

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

ENTERED ON DOCKET

DATE OCT 31 1997

TERESA SUE FABES,)

Plaintiff,)

vs.)

Case No. 96-C-357-B (M) ✓

GULF INSURANCE COMPANY,)

a foreign corporation, THE TRAVELERS)

INSURANCE COMPANY, a foreign)

corporation, and TRAVELERS GROUP,)

INC., a foreign corporation.)

Defendants.)

FILED

OCT 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court for consideration is Defendants The Travelers Insurance Company and Travelers Group, Inc.'s ("Travelers") Objection To Magistrate Judge's Order Awarding Attorneys' Fees And Costs To Plaintiff (Docket # 170). After careful consideration of the record and applicable legal authorities, the Court hereby SUSTAINS the Order of the Magistrate.

I.

On September 22, 1997, Magistrate Judge Frank McCarthy entered an Order granting Plaintiff attorney fees and costs of \$5,063.35 for her successful prosecution of a Motion To Compel (Docket # 167). During the hearing on, and after the granting of, Plaintiff's Motion To Compel, Magistrate McCarthy stated:

If such a motion [for attorney fees] is filed, Mr. Greenwood, you have ten days to respond to that motion, as opposed to the usual fifteen, and put in there any objections that you have, not only to the law that might be cited, but also to the reasonableness of the fees that are requested.

Transcript, Plaintiff's Response, Exhibit A, Docket # 172.

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Travelers timely responded to Plaintiff's Motion For Attorney Fees And Costs. Therein, Travelers generally objected to any award of attorney fees and costs. Although Travelers distinguished Plaintiff's authorities, it cited no legal authority advocating an award of attorney fees and costs was unwarranted under the circumstances. Further, Travelers failed to specifically question the amount of Plaintiff's request, or any component thereof. In his Order granting Plaintiff's Motion For Attorney Fees And Costs, Magistrate McCarthy reasoned Plaintiff was entitled to an attorney fee pursuant to Fed.R.Civ.P. 37(a)(4)(A), and since Travelers failed to object to the amount sought by Plaintiff, he was unable to determine Plaintiff's requested fees and costs were unreasonable. Therefore, Plaintiff's request was granted *in toto*.

II.

This Court reviews a magistrate's discovery orders under a "clearly erroneous or contrary to law" standard. 28 U.S.C. § 636(b)(1)(A); ND L.R. 37.2(A). The burden of making such a showing rests with the party objecting to the magistrate's order. *Id.*

III.

Magistrate McCarthy's Order granting Plaintiff's Motion For Attorney Fees And Costs is not clearly erroneous. The failure of Travelers to cite applicable legal authority or properly object to the amount and reasonableness of the request left Magistrate McCarthy unable to determine such request unreasonable. Although Plaintiff's request may have been inflated, Travelers can not now be heard to object to the unreasonableness of Plaintiff's request. Such objections should have been made to Magistrate McCarthy.

Magistrate McCarthy's Order granting Plaintiff's Motion For Attorney Fees And Costs is not contrary to law. *See* Fed.R.Civ.P. 37 (a)(4)(A).

IV.

Travelers Objection To Magistrate Judge's Order Awarding Attorneys' Fees And Costs To Plaintiff (Docket # 170) is OVERRULED.

IT IS SO ORDERED this 30th day of Oct., 1997.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

AMERADA HESS CORPORATION,

Plaintiff,

vs.

UNITED STATES DEPARTMENT
OF THE INTERIOR,

Defendant.

ENTERED ON DOCKET

DATE

10-31-97

Case No. 94-C-1051-H

FILED

OCT 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF FINAL JUDGMENT

In accord with the Order filed June 18, 1997 denying Amerada Hess Corporation's ("AHC") Motion for Summary Judgment, and thereby granting the Amended Counterclaim of the United States Department of the Interior ("DOI") in this matter, the Court hereby directs the Clerk of this Court to enter the following Final Judgment in this case in accordance with Fed.R.Civ.P. 56 and 58:

The above action having come on for hearing before the Court pursuant to AHC's Motion for Summary Judgment and the issues having been duly heard and a decision having been rendered by an Order entered June 18, 1997,

IT IS HEREBY ORDERED AND ADJUDGED that:

1. Judgment is entered in favor of the United States Department of Interior ("DOI") with respect to the claim for royalties set forth in its Amended Counterclaim filed on March 8, 1996. In particular, DOI is entitled to the royalties sought by its August 3, 1993

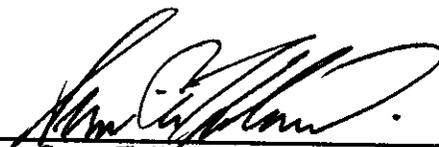
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Decision in the principal amount of \$1,079,000, less the offsets allowed in DOI's December 1, 1995 Decision. In addition, DOI is entitled to interest on the amount under Section 111(a) of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §1721(a), at the rate established under Section 6621 of the Internal Revenue Code, 26 U.S.C. §6621, from the date the royalties were originally due until paid.

2. In addition, judgment is entered in favor of DOI with respect to AHC's February 24, 1989 request for refund of a royalty overpayment that AHC made on a take or pay payment. The Court finds no basis for overturning DOI's December 13, 1993 Decision denying that refund request. Judgment is entered dismissing AHC's Amended Complaint.

IT IS SO ORDERED.

DATED this 27th day of October, 1997.



Sven Erik Holmes
United States District Judge

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

DAVID LEE MAYWALD,

Plaintiff,

vs.

JUDGE JACK LIVELY,
and ATTORNEY NANCY MOORE,

Defendants.

ENTERED ON DOCKET

DATE 10-31-97

Case No. 97-CV-906-H (J) ✓

FILED

OCT 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff, a state prisoner appearing *pro se*, brings this civil rights *Complaint* pursuant to 42 U.S.C. § 1983 (Docket #1) and has filed a motion for leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915(a), as amended. (Docket #2). Based on the representations made in the supporting affidavit, the Court finds that Plaintiff's request to proceed *in forma pauperis* should be granted.

Plaintiff previously filed a similar action in the United States District Court for the Northern District of Oklahoma on November 17, 1995, naming his ex-wife and her attorney as defendants. He alleged that while he was incarcerated at Tulsa County Jail, these defendants procured from the District Court for Montgomery County, State of Kansas, a restraining order and an order terminating his rights to visit his infant son. On December 19, 1995, this Court granted Plaintiff's motion to proceed in forma pauperis and dismissed Plaintiff's complaint as frivolous, finding that because Plaintiff failed to allege a constitutional violation, the action lacked an arguable basis in law. This Court also found that the conduct of Plaintiff's ex-wife and her attorney did not constitute action

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under color of state law for purposes of a section 1983 violation. See Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970) (for a complaint under section 1983 to be sufficient a plaintiff must allege that defendant deprived him of a right secured by the Constitution and laws of the United States, and that defendant acted under color of law).

Now Plaintiff has filed this action against Montgomery County District Judge Jack L. Lively and Nancy Moore, apparently a Kansas court-appointed attorney. He alleges that on September 6, 1995, he was divorced in Kansas and on September 9, 1995, he was arrested in Tulsa, Oklahoma. He is currently incarcerated at the Oklahoma State Reformatory, Granite, Oklahoma. A domestic matter involving Plaintiff, his ex-wife and his infant son remains pending in Montgomery County District Court, State of Kansas. In this § 1983 action, Plaintiff asks "to be transported to child custody severance hearing and to have attorney appointed who will represent me properly by the courts."

The Prison Litigation Reform Act added a new section to the in forma pauperis statute, entitled Screening. See 28 U.S.C. § 1915A. That section requires the Court to review prisoner complaints before docketing, or as soon as practicable after docketing, and dismiss the complaint, or any portion of the complaint, if the complaint . . . is frivolous, malicious, or fails to state a claim upon which relief may be granted." Id. A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke v. Williams, 490 U.S. 319, 325 (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, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A suit is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

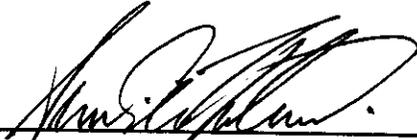
This Court finds that as a state court judge, Judge Lively is "absolutely immune from § 1983 liability unless he acted 'in the clear absence of all jurisdiction.'" Hunt v. Bennett, 17 F.3d 1263 (10th Cir. 1994) (quoting Stump v. Sparkman, 435 U.S. 349, 356-57 (1978)). Furthermore, even if Plaintiff could maintain an action against Judge Lively, this Court would lack subject matter jurisdiction to provide the relief requested by Plaintiff, i.e., to compel a state official from the District Court of Montgomery County, State of Kansas, to perform a duty owed to Plaintiff. See 28 U.S.C. § 1361 (providing the federal court has jurisdiction to compel an officer or employee of the United States to perform a duty owed to plaintiff).

Additionally, liberally construing Plaintiff's *pro se* pleading, see Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's action against his court-appointed attorney (if, in fact, she is his court-appointed attorney) is legally insufficient as the performance of the traditional functions as counsel are not performed "under color of state law" pursuant to 42 U.S.C. § 1983. See Polk County v. Dobson, 454 U.S. 312 (1981). Plaintiff's recourse for these claims lies not in a federal § 1983 action, but in the state courts of Kansas.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's motion for leave to proceed *in forma pauperis* is **granted** and his civil rights *Complaint* is **dismissed as frivolous** since it is based on "an indisputably meritless legal theory." Further, because Plaintiff has sought and been granted leave to proceed *in forma pauperis*, the Clerk of the Court is directed to "flag" this dismissal as "strike two" pursuant to 28 U.S.C. § 1915(g).¹

IT IS SO ORDERED.

This 29TH day of OCTOBER, 1997.



Sven Erik Holmes
United States District Judge

¹Section 1915(g) provides as follows:

In no event shall a prisoner bring a civil action . . . under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action . . . in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

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

FILED
OCT 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-345-H(J)

ENTERED ON DOCKET
DATE 10-31-97

DONNA J. DAY, TOSHA J. HARRISON,
LAURA D. MANNING,

Plaintiffs,

v.

