, and expressly denies any liability, fault or wrongdoing arising out of or relating to any of the conduct alleged in the above-captioned action.

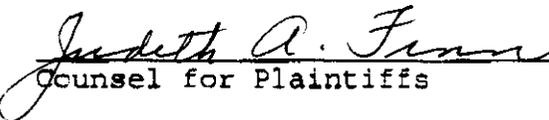
5. Neither this Stipulation and Order, nor the fact of its execution, nor the settlement agreement between the parties, nor any of the negotiations or proceedings related thereto, nor any action taken to carry out or enforce this Stipulation and Order, shall be construed as, or be deemed to be evidence of, an admission or concession on the part of Hawes and Riss of any fault, liability, or any wrongdoing whatsoever, or of any damages having been incurred by Deloitte. Hawes and Riss have denied each and all of the claims and allegations asserted

by Deloitte in the above-captioned action, and expressly deny any liability, fault or wrongdoing arising out of or relating to any of the conduct alleged in the above-captioned action.

6. This Stipulation and Order shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, successors and assigns, and any corporation, partnership or other entity into or with which any party hereto may merge, consolidate or reorganize.

7. This Stipulation and Order may be filed without further notice with the Clerk of the Court.

Dated: Tulsa, Oklahoma  
October 9, 1997

  
Counsel for Plaintiffs

  
Counsel for Deloitte

SO ORDERED:

This 10<sup>th</sup> day of Oct. 1997

James DeWitt  
U.S.D.J.

**FILED**

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

OCT 14 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

GARY LEE WALKER, an individual, )  
)  
Plaintiff, )  
)  
vs. )  
)  
THE PRUDENTIAL INSURANCE COMPANY )  
OF AMERICA, a foreign corporation, )  
and HUDIBURG AUTO GROUP, INC., an )  
Oklahoma corporation d/b/a RIVERSIDE )  
CHEVROLET/GEO )  
Defendants. )

Case No. 96-CV-1058-K ✓

ENTERED ON DOCKET

DATE 10-15-97

**JOINT STIPULATION OF PARTIAL DISMISSAL WITH PREJUDICE**

Plaintiff, Gary Lee Walker, and Defendant, The Prudential Insurance Company of America, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby jointly stipulate for the dismissal of all claims against Prudential with prejudice.

The parties are to bear their own attorney's fees and costs.

DATED: ~~September~~ <sup>October</sup> 13, 1997.

  
\_\_\_\_\_  
Tany D. Humphreys  
The Humphreys Law Firm  
1305 East 15th Street, Suite 200  
Tulsa, OK 74120

  
\_\_\_\_\_  
Timothy A. Carney  
Gable Gotwals Mock Schwabe  
Kihle Gaberino  
2000 NationsBank Center  
15 West 6th Street  
Tulsa, Oklahoma 74119-5447

**ATTORNEYS FOR PLAINTIFF**

**ATTORNEYS FOR DEFENDANT,  
THE PRUDENTIAL INSURANCE  
COMPANY OF AMERICA**

ENTERED ON DOCKET  
DATE 10-15-97

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

BETTY J. DURBIN, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 AMERICAN AIRLINES, INC., )  
 )  
 Defendant. )

No. 96-C-829-K

**F I L E D**

OCT 14 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

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

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 9 day of October, 1997.

  
TERRY C. KEEN, Chief  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 10-15-97

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

PAM SISK, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 BLUE JAY INVESTMENTS, et al., )  
 )  
 Defendants. )

No. 97-C-64-K

**FILED**

OCT 14 1997

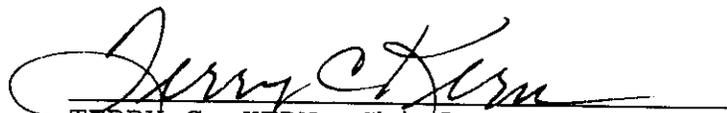
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

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

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 9 day of October, 1997.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

CORENE D. RENTIE,  
SS# 441-36-3951

Plaintiff,

v.

KENNETH S. APFEL, Commissioner  
of Social Security Administration,<sup>1/</sup>

Defendant.

RECORDED ON OCT 15 1997

OCT 15 1997

No. 96-C-957-J ✓

**FILED**

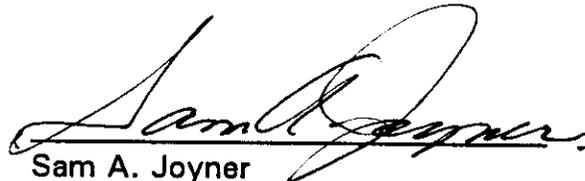
OCT 14 1997

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 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 14 day of October 1997.

  
Sam A. Joyner  
United States Magistrate Judge

<sup>1/</sup> On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, 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

CORENE D. RENTIE,  
SS# 441-36-3951

Plaintiff,

v.

KENNETH S. APFEL, Commissioner  
of Social Security Administration,<sup>1/</sup>

Defendant.

ENTERED ON CLERK'S

OCT 15 1997

No. 96-C-957-J ✓

**FILED**

OCT 14 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER<sup>2/</sup>

Plaintiff, Corene D. Rentie, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.<sup>3/</sup> Plaintiff asserts that (1) the ALJ erred by failing to give appropriate consideration to Plaintiff's chronic venous insufficiency, (2) the ALJ did not give sufficient weight to the opinions of Plaintiff's treating physicians, (3) the ALJ improperly addressed Plaintiff's credibility,

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<sup>1/</sup> On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

<sup>2/</sup> 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.

<sup>3/</sup> Plaintiff filed an application for disability and supplemental security insurance benefits on March 3, 1994. [R. at 69]. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge Richard J. Kallsnick (hereafter, "ALJ") was held September 21, 1995. [R. at 34]. By order dated October 2, 1995, the ALJ determined that Plaintiff was not disabled. [R. at 9]. Plaintiff appealed the ALJ's decision to the Appeals Council. On September 3, 1996, the Appeals Council denied Plaintiff's request for review. [R. at 3].

and (4) that the ALJ did not complete a proper Step Four analysis. For the reasons discussed below, the Court **reverses and remands** the Commissioner's decision.