ROBERT RAFF and
PARTS WAREHOUSE, INC.,

Defendants.

ORDER OF DISMISSAL WITH PREJUDICE

This matter comes before the Court on the Joint Stipulation of Dismissal with Prejudice by the parties. The parties represent to the Court they have entered into an agreement for the entry of this Order of Dismissal with no finding of any sexual harassment, assault and battery, invasion of privacy, or employment discrimination on the part of Parts Warehouse, Inc. or Robert Raff.

IT IS THEREFORE ORDERED that this matter is dismissed with prejudice with no finding of any sexual harassment, assault and battery, invasion of privacy or employment discrimination on the part of Parts Warehouse, Inc. or Robert Raff. Each party shall bear their own attorney's fees and costs.



JUDGE OF THE DISTRICT COURT

SPZ
10/21/97

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

PAUL & KAREN BULL, as parents
and next friend of their
minor daughter, ANGELA
RUSSELL; *et al.*,

Plaintiffs,

vs.

INDEPENDENT SCHOOL DISTRICT
NO. 1 OF TULSA COUNTY, a/k/a
TULSA PUBLIC SCHOOLS; *et al.*,

Defendants.

ENTERED ON DOCKET

DATE 10-31-97

Case No. CIV-96-C-0180H ✓

FILED
OCT 30 1997

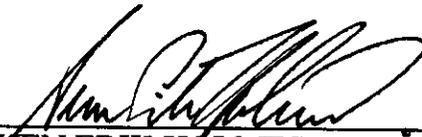
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

In accordance with the order filed on September 4, 1997, awarding Plaintiffs attorney fees and litigation expenses,

IT IS THEREFORE ORDERED that the Plaintiffs recover from the Defendants the sum of \$80,048.67, with post-judgment interest thereon at the rate of 6.06 percent as provided by law.

ORDERED this 29TH day of October, 1997.


SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MARK S. RHEM,
SS# 083-44-3944

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,^{1/}

Defendant.

ENTERED FOR CLERK
OCT 31 1997

No. 96-C-643-J

FILED

OCT 30 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 30 day of October 1997.


Sam A. Joyner
United States Magistrate Judge

^{1/} 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** **FILED**

OCT 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARK S. RHEM,
SS# 083-44-3944

Plaintiff,

v.

No. 96-C-643-J

KENNETH S. APFEL, Commissioner
of Social Security Administration,^{1/}

Defendant.

OCT 31 1997

ORDER^{2/}

Plaintiff, Mark S. Rhem, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.^{3/} Plaintiff asserts error because (1) the ALJ applied an incorrect legal standard at Step Five, (2) the ALJ failed to consider Plaintiff's subjective complaints of pain, (3) the ALJ failed to properly consider Plaintiff's mental impairment and/or attach a Physical Review Technique form to his decision, and (4) the ALJ improperly relied on the testimony of

^{1/} 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.

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

^{3/} Plaintiff filed an application for disability and supplemental security insurance benefits on February 6, 1992. The application was denied initially and upon reconsideration. A hearing before Administrative Law Judge Mark W. Haase (hereafter, "ALJ") was held September 20, 1993. [R. at 42]. By order dated December 22, 1993, the ALJ determined that Plaintiff was not disabled. [R. at 18]. Plaintiff appealed the ALJ's decision to the Appeals Council. On May 2, 1994, the Appeals Council denied Plaintiff's request for review, and denied Plaintiff's request to reopen its prior decision denying review. [R. at 13].

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the vocational expert. For the reasons discussed below, the Court reverses and remands the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff testified that he was born December 25, 1951, and was 41 years old at the time of the hearing. [R. at 33]. According to Plaintiff, he attended school only until age fifteen. [R. at 45]. Plaintiff stated that he currently received \$111.00 for welfare, and that he spent that money on alcohol and drugs. [R. at 48, 53].

Plaintiff testified that he was five feet nine inches tall and weighed 302 pounds. Plaintiff claims that he is out of breath when he walks upstairs, that he has difficulty with his legs and that he walks with a cane. [R. at 50-51].

Plaintiff testified that he spent the majority of his time sitting on a stoop on Main Street talking with some of his friends. [R. at 53-54]. Plaintiff also noted that he enjoyed playing chess. [R. at 56].

Plaintiff testified that he had been incarcerated on several occasions. Plaintiff also acknowledged driving "gypsy cabs" in New York City for a period of time. Plaintiff additionally stated that he lied to "try to get into a program," and that he lied to a doctor. [R. at 46-47, 49, 59-60].

In his application for disability, Plaintiff acknowledged that his activities consisted of watching television, reading, and sometimes walking. [R. at 95-101, 189]. Plaintiff stated that he prepared and cooked meals, that he did some laundry, that he traveled outside of his house approximately three times each week, and that he played cards. [R. at 101-04].

Plaintiff claims he is disabled due to his depression, and due to pain in his legs and ankles. [R. at 93].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

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

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

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

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

42 U.S.C. § 423(d)(2)(A).

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

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^{5/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence

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

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 was not disabled at Step Five of the sequential evaluation. The ALJ concluded that Plaintiff has no significant mental restrictions. The ALJ noted that Plaintiff suffered from mental depression, but concluded that Plaintiff could perform tasks except for detailed or complex tasks. [R. at 26]. The ALJ did not attach a Physical Review Technique Form ("PRT Form"). The ALJ summarized Plaintiff's medical records and concluded that the records and Plaintiff's testimony were not inconsistent with the ability of Plaintiff to perform sedentary work.

IV. REVIEW

Burden of Proof: Step Five

Plaintiff asserts that although the ALJ reached Step Five of the sequential evaluation, the ALJ improperly required Plaintiff to prove that Plaintiff could not perform a full range of sedentary work. Plaintiff is correct that the burden of proof at

Step Five is on the Commissioner. However, the Commissioner met that burden in this case.

Roscoe Martin, M.D., noted that Plaintiff was ambulatory without a limp on April 11, 1992. [R. at 147-48]. Plaintiff testified that he abused alcohol and drugs, but he denied alcohol and drug abuse when examined by Ronald E. Allen, Ph.D. [R. at 150]. Plaintiff's X-rays were normal. [R. at 158]. At a physical examination, Plaintiff's gait was reported as "normal," and no assistive devices were needed. [R. at 162]. A Residual Functional Capacity Assessment noted that Plaintiff could occasionally lift 50 pounds, frequently lift 25 pounds, stand six hours, sit six hours, and push/pull an unlimited amount. [R. at 180]. In one of his psychiatric interviews, the examiner noted that Plaintiff spent his day reading and taking walks. [R. at 189]. Furthermore, Plaintiff's testimony was replete with contradictions.

Neither the record nor the opinion of the ALJ substantiates Plaintiff's complaint that the Commissioner applied an inappropriate legal standard at Step Five.

Mental Impairment & PRT Form

An ALJ must attach a Psychiatric Review Technique form ("PRT") detailing the ALJ's assessment of the claimant's level of mental impairment, to his decision. 20 C.F.R. § 404.1520a(d).

When there is evidence of a mental impairment that allegedly prevents a claimant from working, the Secretary must follow the procedure for evaluating mental impairments set forth in 20 C.F.R. § 404.1520a and the Listing of Impairments. Andrade v. Secretary of Health & Human Services, 985 F.2d 1045, 1048 (10th Cir. 1993). This procedure first requires the Secretary to determine the

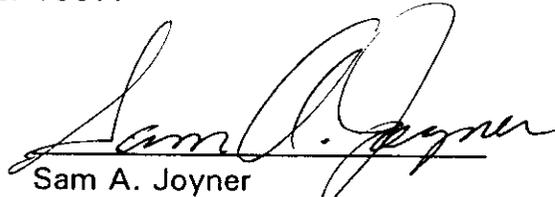
presence or absence of 'certain medical findings which have been found especially relevant to the ability to work,' sometimes referred to as the 'Part A' criteria [of the Listings]. 20 C.F.R. § 404.1520a(b)(2). The Secretary must then evaluate the degree of functional loss resulting from the impairment, using the 'Part B' criteria [of the Listings]. [20 C.F.R.] § 404.1520a(b)(3). To record her conclusions, the Secretary then prepares a standard document called a Psychiatric Review Technique Form (PRT form) that tracks the listing requirements and evaluates the claimant under the Part A and B criteria. See Woody v. Secretary of Health & Human Servs., 859 F.2d 1156, 1159 (3d Cir. 1988); 20 C.F.R. § 404.1520a(d). At the ALJ hearing level, the regulations allow the ALJ to complete the PRT form with or without the assistance of a medical advisor and require the ALJ to attach the form to his or her written decision Id.

Cruse v. United States Dep't of Health & Human Services, 49 F.3d 614, 617 (10th Cir. 1995). Plaintiff correctly asserts that although Plaintiff alleged a mental impairment, the ALJ failed to complete a PRT Form and the ALJ did not discuss the PRT Form in his decision. The Secretary doe not address this argument in his brief.

Plaintiff alleges a mental impairment. The ALJ noted, in his decision, that Plaintiff has "mild depression." [R. at 26]. The ALJ did not complete a PRT Form and no reason is advanced for the failure of the ALJ to complete such a form. The failure of the ALJ to properly analyze Plaintiff's alleged mental impairment is fatal, and the decision of the Secretary must be reversed. On remand, the Secretary should analyze Plaintiff's alleged mental impairment and complete the PRT Form.

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

Dated this 30 day of October 1997.


Sam A. Joyner
United States Magistrate Judge

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

FILED

OCT 30 1997

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

ARNOLD C. MARQUEZ,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security
Administration,

Defendant.

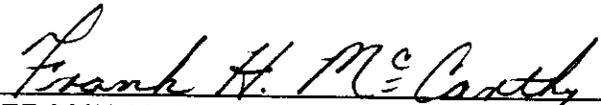
CASE NO. 96-CV-555-M

ENTERED ON DOCKET

DATE OCT 31 1997

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 30th day of Oct., 1997.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

(17)

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

ARNOLD C. MARQUEZ

561-84-3755

Plaintiff,

vs.

KENNETH S. APFEL,¹ Commissioner,
Social Security Administration,

Defendant,

Case No. 96-C-555-M

FILED

OCT 30 1997

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

ENTERED IN COURT

OCT 31 1997

DATE

ORDER

Plaintiff, Arnold C. Marquez, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.² In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

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

¹ Kenneth S. Apfel was sworn in as Commissioner of Social Security on September 29, 1997. Pursuant to Fed.R.Civ.P. 25(d)(1) Kenneth S. Apfel is substituted for Acting Commissioner John J. Callahan as the defendant in this suit.

² Plaintiff's protectively filed March 26, 1993 SSI application and his July 7, 1993 application for disability benefits were denied; the denial was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held January 30, 1995. By decision dated June 20, 1995 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on April 17, 1996. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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

The record of the proceedings has been meticulously reviewed by the Court. The undersigned United States Magistrate Judge finds that the Administrative Law Judge ("ALJ") has properly outlined the required sequential analysis. The Court incorporates that information into this order as the duplication of effort would serve no purpose.

Plaintiff was born February 22, 1955 and was 40 years old at the time of the hearing. He formerly worked as a field laborer and restaurant busboy. He claims to be unable to work as a result of asthma, back injury, pelvic fracture residuals and illiteracy. Plaintiff states he was bedridden for 6 months as a result of an automobile accident which occurred in 1985. [R. 101]. He testified: "I was paralyzed for one year in '85." [R. 344]. He also said he was in the hospital for a month, at home in bed for six more months, and it took him a year to learn how to walk. [R. 346] The medical evidence directly contradicts these assertions. On April 2, 1985 Plaintiff was involved in an automobile accident in which he suffered a renal contusion, a pelvic fracture, and fractures of 3 ribs. [R. 164]. After a five-day hospital stay, he was

discharged with instructions to be kept at bed rest for another seven to ten days for treatment of his renal contusion. The hospital discharge summary contained the notation: "Disability: Four weeks." [R. 164-65]. Records from his follow-up care reveal that on April 16, 1985 he was walking with a walker. [R. 207]. On May 24, 1985 he was still walking with a walker [R. 205]. On July 1, 1985, Plaintiff saw his doctor and complained of pain in his right lower back and left chest, but the note did not indicate that Plaintiff was still using a walker. The doctor noted: "no pain pills needed rest and ambulate more." [R. 204]. In October 1985, the notes reflect continued complaints of pain. The physician found that his left leg was shorter than his right. He released Plaintiff for part-time light work and recommended Plaintiff get custom built shoes. [R. 195].

A report of a general consultative examination performed November 21, 1992, reflects that Plaintiff was capable of sitting for 8 hours a day, standing and walking for 8 hour a day, that he could lift 20 pounds frequently, and that he could reach and grasp. He was limited in his ability to repeatedly bend the back, stoop, and squat. [R. 221]. Although Plaintiff has asthma, the consultative physician reported that it was controlled with medication. [R. 222].

In February 1993, Plaintiff was in another automobile accident. The record contains few medical records related to that accident, but Plaintiff testified that it put his neck out of place for two weeks. He testified he still has a problem on one side a little bit at night when he sleeps, but his medication takes the pain away. [R. 346]. The medical records document intermittent complaints of low back and shoulder pain.

A lumbar x-ray performed 3/18/92 reflects retro-listhesis³ L5 on S1 [R. 275], however x-ray studies performed in 1993 and 1995 were unremarkable. [R. 224, 298-299]. In January 1995 Plaintiff's doctor recorded that Plaintiff threatened to sue him if he failed to file disability papers immediately and that Plaintiff left his office without undergoing an adequate examination. [R. 276-77]. In April 1995, Plaintiff's physician observed that he "appears stable in his orthopedic shoes." [R. 328]. The doctor found no reason that he needed to be seen in the near future, remarked that he had a significant prior injury and that he had recovered excellently following that injury, although he would always have residuals. *Id.*

A consultative psychological evaluation was performed on November 6, 1992. The psychologist reported that Plaintiff scored in the borderline range of intelligence and that he has severe difficulties with simple mathematics; he cannot make simple change and was unable to correctly respond to the question of how much is three plus four. [R. 215-218]. With regard to his ability to perform tasks in a work setting, the psychologist reported that Plaintiff would be able to understand, carry out and remember simple instructions. However, Plaintiff was not competent to manage funds on his own behalf. [R. 218].

The ALJ determined that although Plaintiff was unable to perform his past relevant work, he was capable of performing a full range of light work slightly reduced by a precaution against undue exposure to environmental pollutants,

³ The posterior displacement of one vertebral body on the subjacent body. *Dorland's Illustrated Medical Dictionary*, 28th ed.(1994), p. 1456.

limitation on repeated bending, stooping squatting or understanding, remembering, and carrying out detailed or complex instructions. [R. 31]. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. See *Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) improperly evaluated his impairments which limit his residual functional capacity (RFC); (2) improperly relied upon the Medical-Vocational Guidelines ("Grids"), 20 C.F.R., Pt. 404, Subpt. P, App. 2; and (3) improperly evaluated his credibility.

To support his allegation that the ALJ improperly evaluated his impairments Plaintiff points to the portion of the consultative examination report where the examining physician indicated that the activity level tolerated as result of his respiratory condition was greater than one block. [R. 219]. Plaintiff argues that since the physician did not indicate unlimited walking, that a limitation is implied. Later in the report the physician indicated that Plaintiff was able to stand and walk for 8 hours a day. [R. 221]. Plaintiff also relies on the April 6, 1995 note wherein the doctor reports complaints of instability which affects his ability to stand and walk appropriately. [R. 320]. That notation is made under the area for recordation of subjective complaints. On April 27, 1995, the same physician reports that Plaintiff appears stable in his orthopedic shoes, and that he has recovered excellently from his

prior injury. [R. 328]. The Court finds that the RFC for unskilled light work is supported by substantial evidence in the record.

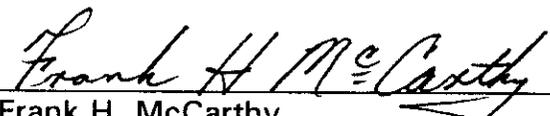
There is no support for Plaintiff's claim that the ALJ failed to apply the appropriate standards in the evaluation of his credibility. The Secretary is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ appropriately referred to the guidelines set forth in Social Security Ruling 88-13 and appropriately applied the evidence to those guidelines. There are numerous discrepancies between Plaintiff's description of his injuries and the medical record. There are also discrepancies in Plaintiff's description of his daily activities. The Court finds that the ALJ evaluated Plaintiff's credibility and allegations of pain in accordance with the correct legal standards established by the Secretary and the courts.

When a claimant's ability to work at a certain RFC level is limited by nonexertional impairments, such as pain, conclusive application of the grids is not appropriate and the Commissioner must produce vocational testimony or other similar evidence. *Thompson v. Sullivan*, 987 F.2d 1482, 1488 (10th Cir. 1993); *Hargis v. Sullivan*, 945 F.2d 1482, 1490 (10th Cir. 1991). However, if there is substantial evidence for the ALJ to determine that a claimant's nonexertional impairments are insignificant, the grids may be applied conclusively. See e.g., *Glass v. Shalala*, 43

F.3d 1392, 1396 (10th Cir. 1994)(citing *Eggleston v. Bowen*, 851 F.2d 1344, 1247 (10th Cir. 1988)(presence of nonexertional impairment does not preclude use of grids if nonexertional impairment does not further limit claimant's ability to perform work)). Further, reliance on the grids is not error where, as here, the ALJ finds the plaintiff's testimony regarding his pain not fully credible. *Castellano v. Sec. of Health and Human Services*, 26 F.3d 1027, 1030 (10th Cir. 1994). The Court finds that the ALJ's reliance on the Grids was appropriate. Even if Plaintiff were limited to sedentary work, Plaintiff's age, 40, his education level, illiterate, and work experience, unskilled, the Grids direct a conclusion of not disabled. 20 C.F.R., Pt. 404, Subpt. P, App. 2, Rule 201.23.

The Court finds that the ALJ evaluated the record in accordance with the legal standards established by the Commissioner and the courts. The Court further finds there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED

DATED this 30th day of October, 1997.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

FILED

OCT 30 1997 *mw*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JACK CHESBRO,)
)
Plaintiff,)
)
vs.)
)
GROUP HEALTH SERVICE OF)
OKLAHOMA, INC., a non-profit)
corporation, d/b/a Blue Cross Blue)
Shield of Oklahoma,)
)
Defendants.)

No. 96-CV-561-B ✓

ENTERED ON DOCKET
DATE OCT 31 1997

ORDER

The Court has for decision the motion for summary judgment pursuant to Fed.R.Civ.P. 56 of Group Health Service of Oklahoma, Inc. ("Blue Cross") (Docket #32). Following a thorough review of the record, the undisputed facts, and the applicable legal authority, the Court concludes Defendant's motion for summary judgment should be sustained in part and overruled in part.

Undisputed Facts

1. Plaintiff, Jack Chesbro ("Chesbro"), was employed by the Defendant from approximately 1970 through 1981, as a marketing representative and as a manager for the Health Check program. In 1981, he resigned to take a position with another company. (Plf. Depo., pp. 12-17). Chesbro then returned to Blue Cross employment in 1983, as an account executive. In 1987, Chesbro was promoted to Manager of Agency Relations for Marketing

and remained in that position until he was discharged on June 24, 1994. (Plf. Depo., pp. 23-25, Plf. Ex. A).

2. As Manager of Agency Relations for Marketing from 1987 until early 1994, Plaintiff reported to Jim Goodwin ("Goodwin"), Vice-President of Marketing. (Affidavit of Goodwin, Deft. Ex. B; Plf. Depo., pp. 24, 41). For a few months before his discharge, Plaintiff reported to Lisa Putt ("Putt"). (Plf. Depo., pp. 37, 41). Plaintiff was responsible for managing outside broker sales. (Plf. Depo., p. 25).