### **I. PLAINTIFF'S BACKGROUND**

Plaintiff was born February 15, 1932, and was 63 years old at the time of the hearing. [R. at 37]. Plaintiff previously worked as an office manager at a blood plasma center. [R. at 40]. Plaintiff testified that in 1992 she shattered her right knee and received a workers' compensation settlement for her injury. [R. at 40]. Plaintiff also testified that in addition to difficulty with her knee, she has heart problems. Plaintiff noted that she has a prolapsed valve, that the elasticity of her heart has decreased, and that she has leakage. [R. at 48]. Plaintiff stated that she takes a nitro pill every morning before six a.m. [R. at 44].

Plaintiff stated that she cannot walk over one-half mile, that her doctors told her that she should rest and that she is permitted to do only light exercise. Plaintiff testified that she drives three to four times each week, and that she attends church and teaches Sunday school. [R. at 40]. Plaintiff stated that she is not supposed to stand or walk for more than two hours at a time. [R. at 46]. Plaintiff testified that she does light housework, but that she cannot sweep or mop. [R. at 48].

## II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.<sup>4/</sup> 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

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<sup>4/</sup> 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<sup>5/</sup> 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.

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

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

### **III. THE ALJ'S DECISION**

In this case, the ALJ determined that Plaintiff could perform her past relevant work as an office manager of a plasma center, and was therefore not disabled at Step Four. The ALJ noted Plaintiff's daily activities and considered her testimony and concluded that they were consistent with light work. The ALJ additionally completed a Psychiatric Review Technique Form concluding that Plaintiff experienced mild and situational anxiety which would not affect her ability to work. Based on the testimony of the Plaintiff, the record, and the testimony of the vocational expert, the ALJ concluded that the Plaintiff could return to her past work.

### **IV. REVIEW**

#### **"Chronic Venous Insufficiency" & Treating Physician**

Plaintiff initially asserts that the ALJ erred by failing to assess the impact of Plaintiff's chronic venous insufficiency on her ability to stand. Plaintiff asserts that Plaintiff has a history of thrombophlebitis and circulatory problems in her right leg and has to wear elastic stockings.

The record does not support Plaintiff's assertions. Plaintiff injured her right knee at work in 1992 and was treated by D.E. Nonweiler, M.D., for her injuries. [R. at 41].

On May 12, 1993, Plaintiff's doctor noted that Plaintiff was "very concerned about a deep venous thrombosis." The doctor observed that this was a genuine concern and concluded that Plaintiff should be tested to determine whether she had deep venous thrombosis. As a preliminary measure, the doctor requested that she wear TED stockings and a knee brace. After the testing was completed, on May 14, 1993, the doctor wrote that "she has no deep venous thrombosis whatsoever. She has superficial thrombosis involving her right greater saphenous vein at the calf which appears old. Her vein is open proximal to this area. . . . I have told her that in view of her superficial thrombosis which appears old I will place her on aspirin, one three times a day with meals. At this point, I do not think we should treat a superficial thrombosis, which appears to be old, particularly in view of her clinical improvement." [R. at 142].

The relevant inquiry, however, is to what degree Plaintiff's superficial thrombosis and other impairments affected her residual functional capacity. By May 28, 1993, Plaintiff's doctor noted that Plaintiff stated she "is doing quite well and her knee has improved quite a bit." [R. at 142]. According to the doctor, her knee still popped when she bent it. By June 25, 1993, Plaintiff's doctor notes that Plaintiff reported that although she still limped and experienced occasional pain, her knee was at least 20% better. Her doctor noted that she had no tenderness to palpitation except slightly and no effusion. On August 27, 1993, Dr. Nonweiler rated Plaintiff for the purpose of her workers' compensation claim. He noted that she had no tenderness except over the medial joint line and had a trace effusion in her knee. Plaintiff's range

of motion was reported as from zero to 120 degrees and Plaintiff was noted to have early signs of osteoarthritis. Dr. Nonweiler concluded that Plaintiff will probably continue to have intermittent knee pain, but that she had reached "maximum medical improvement." He rated her as having an 11% disability to her knee.

Based upon her partial meniscectomy I think she is entitled to a 10% disability. Based upon the arthritis in her knee, I think she is entitled to a 5% disability bringing her total to 26% partial permanent impairment to her right knee as a result of her on the job injury. This is a rating of the total disability and this is not above and beyond any prior ratings but is meant to be a total rating given her function at this time. This then relates to a 10% partial permanent impairment to the person as a whole utilizing Table . . . . [in] accordance with the AMA Guides. I also think that she needs to realize that she cannot do work which is going to involve prolonged standing or a great deal of walking and I think she understands this.

[R. at 140, emphasis added].

On April 22, 1994, Plaintiff was additionally examined and evaluated at the request of her attorneys for workers compensation by Kenneth R. Trinidad, D.O. Dr. Trinidad concluded that Plaintiff had a 13% permanent partial impairment to the whole man due to injuries of the lumbar spine, and an 11% permanent partial impairment to the whole man due to injuries to the right shoulder. [R. at 193].

Dr. Trinidad had previously examined Plaintiff on September 27, 1993. On that date he concluded that Plaintiff had a 20% permanent partial impairment to the left leg due to chronic venous insufficiency which resulted from persistent swelling in the leg. In Dr. Trinidad's opinion, Plaintiff was "temporarily totally disabled" from May 6, 1992 until September 27, 1993. [R. at 198]. Dr. Trinidad additionally noted that Plaintiff

would be unable to perform prolonged standing, and he therefore concluded that Plaintiff should not return to her position at the plasma center. [R. at 198].