3. Plaintiff's position was eliminated on June 24, 1994, due to a reorganization of the Marketing Department in which all positions in the group marketing area were eliminated. (Plf. Depo., pp. 65-67; Affidavit of Tom Bowser, Deft. Ex. C; Memorandum, dated March 1, 1995, regarding reorganization of Marketing Div., Deft. Ex. D). Two other management level employees, Blair Fennell ("Fennell") and Rick Rinehart ("Rinehart"), were discharged at the same time as the Plaintiff as a result of the reorganization. (Plf. Depo., p. 79). The reorganization was determined to be necessary due to a continued three-year trend of declining membership and plummeting sales of Blue Cross. The reorganization took place in several phases, and positions ranging from senior management to support personnel were adversely affected. (Plf. Depo., pp. 148-149; Memorandum regarding reorganization; Deft. Ex. E; Bowser Affidavit, Deft. Ex. C). Positions of both male and female employees in the marketing area were eliminated. (Bowser Affidavit, Deft. Ex. C).

4. Plaintiff believes that at the time of his discharge there were positions open for which he was more qualified than the people actually hired; and he believes that the

Defendant should have terminated another employee to allow him to have such employee's position. (Plf. Depo., pp. 68-71).

5. The decision regarding the reorganization of the Marketing Department resulting in Plaintiff's termination was made by Tom Bowser ("Bowser"), Executive Vice-President of Marketing. (Plf. Depo., pp. 67-71).

6. Plaintiff signed a document at the time he began employment with Defendant in 1983, acknowledging his employee-at-will status. (Plf. Depo., p. 134; Acknowledgment, Def. Ex. G).

7. There were three other managers at Plaintiff's level in the Marketing Department: Fennell (male), Greg Burn ("Burn") (male), and Pam Schoeppel ("Schoeppel") (female). Schoeppel was promoted in February 1993, to the Vice-President of Marketing of Member Service Life. (Plf. Depo., pp. 34-35; Memorandum from Ralph S. Rhodes dated February 10, 1993, Def. Ex. E).

8. Burn was retained and assumed some of Plaintiff's duties. (Plf. Depo., pp. 72-73).

9. Plaintiff was offered one week of severance pay for each year of service with Defendant; however, he declined the severance pay because he would not sign the release that accompanied it. (Plf. Depo., p. 83)

10. Although Defendant has an internal Equal Employment Opportunity Policy which permits employees to file discrimination complaints in regard to race, color, religion, sex, national origin, age, handicap or status as a disabled veteran or veteran of Vietnam,

Plaintiff did not file an internal complaint with the Defendant. (Plf. Depo., p. 136; Deft. Equal Employment Policy, Deft. Ex. F).

11. The Plaintiff did not complete a new position application form for Group Marketing, which was required to initiate the internal hiring process, in order to make known his desire for another position with the Defendant after he was advised of the restructuring. (Plf. Depo., p. 141; New Position Application Form for Group Marketing, Deft. Ex. H).

12. Plaintiff filed his administrative charge on July 31, 1995 (Plf. Depo., p. 150; Charge of Discrimination, Deft. Ex. I). By notice dated June 2, 1996, Plaintiff was provided a dismissal and notice of right to sue letter by the Equal Employment Opportunity Commission. (Plf. Depo., p. 151; Deft. Ex. J).

13. The Plaintiff disagreed with the manner in which Defendant calculated premium charges to the members. Plaintiff stated: "They were basing their renewals on billed charges rather than actual reimbursement to providers, which were inflating the premiums, which were causing us to lose some accounts." (Plf. Depo., p. 28). Plaintiff also claims that members' copayments were based upon billed charges rather than "negotiated fees." (Plf. Depo., pp. 167-68).

14. Plaintiff admits that this premium determination and copayments determination methodology was in place before he accepted employment with the Defendant the second time. (Plf. Depo., p. 29).

15. Plaintiff admits that he never questioned the premium determination or copayments determination methodology in writing to the Defendant. (Plf. Depo., pp. 28-29,

169). Plaintiff states he voiced his concerns regarding the methodology at various meetings of Marketing management people. He admits that no one ever said anything to him of a negative nature about his having expressed such concerns. (Plf. Depo., p. 33). Plaintiff also admits that he has no evidence that Tom Bowser, the Executive Vice-President that restructured the Marketing Department and terminated Plaintiff, was aware of Plaintiff's premium and copayment methodology concerns, or that he took such concerns into consideration when he made decisions regarding the reorganization. (Plf. Depo., pp. 171-173; Bowser Affidavit, Deft. Ex. C).

16. Plaintiff claims reverse discrimination stating he was not promoted because he was male rather than female. This pertains to the promotion of Pam Schoeppel in February 1993, to the position of Vice-President of Marketing of Member Service Life. Plaintiff states his immediate supervisor, John Goodwin, told him he was not considered for the position because "he did not wear a skirt ... [and his] legs were too hairy." (Plf. Depo., pp. 42-43). Plaintiff states he was told by Goodwin that Defendant "needed to place some females in ... upper management positions" because of affirmative action requirements. (Plf. Depo., pp. 43-44). Goodwin states he has no recollection of making such statements and does not believe he would have made a statement which implied that Schoeppel's gender was the only reason she was selected for the position. (Goodwin Affidavit, Deft. Ex. B). Goodwin had nothing to do with the selection process. (Plf. Depo., pp. 44-47). Goodwin's statement was what Goodwin told Plaintiff, not what Goodwin had been told by someone else. (Plf. Depo., p. 124; Goodwin's Affidavit, Deft. Ex. B). Plaintiff did not complain to management or

Human Resources, he merely told Goodwin that he “did not think that was fair.” (Plf. Depo., pp. 45-47).

17. Plaintiff admits that he has no evidence that Bowser was aware of his comment to Goodwin or Goodwin's purported response when Bowser made the decision to eliminate Plaintiff's position, or that Bowser took such comment into consideration in making the decision. (Plf. Depo., pp. 176-177; Goodwin Affidavit, Deft. Ex. B). Goodwin stated that he never discussed with Bowser any comments by Plaintiff regarding Plaintiff's nonselection for the Member Service Life position. (Goodwin Affidavit, Deft. Ex. B).

18. Plaintiff erroneously stated in his administrative complaint that ten or eleven of the total employees promoted at approximately the same time as Schoepfel were female. Plaintiff then conceded in his deposition that this was erroneous and that six of the eleven were females. (Plf. Depo., pp. 144-45, 154; Plf. EEOC Affidavit, p. 3, Deft. Ex. K; Memorandum from Ralph Rhodes dated February 10, 1993, Deft. Ex. E). Plaintiff stated in his opinion some of the women who were promoted were not qualified, but then he admits he has no evidence the promotions were not deserved. (Plf. Depo., pp. 157-160).

19. Plaintiff claims he was terminated due to his sex because Mr. Bowser wanted Ms. Putt, his supervisor, to head the Agency Relations Department; and if Plaintiff remained he was a threat to Ms. Putt. (Plf. Depo., p. 177). However, Plaintiff admits that his evidence in support of his allegation he was terminated because of his sex is his “assumption.” (Plf. Depo., pp. 177-178).

20. Plaintiff bases his intentional infliction of emotional distress claim on his stress

and psychological reaction to having lost his employment, his retirement and the concerns over supporting his family. There was ongoing psychological stress and sleepless nights over what he was going to do for employment. (Plf. Depo., pp. 178-179). Plaintiff remained unemployed for approximately three months after his termination by Defendant.

The Summary Judgment Standard

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342, 345 (10th Cir. 1986); *Lucas v. Dover-Norris Div.*, 857 F.2d 1397 (10th Cir. 1988). 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 sufficient to raise a "genuine issue of material fact." *Anderson*, 477 U.S. at 247-48.

The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. 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 v. Zenith*, 475 U.S. 574, 585 (1986).

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 must construe the evidence and inferences therefrom in a light most favorable to the nonmoving party. *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992).

Legal Analysis and Conclusion

Plaintiff asserts three theories of recovery concerning his employment termination. The first is alleged tortious wrongful discharge in violation of Oklahoma public policy. Second, he was the victim of reverse discrimination and/or retaliation; and thirdly, a claim for intentional infliction of emotional distress.

In *Burk v. K-Mart Corp.*, 770 P.2d 24, 28-29 (Okla. 1989), the Oklahoma Supreme Court sets out a public policy exception to the at-will termination rule. It states:

We thus follow the modern trend and adopt today the public policy exception to the at-will termination rule in a narrow class of cases in which the discharge is contrary to a clear mandate of public policy as articulated by constitutional, statutory or decisional law.

* * *

In light of the vague meaning of the term public policy, we believe the public policy exception must be tightly circumscribed.

In the wrongful discharge public policy claim, Plaintiff states he complained in various

internal marketing department meetings that Blue Cross was computing premium charges based on billed charges and not on the reduced negotiated discounted billing actually paid. Thus, Plaintiff urged premiums were too high resulting in members (insureds) being overcharged, negatively impacting on Blue Cross competing in the market. As a corollary Plaintiff also complained to Goodwin and others in the Marketing Department that this misrepresentation to members regarding the amount actually paid to providers caused members to pay higher copayments. Plaintiff contends these misrepresentations are a violation of Oklahoma public policy in Okla.Stat. tit. 36, §§ 1203 and 1204 (Unfair or Deceptive Acts or Practices Prohibited), and Okla.Stat. tit. 15, §§ 58 and 59 (Actual and Constructive Fraud).

In defense of the alleged public policy violation, Defendant urges there is no public policy violation because it has the right to determine its own premium calculation methodology. Blue Cross also states the teaching of *McKenzie v. Renberg's, Inc.*, 94 F.3d 1478 (10th Cir. 1996), *cert. denied*, 117 S.Ct. 1468 (1997), defeats Plaintiff's wrongful discharge claim because as a member of Blue Cross' Marketing management internal discussions about premium calculation methods was integral to Plaintiff's job. Blue Cross states there was no violation of Plaintiff's protected activity. The Court believes *McKenzie* is distinguishable from the instant matter. In *McKenzie*, the purported protected activity of Plaintiff was the filing of a complaint under the specific language of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215(a)(3). In *McKenzie*, Plaintiff never filed any such claim implicating a protected interest. Herein, Plaintiff made an internal complaint that Blue

Cross misrepresented to its members the amount of actual provider payments it made and this in turn caused an increase in the amount of Blue Cross insureds' copayments.

Blue Cross also states the undisputed evidence establishes that Executive Vice-President Tom Bowser was the one who decided Plaintiff should be terminated and did so for legitimate economic downturn reasons. Further, Bowser was unaware of Plaintiff's comments about misrepresentations to the insureds, so Plaintiff's comments played no part in Bowser's termination decision.

The Court is of the view that the teaching of *McKenzie* is not controlling here. *McKenzie* dealt with specific protected activity under the FLSA and the plaintiff employee never made a claim under the FLSA, but only discussed the employer's obligations under the FLSA internally in her position as the Human Resources manager. The alleged public policy violation herein is broader than in *McKenzie* where the narrow language of the FLSA concerning protected activity was involved. Herein, the subject statutes, Okla.Stat. tit. 36, §§ 1203 and 1204, prohibit deceptive practices and misrepresentations by an insurer to an insured. Such alleged internal "whistleblowing," assuming it existed, is protected by Oklahoma public policy. See, *Hinson v. Cameron*, 742 P.2d 549, 553 n. 11 (Okla. 1987); *Hayes v. Eateries, Inc.*, 905 P.2d 778 (Okla. 1995), and *Vannerson v. Bd. of Regents of U. of Okl.*, 784 P.2d 1053 (Okla. 1989).

Although Bowser states he was the sole terminating authority, and he had no knowledge of Plaintiff's complaints, the complaints were made by Plaintiff to Vice-President of Marketing, Goodwin, as well as others in the Marketing Department. The Court is of the

view these facts and circumstances do create a material issue of fact for the fact finder concerning whether or not Plaintiff's such complaints were substantially related to his termination.

Concerning Plaintiff's reverse sex discrimination claim, he contends he was terminated because of his sex or in retaliation for complaining that a female was promoted to a position ahead of Plaintiff, for which Plaintiff asserts he was better qualified. In February 1993, Pam Schoeppel, a female, was promoted to Vice-President of Marketing of Member Service Life. Plaintiff thought he was the better qualified to be promoted into the position and so told his supervisor, Vice-President of Marketing, Jim Goodwin. Plaintiff states Goodwin said the reason Plaintiff was not promoted was because "he did not wear a skirt...[and his] legs were too hairy." Goodwin told Plaintiff that the company, for affirmative action purposes, wanted to promote females in upper management. Goodwin states he does not recall making such statements. There is no evidence Executive Vice-President Bowser was aware of the statements of Goodwin or considered them in his decision to terminate Plaintiff. Neither is there evidence that Goodwin was involved in the Plaintiff's termination. The Tenth Circuit has stated isolated comments reflecting personal opinions are insufficient to prove an employment action was taken for a discriminatory reason. *EEOC v. WilTel, Inc.*, 81 F.3d 1508, 1514 (10th Cir. 1996); *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1457 (10th Cir. 1994). A causal connection between the comment and the adverse employment decision must be shown. *Trans-World Airline v. Thurston*, 469 U.S. 111 (1985). "[S]tatements which are merely expressions of personal opinion or bias do not

constitute direct evidence of discrimination.” *EEOC v. WilTel, Inc.*, 81 F.3d at 1514 (citing *Heim v. State of Utah*, 8 F.3d 1541, 1546-7 (10th Cir. 1993); *Ramsey v. City & County of Denver*, 907 F.2d 1004, 1008 (10th Cir. 1990)).

Plaintiff, as a majority-plaintiff, has a greater burden to establish a *prima facie* case. Plaintiff must “identify background circumstances that would justify applying to [him] the same presumption of discrimination afforded to a minority plaintiff.” *Reynolds v. School Dist. No. 1*, 69 F.3d 1523, 1534 (10th Cir. 1995); *see also*, *Notari v. Denver Water Dept.*, 971 F.2d 585, 589 (10th Cir. 1992); *Rhoads v. Wal-Mart Stores, Inc.*, 83 F.3d 433 (10th Cir. 1996); and *Buchanan v. Bridgestone/Firestone, Inc.*, 113 F.3d 1245 (10th Cir. 1997). The record does not support that the Plaintiff has presented evidence establishing such “background circumstances” applying to him the same presumption of discrimination afforded to a minority plaintiff. The undisputed facts reveal no material issue of fact remains regarding the necessary “background circumstances” to create a *prima facie* case of reverse discrimination. Neither is there evidence herein sufficient to create an inference of sex-related retaliation against the Plaintiff as it does not meet the reverse discrimination test stated above.

Regarding Plaintiff's intentional infliction of emotional distress claim, the record does not create a material fact issue of conduct by the Defendant “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Tatum v. Phillip Morris, Inc.*, 809 F.Supp. 1452 (W.D.Okla. 1992), *aff'd*, 16 F.3d 417 (10th Cir. 1993), *cert. denied*, 511

U.S. 1083 (1994); *Eddy v. Brown*, 715 P.2d 74, 77 (Okla. 1986); *Bostwick v. Atlas Iron Masters, Inc.*, 780 P.2d 1184, 1188 (Okla.App. 1988); *Pytlík v. Professional Resources, Ltd.*, 887 F.2d 1371, 1379 (10th Cir. 1989); and Restatement (Second) Torts § 46.

Therefore, Defendant's motion for summary judgment pursuant to Fed.R.Civ.P. 56 is hereby overruled regarding Plaintiff's alleged claim of wrongful termination under Oklahoma public policy. Partial summary judgment is hereby sustained regarding Plaintiff's claim of reverse sex discrimination and/or retaliation under Title VII, and partial summary judgment is also sustained regarding Plaintiff's state claim of intentional infliction of emotional distress.¹

The parties shall comply with the following supplemental scheduling order:

December 19, 1997	Exchange all exhibits and designations of depositions
December 26, 1997	Counterdesignation of depositions
January 16, 1998	File agreed Pretrial Order
February 9, 1998	File Suggested Voir Dire, Suggested Instructions, and any trial brief
February 17, 1998 9:30 A.M.	Jury trial.

¹ Based on the above rulings on Defendant's summary judgment motion, Defendant's motions in limine (Docket No. 31) are moot.

IT IS SO ORDERED this 30th day of October, 1997.

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

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

YUSSUF B. SHAFU,
Plaintiff,

vs.

STAX DIVISION OF CIRCLE K
CORPORATION,
Defendant.

ENTERED ON DOCKET
DATE OCT 31 1997

Case No. 97CV-111B ✓

F I L E D
OCT 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL
WITH PREJUDICE

Pursuant to Rule 41 of the Federal Rules of Civil Procedure the parties would state that this matter has been settled and full payment has been accepted by Plaintiff, and therefore, the parties stipulate that this matter is dismissed with prejudice, each party to bear their own costs and attorney fees.

Yussuf B. Shafau
Yussuf B. Shafau, Plaintiff

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(405) 235-1356

ATTORNEY FOR DEFENDANT

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

F I L E D

OCT 29 1997

KYLE WHITE,

Plaintiff,

-vs-

STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY, an Illinois corporation,

Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

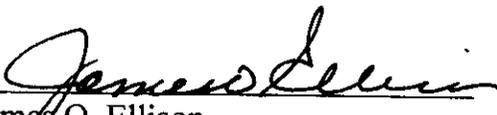
No. 97-CV-0124-E

ENTERED ON DOCKET
DATE OCT 30 1997

ORDER OF DISMISSAL WITHOUT PREJUDICE

The Court, having reviewed the Unopposed Application for Order of Dismissal Without Prejudice filed herein, hereby orders the above styled case dismissed without prejudice to further filing.

DATED this 28th day of October, 1997.


James O. Ellison
United States District Judge

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

F I L E D

OCT 29 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADRIEL C. L. SIMPSON,)

Plaintiff,)

vs.)

Case No. 97-CV-830-E (J) /

STANLEY GLANZ;)

RALPH E. DUNCAN III;)

OTHER UNKNOWN TULSA COUNTY)

SHERIFF DETENTION STAFF MEMBERS,)

Defendants.)

ENTERED ON DOCKET

DATE OCT 30 1997

ORDER

Plaintiff, Adriel C. L. Simpson, has paid the fee to commence this civil rights action pursuant to 42 U.S.C. § 1983 (Docket #1), arising out of alleged use of excessive force by prison guards.

Plaintiff's complaint, filed on September 11, 1997, alleges that on September 12, 1995, and on December 3, 1996, Corporal Ralph E. Duncan III and other unknown detention staff members of the Tulsa County Sheriff Office sprayed a "chemical agent weapon" into his cell as a "punitive measure of control." Plaintiff alleges he was denied medical treatment and requests declaratory and injunctive relief as well as compensatory damages in the amount of \$100,000 from each "liable defendant." (#1, at 5).

The Prison Litigation Reform Act ("PLRA") amended section 1997e of the Civil Rights of Institutionalized Persons Act of 1980 (42 U.S.C. §§ 1997-1997j), initiating several significant changes in the management of prison litigation. Section 1997e bars a suit brought by a prisoner with respect

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to prison conditions¹ under § 1983, or any other Federal law, until such administrative remedies as are available are exhausted. See 42 U.S.C. § 1997e(a).² Thus, if a prisoner has not exhausted all available administrative remedies, the Court must dismiss the complaint for lack of subject matter jurisdiction.

In this case, Plaintiff admits he has not exhausted available administrative remedies, but he contends "inmate complaints had previously proven to be futile endeavors." (#1, at p.7). Regardless of his excuse, Plaintiff is still obligated to pursue all levels of the administrative scheme. After liberally construing Plaintiff's pro se pleading, see Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's action should be dismissed for failure to exhaust administrative remedies.

Notwithstanding the above, pursuant to 42 U.S.C. § 1997e(c)(1), a court shall dismiss "any action brought with respect to prison conditions under section 1983 . . . , or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." In fact, should the court

¹A definition of "prison conditions" is found at 18 U.S.C. § 3626g(2) (part of the PLRA):

(2) the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison.