Plaintiff additionally asserts that the ALJ failed to give the appropriate weight to Plaintiff's treating and examining physicians' opinions on her ability to stand and/or walk. The ALJ concluded that Plaintiff could perform light work. "Light work" requires "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to ten pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. . . ." 20 C.F.R. § 404.1567(b) (emphasis added). Therefore, to conclude that Plaintiff is capable of performing light work, the ALJ was required to find that Plaintiff could walk and stand "a good deal." As noted above, Plaintiff's treating physicians have concluded that Plaintiff should not do prolonged walking or standing. The ALJ does not address the opinions of Plaintiff's treating physicians, or explain why he concludes inapposite to them. The ALJ's conclusion that Plaintiff can perform "a wide range of light work activity" is not supported by the record. See, e.g., Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984) (if an ALJ disregards a treating physician's opinion, he must set forth "specific, legitimate reasons" for doing so.).

#### **Step Four**

The ALJ's conclusion that Plaintiff can perform "light work" is not supported by the record. However, the ALJ additionally concludes that Plaintiff can return to her past relevant work. If the ALJ's conclusions at Step Four are supported by the record, the conclusion that Plaintiff could return to her former work would provide an alternative basis for affirming the ALJ.

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

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

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

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

1. A finding of fact as to the individual's RFC.
2. A finding of fact as to the physical and mental demands of the past job/occupation.

3. A finding of fact that the individual's RFC would permit a return to his or her past job or occupation.

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

One difficulty presented by this case is Plaintiff's past relevant work requirements. The ALJ found that Plaintiff's past relevant work consisted of walking no more than one hour, sitting for approximately seven hours with occasional bending, frequently lifting and carrying up to ten pounds, and managing individuals. As noted by Plaintiff, Plaintiff's workers' compensation records indicate that her job involved repetitive pushing of centrifuges weighing more than 500 pounds.<sup>6/</sup> [R. at 191, 195]. The ALJ neither addresses nor reconciles this apparent contradiction in the record with respect to the requirements of Plaintiff's past relevant work.<sup>7/</sup>

Plaintiff additionally asserts that her heart difficulty impairs her ability to work. Plaintiff notes that her brothers and fathers have all died of heart disease and that Plaintiff's physician has cautioned her about her own heart disease. Plaintiff had a stressmill test on March 10, 1994. The doctor noted that the results were limited due

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<sup>6/</sup> The ALJ relied primarily on Plaintiff's written description of her past relevant work in her vocational report. Plaintiff noted that it required walking for one hour, sitting of seven hours, occasional bending and lifting of ten pounds or less. [R. at 104]. The ALJ asked Plaintiff only a few general questions about her past relevant work during the hearing. [R. at 41].

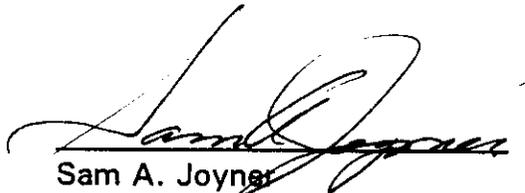
<sup>7/</sup> An ALJ is permitted to find that an individual can return to his or her past relevant work as that individual performed that work, or as that work is generally performed in the national economy. Andrade v. Sec. of Health & Human Services, 985 F.2d 1045, 1950-51 (10th Cir. 1993). The ALJ made no alternative finding that Plaintiff could perform the work as her work was generally performed in the national economy.

to Plaintiff's beta blocker therapy. Plaintiff was diagnosed with left ventricular hypertrophy and aortic valve disease with aortic insufficiency. On April 27, 1994, Martin E. Scott, M.D., summarized Plaintiff's physician visits, noting that after a visit on April 19, 1994, William Ross, a cardiologist, recommended a cardiac catheterization with a potential need for angioplasty. Plaintiff was, at that time, to arrange for a consultation with Tulsa Medical College and "to avoid any unnecessary physical exertion until the time of that consultation and catheterization has been performed." [R. at 205]. A June 30, 1994 consultative examination by Daniel Studdard, D.O., noted "suspect unstable angina with severe coronary artery disease." [R. at 226]. The hearing before the ALJ occurred on September 21, 1995. Plaintiff testified that as long as she gets plenty of rest she does fine but that if she is subjected to stress it triggers her heart condition. [R. at 49-50]. According to Plaintiff, she is to avoid stress. The ALJ did not further question Plaintiff about her stress or her visits to her doctor. As noted above, in April 1994 Plaintiff was told to further reduce her activities and seek a consultation with Tulsa Medical College. The ALJ did not ask Plaintiff, at the September 1995 hearing about the current status of such consultations. The ALJ does not adequately address Plaintiff's claimed impairment due to her heart.

On remand, the ALJ should address the inconsistencies in the record with respect to Plaintiff's past relevant work, and address the potential limitations placed on Plaintiff by her heart impairment.

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

Dated this 14 day of October 1997.

  
Sam A. Joyner  
United States Magistrate Judge

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

UNITED STATES OF AMERICA, )  
 )  
 ) Plaintiff, )  
 )  
 vs. )  
 )  
 \$189,825.00 IN UNITED STATES CURRENCY, )  
 )  
 ) Defendant, )  
 )  
 and )  
 )  
 EDUARDO RANGEL VELAZQUEZ, )  
 IVAN FARON VELAZQUEZ, )  
 LUCIANO CHAVEZ, and JOSE VAZQUEZ, )  
 )  
 ) Claimants. )

Case No. 96-CV-1084-J ✓

**FILED**

OCT 14 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON COURT

OCT 15 1997

**ORDER**

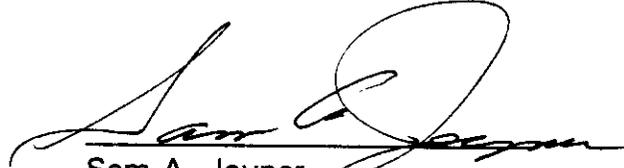
Now before the Court is what the Court will treat as a motion for voluntary dismissal of the claims of Jose Vasquez and Luciano Chavez. [Doc. No. 40]. Mr. Vasquez and Mr. Chavez wish to voluntarily dismiss their claims without prejudice and the United States of America does not object. The motion is, therefore, **GRANTED**. Mr. Vasquez' claim (doc. no. 7) and Mr. Chavez' claim (doc. no. 10) are dismissed without prejudice.

Currently pending before the Court is a motion for leave to amend to add various **Bivens** and § 1983 claims. [Doc. No. 19]. To the extent that motion is being asserted by Jose Vasquez and Luciano Chavez it is withdrawn. To the extent the motion for leave to amend is being asserted by Eduardo Rangel Velazquez and Ivan Faron Velazquez, it is still pending.

44

IT IS SO ORDERED.

Dated this 14 day of October 1997.



Sam A. Joyner  
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

JANET J. BARBEE,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner  
of Social Security Administration,

Defendant.

OCT 15 1997

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

Case No. 96-CV-825-J

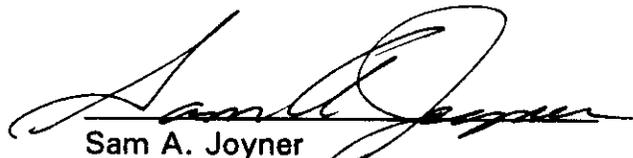
ENTERED ON DOCKET

DATE OCT 15 1997

**JUDGMENT**

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

It is so ordered this 14 day of October 1997.



Sam A. Joyner  
United States Magistrate Judge

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

JANET J. BARBEE, )  
 )  
 ) Plaintiff, )  
 )  
 ) v. )  
 )  
 ) KENNETH S. APFEL, Commissioner )  
 of Social Security Administration,<sup>1/</sup> )  
 )  
 ) Defendant. )

ENTERED ON CLERK'S  
DATE OCT 15 1997

Case No. 96-CV-825-J ✓

**FILED**

OCT 14 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER<sup>2/</sup>**

Now before the Court is Plaintiff Janet J. Barbee's appeal of a decision by the Commissioner of the Social Security Administration ("Commissioner") denying her disability insurance benefits under Title II of the Social Security Act. The Administrative Law Judge ("ALJ"), James D. Jordan, determined that Plaintiff did not have a medically severe impairment or combination of impairments that significantly limited her ability to do basic work activities. Plaintiff argues that this conclusion is not supported by substantial evidence. For the reasons discussed below, the Commissioner's decision is **REVERSED** and this case is **REMANDED** for further proceedings consistent with this Order.

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<sup>1/</sup> On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of the Social Security Administration. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Acting Commissioner of the Social Security Administration, as the Defendant in this action.

<sup>2/</sup> 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.

**I. STANDARD OF REVIEW**

A disability under the Social Security Act is defined as the

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

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

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

42 U.S.C. § 423(d)(2)(A). To make a disability determination in accordance with these provisions, the Commissioner has established a five-step sequential evaluation process.<sup>3/</sup>

The standard of review applied by this Court to the Commissioner's disability determinations is set forth in 42 U.S.C. § 405(g). According to § 405(g), "the finding of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." Substantial evidence is that amount and type of evidence that a

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<sup>3/</sup> Step one requires the claimant to establish that he is not engaged in substantial gainful activity as defined at 20 C.F.R. §§ 416.910 and 416.972. Step two requires the claimant to demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 416.921. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). See 20 C.F.R. § 416.925. If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if he can perform his past work. If a claimant is unable to perform his past work, the Commissioner has the burden of proof at step five to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See, 20 C.F.R. § 416.920; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); and Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988).

reasonable mind will accept as adequate to support the ultimate conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

To determine whether the Commissioner's decision is supported by substantial evidence, the Court will not undertake a *de novo* review of the evidence. Sisco v. U.S. Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the 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).

In addition to determining whether the Commissioner's decision is supported by substantial evidence, it is also this Court's duty to 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 he/she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

## II. STEP TWO OF THE SEQUENTIAL EVALUATION PROCESS

The ALJ in this case stopped his analysis at step two of the process used by the Commissioner to evaluate claims of disability. See note 3, *supra*. Step two of the Commissioner's sequential evaluation process is governed by the Commissioner's "severity regulation." Bowen, 482 U.S. at 140-41; Williams, 844 F.2d at 750-51.

The "severity regulation" provides that:

If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, [the Commissioner] will find that you do not have a severe impairment and are, therefore, not disabled. [The Commissioner] will not consider your age, education, and work experience.

20 C.F.R. § 404.1520(c).

Pursuant to the Commissioner's "severity regulation," a claimant must make a "threshold showing that his medically determinable impairment or combination of impairments significantly limits his ability to do basic work activities." Williams, 844 F.2d at 751. This threshold determination is to be based on medical factors alone. Vocational factors, such as age, education, and work experience, are not to be considered. Bowen, 482 U.S. at 153; Williams, 844 F.2d at 750.

The ability to do basic work activities is defined as "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. § 404.1521(b). These abilities and aptitudes include the following:

- (1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;

- (2) Capacities for seeing, hearing, and speaking;
- (3) Understanding, carrying out, and remembering simple instructions;
- (4) Use of Judgment;
- (5) Responding appropriately to supervision, co-workers and usual work situations; and
- (6) Dealing with changes in a routine setting.

20 C.F.R. § 404.1521(b).

Plaintiff's burden on the severity issue is *de minimis*. Williams, 844 F.2d at 751. As the United States Supreme Court explains, the Commissioner's severity regulation

increases the efficiency and reliability of the evaluation process by identifying at an early stage those claimants whose medical impairments are so slight that it is unlikely they would be found to be disabled even if their age, education, and experience were taken into account.