²Section 1997e(a) provides:

(a) No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

determine a § 1983 claim does fall within section 1997e(c)(1), the action may be dismissed without requiring the exhaustion of administrative remedies. See 42 U.S.C. § 1997e(c)(2).

A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke v. Williams, 490 U.S. 319, 325 (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, 112 S.Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A suit is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

The Supreme Court has defined the parameters for Eighth Amendment³ claims arising out of injuries suffered by prisoners at the hands of prison guards: whether force was applied in good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. Hudson v. McMillian, 503 U.S. 1, 7 (1992). In addition, the Eighth Amendment's prohibition against cruel and unusual punishment excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort "repugnant to the conscience of mankind." Id., at 9-10.

Simpson alleges that on two occasions, September 12, 1995 and December 3, 1996, the cell in which he was confined was sprayed with a chemical agent. In both instances, Plaintiff alleges "other" cell mates or inmates were banging on the cell door. From the incident reports provided and the transcription of Corporal Duncan's taped interview, on more than one occasion these "other" inmates had been directed to quiet down and to stop banging on the door. Plaintiff provides no evidence that Defendants used force maliciously or sadistically to cause harm or used more than *de*

³The Eighth Amendment applies to states through incorporation by the Fourteenth Amendment. Mitchell v. Maynard, 80 F.2d 1433, 1440 (10th Cir. 1996) (citing Rhodes v. Chapman, 101 S.Ct. 2392, 2398 (1981)).

minimis force. Even taking Plaintiff's allegations as true, there is no evidence that the use of the "chemical agent" weapon was of the sort "repugnant to the conscience of mankind." *Id.* From what Plaintiff has alleged, Defendants were attempting to maintain or restore discipline. See Mitchell v. Maynard, 80 F.3d 1433, 1440 (10th Cir. 1996) (citing Hudson, 503 U.S. at 6-7 (1992)).

In addition, while Plaintiff claims "none of us were allowed to change clothes and shower after chemical agents were used on us," Simpson does not allege that he sustained any physical injury⁴ as a result. Nor does he state or provide any supporting evidence that he requested medical treatment, or that he sustained a serious injury as a result of Defendants' alleged denial of medical care. Although the Supreme Court has held that the extent of injury suffered by the inmate is merely "a factor that may bear on the necessity or wantonness of the use of force," Hudson, at 7, the Court finds that the *de minimis* use of the chemical agent on these two occasions fails to rise to the level required to constitute an Eighth Amendment violation.

Even liberally construing Plaintiff's complaint to allege an excessive force claim, the Court concludes that Plaintiff has failed to raise a valid Eighth Amendment claim for excessive force, nor has he alleged the requisite "physical injury" to support his claim for inadequate medical treatment. Therefore, Plaintiff's complaint should be dismissed as frivolous since it is based "on an indisputably meritless legal theory." Neitzke, 490 U.S. at 327.

⁴Section 1997e(e) further provides that "no Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." See 42 U.S.C. § 1997e(e). Consequently, the Court concludes that Plaintiff has failed to meet the physical injury requirement of 42 U.S.C. § 1997e(e).

ACCORDINGLY, IT IS HEREBY ORDERED that the above captioned case is
dismissed with prejudice.

SO ORDERED THIS 28th day of October, 1997.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

4

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

GLORIA BOMAR,
Plaintiff,

v.

ASBURY UNITED METHODIST CHURCH,
an Oklahoma Church,

Defendant.

ENTERED ON DOCKET

DATE 10-30-97

Case No. 96-cv-701-H

FILED

OCT 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for a trial by jury on October 27-29, 1997. On October 29, 1997, the jury returned its verdict finding Defendant Asbury United Methodist Church liable on Plaintiff Gloria Bomar's claim of hostile work environment sexual harassment. The jury awarded Plaintiff \$15,000 in compensatory damages.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Plaintiff and against Defendant in the amount of \$15,000.

IT IS SO ORDERED.

This 30th day of October, 1997.


Sven Erik Holmes
United States District Judge

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

THOMAS J. HALE III,)
)
 Plaintiff,)
)
 vs.)
)
 STANLEY GLANZ, Sheriff of Tulsa Co.;)
 ROBERT DICK, JOHN SELPH, and)
 LEWIS HARRIS, Tulsa Co.)
 Commissioners,)
 Defendants.)

ENTERED ON DOCKET

DATE 10-30-97

No. 96-CV-493-H ✓

FILED

OCT 30 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

At issue before the Court is Defendants' motion to dismiss, or in the alternative, for summary judgment (#14).¹ A special report, pursuant to Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978), was filed simultaneously with the Defendants' motion. Plaintiff Thomas J. Hale, III, appearing *pro se* and *in forma pauperis*, has filed his response and brief in support (#21). After a careful review of the record and applicable legal authorities, the Court finds that Plaintiff has failed to state a claim upon which relief can be granted against these Defendants and that Defendants' Motion to Dismiss should be granted.

Background

Plaintiff's cause of action arose while he was a pretrial detainee in the Tulsa County Jail ("TCJ") and its detention facility, the Adult Detention Center ("ADC"), during the period February 27, 1996 through June 3, 1996. Plaintiff alleges Defendant Glanz is an elected official and, as such, is responsible for the Tulsa County Jail and its detaining facility. He also brings this civil rights action

¹References are to the court record and indicate the docket number of the pleading filed in this action.

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against the Tulsa County Commissioners, John Selph, Robert Dick and Lew Harris, asserting that they are "entrusted with the budgeting and outside medical hiring" for the operation of the Tulsa County Jail.

Plaintiff identifies the following four counts in his civil rights *Complaint*:

Count I (against all Defendants): Adequate medical care was denied throughout Plaintiff's length of stay complicating existing and creating new medical problems.

Count II (against all Defendants): Inadequate ventilation and temperature control. Defendant neglected to repair and maintain all leaking or inoperative toilets, showers, drainage and ventilation system, causing personal injury.

Count III (against Defendant Glanz): That Plaintiff was forced to wear unsanitary clothing. Plaintiff was given dirty and unsanitary sheets, linens and towels; that Plaintiff also forced to drink from unsanitary drinking cups and eat from unsanitary utensils.

Count IV (against Defendant Glanz): Defendant Glanz neglected to provide adequate protection to Plaintiff and other inmates from violent offenders who often times physically abused other inmates.

In his prayer for relief, Plaintiff seeks immediate release from the Tulsa County Jail "because he is being held in violation of his civil rights," in addition to compensatory damages for personal injury, pain and suffering as well as punitive damages. He also requests the Court to organize an oversight committee to monitor and advise the courts concerning the deplorable conditions of the Tulsa County Jail.

Defendants filed a motion to dismiss, or in the alternative, for summary judgment simultaneous with the filing of the court-ordered Martinez report ("Special Report"). Defendants urge that Plaintiff's *Complaint* should be dismissed as the allegations are conclusory, untrue, and fail to establish a constitutional violation. Defendants also contend they are entitled to qualified immunity, that Plaintiff has failed to allege any facts to create liability under the *respondeat superior* theory, and that punitive damages cannot be awarded against the county. Furthermore, Defendants argue that Plaintiff's *Complaint* should be dismissed as frivolous pursuant to 28 U.S.C. §1915(d), as amended by the Prison Litigation Reform Act ("PLRA").

Plaintiff has responded to Defendants' motion as well as the Special Report, objecting and alleging the report is "incomplete" and "inaccurate." Plaintiff requests an evidentiary hearing and appointment of counsel.

Analysis

A. Standards

1. Dismissal for failure to state a claim

Title 42 U.S.C. § 1983 provides individuals a federal remedy for deprivation of their rights secured by the Constitution and laws of the United States. See Dixon v. City of Lawton, 898 F.2d 1443, 1447 (10th Cir. 1990). For a complaint under section 1983 to be sufficient a plaintiff must allege two prima facie elements: that defendant deprived him of a right secured by the Constitution and laws of the United States,² and that defendant acted under color of law.³ Adickes v. S. H. Kress

²The rights set forth in the Bill of Rights are held exclusively by the states, secured from infringement by the federal government. Flagg Bros. v. Brooks, 436 U.S. 149 (1978). Therefore, constitutional civil rights claims of individuals apply to the states only through the Fourteenth

& Co., 398 U.S. 144, 150 (1970). Federal Rule of Civil Procedure 8(a) sets up a liberal system of notice pleading in federal courts. This rule requires only that the complaint include a short and plain statement of the claim sufficient to give the defendant fair notice of the grounds on which it rests. Leatherman v. Tarrant Cty. Narcotics Unit, 507 U.S. 163, 168 (1993) (rejecting heightened pleading requirements in civil rights cases against local governments). If plaintiff's complaint demonstrates both substantive elements it is sufficient to state a claim under section 1983. Id.; Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988).

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

Amendment and require state action to afford relief under section 1983. See Monroe v. Pape, 365 U.S. 167 (1961), overruled on other grounds, Monell v. Dept. of Social Services, 436 U.S. 658 (1978). The state action test requires: (1) that the deprivation be caused by the exercise of a right or privilege created by the state or by a person for whom the state is responsible, and (2) that the actor must be someone who is a state actor. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

³There is an overlap between the state action requirement under the Fourteenth Amendment and action under color of law. See Lugar, 457 U.S. at 926. Where the plaintiff has already demonstrated state action under the first element the necessity to show action under color of law is also satisfied.

2. *Summary Judgment*

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); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance 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") (emphasis in original). "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 ("there is no issue for

trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. [citation omitted]. If the evidence is merely colorable, [citation omitted], or is not significantly probative, summary judgment may be granted.").

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).

A Martinez report is treated like an affidavit, and the court is not authorized to accept the factual findings of the prison investigation when the plaintiff has presented conflicting evidence. Hall, 935 F.2d at 1111. The plaintiff's complaint may also be treated as an affidavit if it alleges facts based on the plaintiff's personal knowledge and has been sworn under penalty of perjury. Id., (quoting Jaxon, 773 F.2d at 1139 n. 1)).