Bowen, 482 U.S. at 153 (emphasis added). The Commissioner's own regulations state that

[g]reat care should be exercised in applying the not severe impairment concept. If an adjudicator is unable to determine clearly the effect of an impairment or combination of impairments on the individual's ability to do basic work activities, the sequential evaluation process should not end with the not severe evaluation step. Rather, it should be continued.

Social Security Ruling 85-28 (1985). In other words, step two "is an administrative convenience [used] to screen out claims that are 'totally groundless' solely from a medical standpoint." Higgs v. Bowen, 880 F.2d 860, 863 (6th Cir. 1988).

**III. THE ALJ'S CONCLUSION THAT PLAINTIFF DID NOT SUFFER FROM A SEVERE IMPAIRMENT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.**

Title II of the Social Security Act provides a system of limited disability benefits to individuals who meet certain requirements. One such requirement is that the claimant establish that he/she was disabled prior to the expiration of his/her "insured status." Potter v. Secretary of Health and Human Services, 905 F.2d 1346, 1348-49 (10th Cir. 1990). Based on her work record, Plaintiff's insured status expired on December 31, 1988. Plaintiff alleges that she became unable to work on June 15, 1986. [*R. at 65*]. Plaintiff must demonstrate, therefore, that she became disabled between June 15, 1986 and December 31, 1988 ("the relevant period").

Plaintiff alleges that she cannot work because she has frequent diarrhea, vomiting and migraine headaches. Plaintiff alleges that the diarrhea and vomiting are caused by Crohn's disease. Crohn's disease is a nonspecific, chronic inflammation of the tissue in the gastrointestinal tract. The etiology of the disease is unknown and there is no known therapy for treatment of the disease. See The Merck Manual of Diagnosis and Therapy 830-834 (1992). The record is not clear for the relevant period, but Plaintiff apparently has diarrhea 6-7 times per day, spending 3-4 minutes in the bathroom at a time on good days and spending ½-¾ of her day in the bathroom on bad days. On occasion the diarrhea contains blood, causing Plaintiff some anemia. Plaintiff has vomiting spells a couple times a month and usually has to see a doctor to control the vomiting. [*R. at 38-41, 57-60*].

The record demonstrates that Plaintiff had been diagnosed with Crohn's disease during the relevant period and that she was suffering spells of diarrhea, anemia and vomiting. [R. at 109-18, 139, 163-167, 198]. The ALJ does not dispute that Plaintiff suffered with Crohn's disease during the relevant period. However, the ALJ finds that during the relevant period, the symptoms of Plaintiff's Chron's disease were being adequately controlled by medication. [R. at 16-17]. Because he found that Plaintiff's symptoms were being controlled, the ALJ found that during the relevant period, Plaintiff was not suffering from an impairment or combination of impairments that significantly limited her ability to do basic work activities. Id.

The Court must determine whether there is substantial evidence in the record to support the ALJ's conclusion that between June 15, 1986 and December 31, 1988, the symptoms of Plaintiff's Crohn's disease were being adequately controlled by medication. The Court has reviewed the record for the relevant period and concludes that the ALJ's decision is not supported by substantial evidence.

In July 1984, Plaintiff began seeing doctors at Springer Clinic in Broken Arrow, Oklahoma. Plaintiff was complaining of recent gastrointestinal bleeding, anemia, bloating, and constant diarrhea. Plaintiff was diagnosed with Crohn's disease. [R. at 119-25]. Over the course of the next two years Plaintiff was seen at least 10-12 times for vomiting, diarrhea and headaches. [R. at 113-18, 142, 164-67]. Plaintiff's condition appeared to worsen in June 1986 when she reported that during the last six

months, she had to go to the emergency room to control her symptoms.<sup>4/</sup> Plaintiff was placed on new medication, and in July 1986 it was reported that Plaintiff was doing well on her new medication and that she had made a trip to Bells Amusement Park. [*R. at 112*].

There are no medical records for the two-year period between July 1986 and July 1988. Plaintiff even quit taking her medication for the last of these two years. [*R. at 141*]. If the Court stopped here, it would agree with the ALJ that by July 1986, Plaintiff's symptoms seemed to be under control. However, beginning in July 1988, Plaintiff began seeing doctors for vomiting and diarrhea and she was reporting that her stomach was on fire. [*R. at 139-140*]. In July 1988, Plaintiff reported having 10 stools per day, but with no blood. [*R. at 141*]. In October 1988, Plaintiff reported that she drank a whole bottle of Pepto Bismal and was taking four Tagament per day to control her symptoms. [*R. at 139*].

The ALJ also ignores the fact that Plaintiff was not working from July 1986 to December 1988. The medical evidence of record amply demonstrates that Plaintiff's Crohn's disease is significantly exacerbated when she is subjected to any type of stress. Thus, even if Plaintiff's symptoms were under control from July 1986 to December 1988, there is no indication that they would remain under control if Plaintiff were in a work environment.

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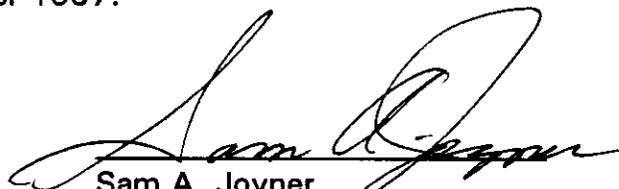
<sup>4/</sup> There are no records in the file regarding these alleged emergency room visits.

At a minimum, the record is not clear as to the effect of Plaintiff's Crohn's disease on her ability to do basic work activities during the relevant period. The Court is persuaded, however, that Plaintiff has met her *de minimis* burden of establishing that she has a medical impairment that will have more than a "slight" impact on her ability to perform basic work activities. Plaintiff's ability to do basic work activities would be compromised more than slightly in light of the fact that she has persistent nausea with 6-10 stools per day and occasional vomiting. The Court does not comment on the degree to which Plaintiff's ability to do basic work activities would be compromised. The Court simply finds that a determination of the degree to which Plaintiff's ability to do basic work activities has been compromised cannot end at step two of the sequential evaluation process. This case must be remanded so that the sequential evaluation process may proceed past step two.

Accordingly, the Commissioner's decision denying Plaintiff disability benefits under Title II of the Social Security Act is **REVERSED** and this case is **REMANDED** for further proceedings consistent with this Order.

IT IS SO ORDERED.

Dated this 14 day of October 1997.

  
Sam A. Joyner  
United States Magistrate Judge

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

BARBARA BLAKE, )  
an individual, )  
 )  
Plaintiff, )  
 )  
vs. )  
OKLAHOMA OFFSET, INC., )  
a corporation, and )  
Kenneth Fleming, )  
an individual )  
 )  
Co-Defendants. )

ENTERED ON DOCKET

DATE 10-14-97

Case No. 97 CV 670-H (J) ✓  
Judge Holmes

**F I L E D**

OCT 14 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

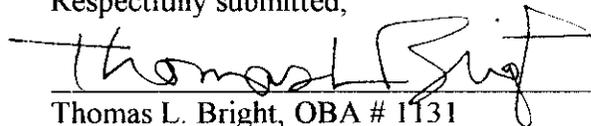
STIPULATION OF DISMISSAL

It is hereby stipulated and agreed by Barbara Blake, Plaintiff, by and through Thomas L. Bright, her attorney, and Offset Oklahoma, Inc. and Kenneth Fleming, Defendants, by and through Charles J. Mataya of BOULT CUMMINGS CONNERS & BERRY, PLC, and Susan E. Major, their attorneys, that the above-entitled actions be dismissed with prejudice. The parties have agreed to bear their own costs and attorneys fees and not to attempt to shift the burden of such costs and fees to the opposing party through the federal rules of civil procedure, or through state or federal cost or fee shifting laws.

It is agreed that the Court is to retain jurisdiction over the parties for purposes of determining any dispute relating to the agreements reached between the parties resulting in this dismissal.

Entered this 10<sup>th</sup> day of October, 1997.

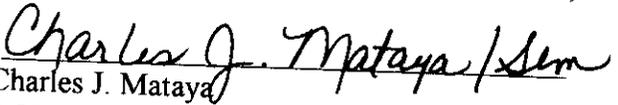
Respectfully submitted,

  
\_\_\_\_\_  
Thomas L. Bright, OBA # 1131

Attorney at Law  
406 South Boulder, Suite 411  
Tulsa, Oklahoma 74103-3825

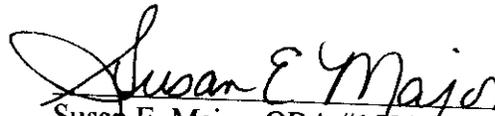
ATTORNEY FOR THE PLAINTIFF,  
BARBARA BLAKE

BOULT CUMMINGS CONNER & BERRY, PLC

  
Charles J. Mataya

BOULT CUMMINGS CONNERS & BERRY, PLC  
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And



Susan E. Major, OBA #15298  
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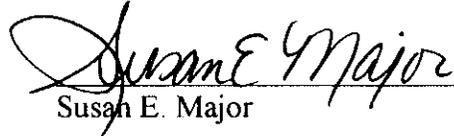
ATTORNEYS FOR DEFENDANTS  
OKLAHOMA OFFSET, INC. and  
KENNETH FLEMING

**CERTIFICATE OF SERVICE**

I, Susan E. Major, do hereby certify that on the 14<sup>th</sup> day of October, 1997, I did mail a true and correct copy of the above and foregoing pleading to the following:

Mr. Thomas L. Bright  
Attorney at Law  
406 South Boulder, Suite 411  
Tulsa, Oklahoma 74103-3825

via first class mail with sufficient postage thereon fully prepaid.

  
\_\_\_\_\_  
Susan E. Major

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

ENTERED ON DOCKET

FEDERAL INSURANCE CO., et al., )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
SOUTHWESTERN WIRE CLOTH, et al )  
 )  
Defendants. )

DATE 10-14-97

No. 95-C-689-K ✓

**FILED**

OCT 14 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

Before the Court is the motion of defendant Hartford Fire Insurance Company for summary judgment. This lawsuit is an action to determine whether certain insurance policies give rise to a duty to defend the Southwestern defendants<sup>1</sup> in a lawsuit brought by Derrick Manufacturing Corporation ("Derrick") against the Southwestern defendants in the United States District Court for the Southern District of Texas. See Derrick Mfg. Corp. v. Southwestern Wire Cloth Inc., CAH-94-0135 (S.D.Tex., filed January 14, 1994) (hereinafter referred to as the "underlying action.") The complaint in the underlying action alleges that the Southwestern defendants, by manufacturing and marketing a replacement screen for a screen manufactured and marketed by Derrick, infringed Derrick's patent and trademark. In their own summary judgment motion, plaintiffs concede that the patent infringement claims in the underlying action are not germane to the coverage issues presented

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<sup>1</sup>The term "Southwestern defendants" refers to the following defendants in this case: Southwestern Wire Cloth, Inc.; Southwestern Wire Cloth Oilfield Screens, Inc., and Robert E. Norman.

by this case. Rather, plaintiffs contend the focus of this lawsuit is on the non-patent/trademark infringement claims. See Doc. No.52, p.3. However, the Southwestern defendants have filed an opposition to the present motion, which seeks coverage for the patent infringement claims as well.

Plaintiffs characterize the non-patent/trademark infringement claims in the underlying lawsuit as allegations that the Southwestern defendants misappropriated the name "Derrick" in the advertisements used to market the replacement screens manufactured by the Southwestern defendants. Derrick placed the following designations on its screens: "PWP", "HP" and "DX". Derrick alleges in the underlying action that the Southwestern defendants placed these same designations on their replacement screens and used the same designations in their advertising. Derrick argued in the underlying lawsuit that the Southwestern defendants' use of the name "Derrick" and their use of the "PWP", "HP" and "DX" designations infringed Derrick's trademark and constituted unfair competition and dilution of the name and designations.