B. Sufficiency of Plaintiff's Claims

1. Claim for Denial of Adequate Medical Care

The Supreme Court has held that convicted prisoners have an Eighth Amendment right to adequate medical care and that recovery under section 1983 is available for deliberate indifference to their serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104-106 (1976). While the Eighth Amendment does not apply to pretrial detainees, the Tenth Circuit has held that detainees are entitled to the same protection as prisoners, and that "it is proper to apply a due process standard which protects pretrial detainees against deliberate indifference to their serious medical needs." Meade, 841

F.2d at 1529-30.

Plaintiff alleges he received a black eye and laceration above the eye, which resulted in permanent eye injury. Plaintiff has submitted a "sworn statement by an inmate" in support of his allegations that he sustained a black eye while incarcerated as a pretrial detainee at TCJ.⁴ Plaintiff indicates, "although not readily available to the *pro se* litigant," the "D.O.C. optometrist evaluation" that "a cataract had formed on the left eye" is "a matter of record" and will substantiate his claim. Yet there is not one single reference to a "black eye," or a "laceration above the eye," or even to any eye problems in the medical notes of the prison medical personnel submitted in the Special Report (#13, Ex. A). Nor does the "sworn statement" of Plaintiff's fellow inmate constitute evidence admissible to refute the Defendants' motion or the Special Report. See Fed. R. Civ. P. 56(e).

Plaintiff also alleges he sustained a back injury due to a "slip and fall" accident on or about March 9, 1996, when he slipped in his cell because of the accumulated water from leaking ceilings. The Special Report indicates that on March 7 1996, Plaintiff complained of a "fall from top bunk [with] injury to [lower] back" ... "fell off the bunk in his sleep." (#13, Ex. A). The medical records reveal that on March 16, 1996, Plaintiff was still complaining of some discomfort in his leg and back, and a notation is made to continue the muscle relaxer. (#13, Ex. A). Although Plaintiff contends he received less than the full dosage for the prescribed period, the medication administration record

⁴The sworn statement of inmate Chester Alexander reads, in its entirety, as follows:

November 12, 1996

I first met Thomas J. Hale III during my incarceration in the Tulsa County Jail Adult Detention Facility. Mr. Hale was being housed in the same cell with my brother. On several occassions (sic) the two cells were allowed to go out to the excercise (sic) yard together. It was during one of these excercise (sic) periods that I observed Mr. Hale with a black eye during the spring of 1996.

provided in the Special Report indicates Plaintiff received Motrin, 400 mg, twice a day, in addition to Parafon forte, 500 mg, twice a day, beginning March 7, 1996 through March 14, 1996 (#13, Ex. A).

Finally, Plaintiff alleges the Defendants denied him proper medical treatment for a rash on his thighs and in his groin area as well as for treatment of sores in both ears. The Special Report indicates Plaintiff submitted grievances on 4-26-96, 4-29-96 and 5-7-9. Although Plaintiff contends he did not receive a timely response to his requests, the Special Report reveals that on May 7, 1996, "inmate was given small amt. of antifungal cream and was asked to put in a sick call slip." (#13, Ex. A). Then on the following day, May 8, 1996, a notation was made that the "nurse was @ cell to talk [with] inmate concerning rash... will give antifungal cream ... inmate stated the cream he received on 5-7 did help." (#13, Ex. A) Another medications entry is made on May 21, 1996, that Plaintiff was to apply antifungal cream to "left ear lobe and groin for 10 days." The Special Report further indicates that the fungal medication was administered from June 5, 1996 through June 8, 1996. (#13, Ex. A). Furthermore, the report reveals that on at least 37 occasions, Plaintiff refused medications or did not respond to pill call. (#13, Ex. A) While it is true there is no indication what medication was refused or which pill was not received, Plaintiff agrees that at least 24 of these 37 times he did refuse the medication.⁵

Notwithstanding the above summary of the medical care received by Plaintiff, the Court finds that Plaintiff's *Complaint* is insufficient to state a claim against any of the named Defendants for the

⁵Apparently there was some disagreement between Plaintiff and the medical staff as to the administration of certain medications, which "were crushed." However, Plaintiff has not made any reference in his *Complaint* as to these medications, nor to the method of administering them. See #22, p.7 and Ex. C, *Tulsa World* article.

denial of medical care. As to Sheriff Glanz, Plaintiff alleges only that "[t]he citizens of Tulsa County entrusted the responsibility of maintaining a safe and secure facility for its inmates to its Sheriff Stanley Glanz" and that as Sheriff of Tulsa County, he is "CEO" of its detaining facility. As to the County Commissioners, Plaintiff alleges that they are "entrusted with budgeting and hiring vendors to operate within the Tulsa County Jail and its detaining facilities." Pursuant to Oklahoma law, the Sheriff is responsible for making medical care available when necessary to pretrial detainees. Okla. Stat. Ann. tit. 57, § 52 (West Supp. 1997). The County Commissioners are required to inspect the jails at least once a year and to "examine the health, cleanliness and discipline conditions of the jail." Okla. Stat. Ann. tit. 57, § 1 (West 1991). However, Plaintiff does not allege a dereliction in these supervisory duties or that Defendants generally failed to have medical care available. Rather, the gist of Plaintiff's *Complaint* is that Defendants failed to provide adequate medical care. His claims, therefore, would have to rest on the principle of *respondeat superior*, which does not apply in a § 1983 action. Meade, 841 F.2d at 1530. The Court therefore concludes that Plaintiff has failed to state a claim against these Defendants for denial of adequate medical care.

After carefully reviewing the evidence, the Court further finds that Plaintiff fails to allege that he suffered from a serious medical condition that was not diagnosed or untreated. Plaintiff's allegations challenge, to a great extent, if not entirely, the adequacy and/or timing of the health care provided to him while a pretrial detainee at TCJ. The Tenth Circuit has held that accidental or inadvertent failure to provide adequate medical care, or negligent diagnosis or treatment of a medical condition do not constitute a medical wrong under the Eighth Amendment. Ramos v. Lamm, 639 F.2d 559, 574 (10th Cir. 1980) *cert. denied*, 450 U.S. 1041 (1981) (quoting Estelle v. Gamble, 429 U.S. at 106). Absent a showing of deliberate indifference which results in substantial harm, a delay

in providing medical care does not constitute a Fourteenth Amendment violation. See Olson v. Stotts, 9 F.3d 1475, 1477 (10th Cir. 1993) (quoting Mendoza v. Lynaugh, 989 F.2d 191, 195 (5th Cir. 1993)).

Assuming Plaintiff's allegations are true, and after carefully reviewing the record and the Special Report, the Court concludes that Plaintiff has failed to make any showing of "substantial harm" or "a serious medical need" or that the jail officials possessed the requisite culpable state of mind. Accordingly, having liberally construed Plaintiff's *Complaint*, the Court finds that Plaintiff could not prevail on the facts alleged and allowing him an opportunity to amend his *Complaint* to name additional defendants would be futile. Hall, 935 F.2d at 1110.

2. *Claim for Conditions of Confinement*

Plaintiff also alleges that the totality of the conditions of his confinement deprived him of basic human needs and therefore violated his constitutional rights. As stated previously, the treatment a pretrial detainee receives in jail and the conditions under which he is confined are subject to constitutional scrutiny under the Fourteenth Amendment. Bell v. Wolfish, 441 U.S. 520 (1979). As a pretrial detainee, Plaintiff may not be subject to conditions which amount to punishment or otherwise violate the constitution.

Plaintiff alleges that he was housed in an overcrowded cell, he was forced to eat cold food that should have been hot or hot food that should have been cold, he was not provided sanitary linens, he was housed in a cell with faulty and leaking plumbing, he was housed in a cell with moldy sinks, showers and toilets, and he was denied clean clothing. However, these complaints constitute, at most, temporary inconveniences and are not serious enough to be considered cruel or unusual

punishment. See Bell v. Wolfish, 441 U.S. 520 (1979). While prison overcrowding may violate the Constitution where it is so egregious that it endangers the safety of inmates, Plaintiff has failed to show that any of these allegations posed a "substantial risk of serious harm." Farmer v. Brennan, 511 U.S. 825, 834 (1994). Some degree of discomfort is inherent in a prison setting. While the plumbing problems and unsanitary clothing or sheets are admittedly inconvenient, Plaintiff must allege a factual basis which supports the inference that prison officials maintain these conditions to punish him. Id. Therefore, without more, these claims also fail and the Court finds that Plaintiff has failed to state a claim as to the unconstitutionality of the conditions of his confinement.

3. *Claim for Failure to Protect*

Lastly, Plaintiff challenges a number of conditions which violate his interest in personal safety. He alleges that Defendant Glanz "neglected to provide adequate protection to plaintiff and other inmates from violent offenders who often times physically abused other inmates." In support of this claim, Plaintiff states that he was assaulted on or about March 20, 1996 by fellow inmates and that detention officers failed to intervene to stop the assault. Plaintiff states he "received several injuries."

Pretrial detainees and inmates have a right to be reasonably protected from threats of violence and attacks by other inmates. See Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981). Deliberate indifference on the part of corrections officials to inmate safety and the probability of violent attacks violates a convicted prisoner's Eighth Amendment rights. Berry v. City of Muskogee, 900 F.2d 1489, 1494-95 (10th Cir. 1990). Under the deliberate indifference standard, "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that [an] inmate[] face[s] a substantial risk of serious harm and

disregards that risk by failing to take reasonable measures to abate it." Farmer v. Brennan, 511 U.S. 825, 847 (1994). As discussed supra, detainees retain at least the constitutional protections of convicted prisoners. Bell v. Wolfish, 441 U.S. 520, 545 (1979). Therefore, if an official's conduct amounts to deliberate indifference, a detainee's Fourteenth Amendment Due Process rights are violated.

Here Plaintiff has failed to allege that Defendant Glanz knew that Plaintiff faced a substantial risk of serious harm and then disregarded that risk by failing to take reasonable steps to abate it. In addition, the record is void of evidence demonstrating that Plaintiff suffered serious harm. The evidence provided by Defendants and unrefuted by Plaintiff shows that no inmate required medical care as the result of a jail disturbance on March 20, 1996 (#13, Ex. K). In addition, the investigator found that a review of Plaintiff's grievance forms revealed no concern for personal safety. Finally, the Special Report describes the Policy and Procedure of the Tulsa County Sheriff's Office implemented to provide security (#13, p. 32). According to the report, the detention division is required to conduct security or welfare checks at least one (1) time every thirty (30) minutes. The inspection includes walking around the outside of the cells and looking in for any signs of trouble. Plaintiff fails to provide any evidence to refute Defendant's evidence.