The Southwestern defendants allege that they were the insureds under insurance policies issued by the three plaintiff<sup>2</sup> insurance companies and the defendant insurance company, Hartford Fire Insurance Company ("Hartford"). At the time the underlying lawsuit was filed, the Southwestern defendants tendered the lawsuit to Hartford and the Chubb plaintiffs for defense. Both groups of

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<sup>2</sup>The parties refer to the plaintiff insurance companies as the Chubb Insurance Group.

insurance companies initially agreed to defend the Southwestern defendants under a reservation of rights. Both groups of insurance companies then conducted an investigation into whether the claims in the underlying lawsuit were covered by the various insurance policies in effect. Hartford apparently concluded its investigation first and determined that the claims in the underlying action were not covered by the terms in its insurance policy with the Southwestern defendants. Consequently, Hartford withdrew its defense of the Southwestern defendants on September 26, 1994.

After an investigation, plaintiffs concluded that the claims in the underlying action were not within the time period their policies were effective with the Southwestern defendants. Plaintiffs allege that by the time they came to this conclusion, Hartford had already withdrawn its defense of the Southwestern defendants. Plaintiffs argue in their summary judgment motion that

[r]ather than leave their insured unprotected, the Chubb Plaintiffs decided to continue to defend the Southwestern Defendants and instead brought this Declaratory Judgment action to determine the rights and duties of the parties with regard to the insurance issues. The Chubb Plaintiffs [allege they] have now expended approximately \$1.75 million in litigation expenses to defend the Southwestern Defendants, and through this action, seek to recoup these expenses from Hartford [whom they believe had a duty to defend the Southwestern Defendants].

[Doc. No. 52, pp.2-3]

Plaintiffs and the Southwestern defendants argue that the claims in the underlying lawsuit are covered by the "advertising

injury" term in Hartford's insurance policy. Hartford's insurance policy provides coverage for "'[a]dvertising injury' caused by an offense committed in the course of advertising your goods, products or services. . . ." "Advertising injury" is further defined by Hartford's policy to include "misappropriation of advertising ideas or a style of doing business" and "infringement of copyright, title or slogan." Hartford argues in its motion for summary judgment that Derrick's non-patent claims in the underlying lawsuit were all based on infringement or misuse of Derrick's "trademark" and trademark infringement is not included within the policy's definition of "advertising injury." Thus, Hartford argues that the applicable insurance policy does not cover the claims brought by Derrick against the Southwestern defendants.

The parties have not disputed plaintiffs' assertion that Oklahoma law applies to the issues in this action. (Doc. no. 52 at 14 n.3). Certain principles are established. An insurer has a duty to defend an insured whenever it ascertains the presence of facts that give rise to the potential of liability under the policy. First Bank of Turley v. FDIC of Maryland, 928 P.2d 298, 303 (Okla.1996). The duty arises when the allegations in a complaint, and other information gained by the insurer, indicate a possibility of coverage. Id. at 303 n.14 & n.15. When defining a term found in an insurance contract, the language is given the meaning understood by a person of ordinary intelligence. Max True Plastering Co. v. U.S.F.&G. Co., 912 P.2d 861, 869 (Okla.1996) (footnote omitted). A policy term is ambiguous under

the reasonable expectations doctrine if it is reasonably susceptible to more than one meaning. Id. Any doubt whether a duty to defend has arisen must be resolved in favor of the insured. Maryland Cas. Co. v. Willsey, 380 P.2d 254, 258 (Okla.1963).

First, the Court must consider whether allegations of trademark infringement fall within the "advertising injury" provision of the policy. The Court does not write on a clean slate. In Advance Watch Co., Ltd. v. Kemper Nat. Ins. Co., 99 F.3d 795 (6th Cir.1996), upon which Hartford heavily relies, the court ruled that "misappropriation of advertising ideas or style of doing business" does not refer to "a category or grouping of actionable conduct which includes trademark or trade dress infringement." Id. at 802. Hartford urges this Court to adopt the reasoning of the Advance Watch decision, while the Chubb plaintiffs and Southwest defendants ask the Court to follow contrary authority from several federal district courts and state appellate courts. See, e.g., Dogloo, Inc. v. Northern Ins. Co. of New York, 907 F.Supp. 1383 (C.D.Cal.1995) (citing cases); Lebas Fashion Imports of USA v. ITT Hartford Ins. Group, 59 Cal.Rptr.2d 36 (Cal.App.1996). While the Advance Watch decision appears to be the only published decision by a federal appellate court on the issue, this Court notes that the Ninth Circuit followed the Lebas decision in an unpublished decision. See Letro Products, Inc. v. Liberty Mut. Ins. Co., 1997 WL 272245 (9th Cir.)

After careful consideration, this Court declines to follow the Advance Watch decision. In this Court's view, the analysis

employed by the Sixth Circuit, i.e., restricting the word "misappropriation" to the common law tort of the same name rather than the more common and ordinary meaning "to take wrongfully", does not comport with the governing interpretive principles of Oklahoma law, quoted above. An ambiguity exists, and it was a reasonable expectation on the part of the insured that coverage for trademark infringement existed. Additionally, Hartford's decision to decline coverage came in 1994; the Advance Watch decision was issued in 1996. The Court is aware of no authority by which a subsequent legal decision from another jurisdiction may be retroactively applied to proclaim that no possibility of coverage existed at the time the insurer made its decision.

This Court further rejects the second "independent" ground cited by the Advance Watch court under the facts before it, i.e., that the injury was not caused by advertising. In the underlying litigation, Derrick clearly alleged that the use of the name "Derrick" in the Southwestern defendants' advertising was a source of injury. This is not comparable to the situation in Advance Watch, where the Sixth Circuit ruled that the neutral advertising of allegedly counterfeit writing instruments did not cause injury. In sum, Hartford's motion is denied as to trademark infringement.

Hartford also moves for summary judgment as to the patent infringement claims raised in the underlying action. As earlier noted, plaintiffs concede the absence of coverage for these issues, but the Southwestern defendants contest Hartford's motion on the point. It is undisputed that the new advertising injury offense of

"misappropriation of advertising ideas or style of doing business" replaced the prior advertising offenses of "unfair competition" and "piracy" in standard insurance contracts like the one at issue. The Insurance Services Office, an insurance industry organization which develops standardized policy language, prepared an "Introduction and Overview" form describing this change in language as intending "no change in scope". (Southwestern Defendant's Opposition Brief at 4-5). The Southwestern defendants therefore argue that potential coverage exists under any or all of these offenses.

Upon review, this Court joins the majority of published decisions, which favors Hartford. See Everest & Jennings, Inc. v. American Motorists Ins. Co., 23 F.3d 226, 229 (9th Cir.1994) (no connection shown between patent infringement and advertising); Iolab Corp. v. Seaboard Sur. Co., 15 F.3d 1500, 1505 (9th Cir.1994) (patent infringement was not piracy related to advertising); Gencor Industries, Inc. v. Wausau Underwriters Ins. Co., 857 F.Supp. 1560, 1566 (M.D.Fla.1994) (piracy and unfair competition does not include patent infringement); Atlantic Mut. Ins. Co. v. Brotech Corp., 857 F.Supp. 423, 428-29 (E.D.Pa.1994) (same), aff'd, 60 F.3d 813 (3d Cir.1995); St. Paul Fire & Marine Ins. Co. v. Advanced International Sys., 824 F.Supp. 583, 585-87 (E.D.Va.1993) (patent infringement does not constitute misappropriation of advertising ideas or style of doing business), aff'd, 21 F.3d 424 (4th Cir.1994). Hartford is entitled to summary judgment as to the patent infringement issue.

Next, Hartford argues that, even if the Court finds a duty to defend some of the allegations in the underlying action, the "weight of existing authority favors the right of the insurer to apportion its defense obligation between covered and non-covered claims." (Hartford's Brief at 29). The Oklahoma appellate courts have not addressed the issue in a published decision. This Court's research indicates the majority rule is that as long as the complaint or petition alleges facts constituting at least one cause of action covered by the policy, the insurance company has a duty to defend the entire case. See, e.g., Caplan v. Fellheimer Eichen Braverman & Kaskey, 68 F.3d 828, 831 n.1 (3d Cir.1995) (Pennsylvania law); Lafarge Corp. v. Hartford Cas. Ins. Co., 61 F.3d 389, 395 (5th Cir.1995) (Texas law); Town of Duncan v. State Budget and Control Bd., 482 S.E.2d 768, 773 (S.C.1997). This Court is persuaded that the Supreme Court of Oklahoma, if faced with the issue, would adopt the majority position. Hartford has argued, based upon submissions by defense attorneys in the underlying action, that an apportionment is possible of the time spent between the patent claims and the trademark claims. The materials which Hartford quotes consist largely of "rough estimates" and do not establish a sufficient basis for summary disposition.

Next, Hartford contends that it had no duty to defend any claims against Southwestern Wire Cloth Oilfield Screens, Inc. ("Oilfield"), which was a named defendant in the underlying action (and the present lawsuit) on the ground it is not a named insured under Hartford's policies. Oilfield was incorporated as a wholly

owned subsidiary on December 15, 1993 and formally merged back into Southwestern Wire Cloth, Inc. at the end of 1995. Oilfield paid no premium to Hartford and was not even created until December 1993, seven months after the last Hartford policy expired. Hartford cites authority for the proposition that a corporate acquisition occurring after the policy period can have no retroactive effect on the identity of the named insured. Plaintiffs respond that this rule applies to the acquisition of completely separate corporations acquired by the insured corporation after the expiration of the policy period, not to the merger of a wholly owned subsidiary. The Court agrees with plaintiffs, and denies summary judgment.<sup>3</sup>

Finally, Hartford argues that it has no obligation to defend Southwestern for offenses committed after its policy period, i.e., April 1, 1993. The plaintiffs and codefendants have not specifically responded to this aspect of the motion. Once more, even adopting Hartford's position as a matter of law, the Court will require proof that some claims in the underlying action alleged acts of infringement subsequent to the policy expiration date, and that it is possible to allocate the amount of defense expense between those claims and the claims for which Hartford should have provided a defense.

It is the Order of the Court that the motion of the defendant Hartford Fire Insurance Company for summary judgment (#38) is hereby GRANTED in part and DENIED in part. Specifically, the

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<sup>3</sup>In any event, it appears the claims asserted against Oilfield were identical to those asserted against Southwestern.

motion is denied insofar as it seeks a declaration that Hartford owed no duty to defend the trademark infringement claims under its insurance policies, and is granted as to the same declaration regarding the patent infringement claims. Hartford may reurge the issues of apportionment at trial.

ORDERED this 9 day of October, 1997.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

LOUIS L. RUSSELL,  
SS# 476-44-5238

Plaintiff,

v.

KENNETH S. APFEL, Commissioner  
of Social Security Administration,<sup>1/</sup>

Defendant.

OCT 10 1997

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 96-C-612-J ✓

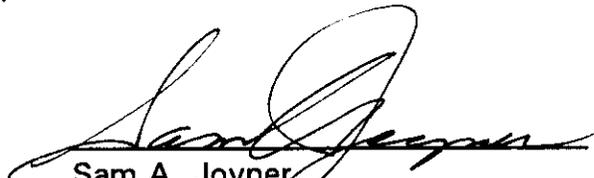
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DATE OCT 14 1997

**JUDGMENT**

Pursuant to the request of Defendant, this action has been remanded to the Commissioner under Step Four. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 10 day of October 1997.

  
Sam A. Joyner  
United States Magistrate Judge

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<sup>1/</sup> On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.