In addition, Plaintiff has alleged that Defendant Glanz is the elected sheriff of Tulsa County and is "CEO" of its detaining facility. "A supervisor is not liable under § 1983 unless an 'affirmative link' exists between the [constitutional] deprivation and either the supervisor's 'personal participation, his exercise of control or direction, or his failure to supervise.'" Meade, 841 F.2d at 1526 (citations omitted). A supervisor or municipality may be held liable where there is essentially a complete failure to train, or training that is so reckless or grossly negligent that future misconduct is almost inevitable.

Id. (citations omitted). Unless a supervisor has established or utilized an unconstitutional policy or custom, a plaintiff must show that the supervisory defendant breached a duty imposed by state or local law which caused the constitutional violation. Id. (citations omitted).

Under Oklahoma law, a sheriff is responsible for the proper management of the jail in his county and the conduct of his deputies. Okla.Stat. Ann. tit. 19, §§ 513, 547(A) (1988 & 1997 Supp.); see Wolfenbarger v. Williams, 774 F.2d 358, 365 (10th Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986). As a result, "a sheriff is accountable in a § 1983 action whenever a sheriff, in a position of responsibility, knew or should have known of the misconduct, and yet failed to prevent future harm." Meade, 841 F.2d at 1528 (citing Anthony v. Baker, 767 F.2d 657, 666 (10th Cir. 1985)).

In the instant case, Plaintiff has alleged neither that Defendant Glanz personally participated nor that he acquiesced in the alleged unconstitutional conduct. Nor does the *Complaint* sufficiently attribute the alleged wrongdoing to a county policy so as to withstand a motion to dismiss. See Meade, 841 F.2d at 1529-30. Therefore, the Court concludes that as to the claim of failure to protect, Plaintiff has failed to state a claim upon which relief can be granted and his *Complaint* must be dismissed.

Furthermore, even assuming Plaintiff's allegations are true, and after carefully reviewing the record and the Special Report, the Court concludes that Plaintiff has failed to make any showing of "substantial harm" or that the jail officials possessed the requisite culpable state of mind. Accordingly, having liberally construed Plaintiff's *Complaint*, the Court finds that Plaintiff could not prevail on the facts alleged and allowing him an opportunity to amend his *Complaint* to name additional defendants would be futile. Hall, 935 F.2d at 1110.

Conclusion

After reviewing the pleadings in the light most favorable to Plaintiff, and even under the liberal standards applicable to *pro se* plaintiffs, the Court concludes that Plaintiff has failed to state a claim on which relief can be granted and that Defendants are entitled to dismissal of Plaintiff's civil rights *Complaint*. Accordingly, Defendants' motion to dismiss (#14) is hereby **granted** and Plaintiff's *Complaint* is dismissed with prejudice.

All pending motions are **denied as moot**.

Additionally, because Plaintiff has been granted *in forma pauperis* status, the Clerk of the court is directed to "flag" this dismissal as a strike pursuant to 28 U.S.C. § 1915(g).

IT IS SO ORDERED.

This 29th day of October, 1997.



Sven Erik Holmes
United States District Judge

FILED

OCT 29 1997

Paul Lombardi, Clerk
U.S. DISTRICT COURT

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

IN RE:)
)
Walter Edward, Kostich, Junior,)
)
Debtor/Appellant.)

Case No. 97-CV-746-Bu(J) ✓
Chapter 13
Bankruptcy Appeal
95-04056-M

OCT 29 1997

ENTERED ON DOCKET
OCT 30 1997
Paul Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

DATE _____

On October 9, 1997, Appellant was ordered to show cause by October 20, 1997 why this bankruptcy appeal should not be dismissed. [Doc. No. 3]. Appellant has not responded to the order to show cause.

Appellant's appeal is dismissed for the following reasons:

- (1) Appellant failed to respond to the October 9, 1997 show cause order;
- (2) The Court lacks jurisdiction because this appeal was not filed within 10 days as required by Fed. R. Bankr. P. 8002. See Herwit v. Deyhimy, 970 F.2d 709 (10th Cir. 1992);
- (3) Appellant failed to timely designate the record on appeal and file a statement of the issues as required by Fed. R. Bankr. P. 8006. See Nielsen v. Price, 17 F.3d 1276 (10th Cir. 1994).

IT IS SO ORDERED.

Dated this 29th day of October 1997.


Michael Burrage
United States District Judge

4

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

JOYCE ACHIRI,)
)
Plaintiff,)
)
vs.)
)
COUNTRY MUTUAL INSURANCE)
COMPANY,)
)
Defendant and)
Third-Party Plaintiff,)
)
vs.)
)
VICTOR R. LAGRONE,)
)
Third-Party Defendant.)

No. 97-C-137-BU ✓

ENTERED ON DOCKET

DATE OCT 30 1997

FILED

OCT 29 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On October 21, 1997, this Court entered an order directing Third-Party Plaintiff, Country Mutual Insurance Company, to serve the summons and the Third-Party Complaint upon Third-Party Defendant, Victor R. Lagrone, or show good cause for its failure to obtain service by October 28, 1997. In the Order, the Court notified Third-Party Plaintiff that if service of the summons and the Third-Party Complaint was not made upon Third-Party Defendant or if the Third-Party Plaintiff had not shown good cause for its failure to obtain service by October 28, 1997, the action against Third-Party Defendant would be dismissed without prejudice.

Upon review of the Court file, it appears that Third-Party Defendant has not been served with the summons and the Third-Party Complaint and that Third-Party Plaintiff has not shown good cause for its failure to obtain service.

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Accordingly, the Third-Party Complaint against Third-Party Defendant, Victor R. Lagrone, is **DISMISSED WITHOUT PREJUDICE**.

ENTERED THIS _____ day of October, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

DOUGLAS R. O'NEAL,)
)
) Plaintiff,)
)
 vs.)
)
)
)
) JIM EARP, Sheriff of)
) Delaware County, Oklahoma;)
) KENT VICE, Deputy of Delaware)
) County, Oklahoma; BILL STOUT,)
) Deputy of Delaware County,)
) Oklahoma; and GENA WILLIAMS,)
) Jailer for Delaware County,)
) Oklahoma,)
)
) Defendants.)

Case No. 95-CV-1241-E ✓

FILED
OCT 29 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE OCT 30 1997

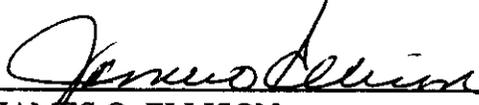
JUDGMENT

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

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

IT IS SO ORDERED.

This 28th day of October, 1997.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

24

ENTERED ON DOCKET

DATE 10-30-97

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

STEVE MARTIN CLAYTON DODSON and)
FRANCES MARTIN DODSON,)
)
)
)
 Plaintiffs,)
)
 v.)
)
 DEAN WITTER REYNOLDS, INC., et al.)
)
 Defendants.)

Case No. 96-C-854-K✓

F I L E D

OCT 30 1997 *P*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Pursuant to the plaintiffs' motion to dismiss filed October 27, 1997, this action is hereby dismissed.

IT IS SO ORDERED this 29 day of October, 1997.


TERRY C. KERN, Chief
United States District Judge

ENTERED ON DOCKET
DATE 10-30-97

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

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

No. 96-C-895-K ✓

FILED

OCT 30 1997

ORDER

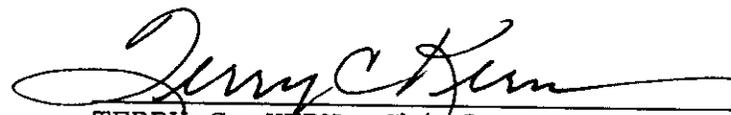
Phil Lombardi, Clerk
U.S. DISTRICT COURT

On October 8, 1997, the Magistrate Judge filed his Report and Recommendation, recommending dismissal of this action for failure of plaintiffs to appear at the status conference directed by the Court. It is established that this litigation has been ongoing for some months, that the pro se plaintiffs have filed numerous pleadings, and that notice of the status conference was sent to the address they have used throughout the case.

No objection has been filed to the Report and Recommendation and the time limit of Rule 72(b) F.R.Cv.P. has passed. The Court sees no reason to depart from the Magistrate Judge's recommendation.

It is the Order of the Court that this action is dismissed.

ORDERED THIS 29 DAY OF OCTOBER, 1997


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

71

DATE 10-30-97

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

GALINO LOPEZ,)
)
Plaintiff,)
)
vs.)
)
RON CHAMPION, Facility Head of)
Dick Connors Correctional Center, <i>et. al,</i>)
)
Defendants.)

Case No. 97-CV-6-K(J) ✓

F I L E D

OCT 30 1997 *JP*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This is a civil rights action brought by Plaintiff pursuant to 42 U.S.C. § 1983. Plaintiff appears *pro se* and *in forma pauperis*. On September 26, 1997, Magistrate Sam A. Joyner ordered Plaintiff to show cause by October 19, 1997 why this civil rights action should not be dismissed pursuant to the authorities identified and discussed in the order to show cause. [Doc. No. 11]. Plaintiff has not responded to the order to show cause.

This Court hereby dismisses this civil rights action due to Plaintiff's failure to respond to the September 26, 1997 show cause order. The Court also adopts the reasoning set forth in the magistrate's September 26th show cause order and incorporates that reasoning as if set forth in full in this order. The Court finds that this civil rights action should be independently dismissed for the following reasons:

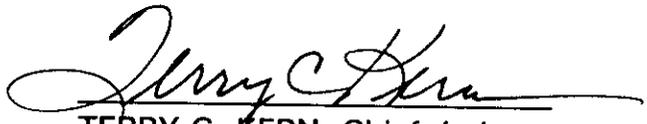
1. Plaintiff's disciplinary segregation and denial of visitation claims fail to allege facts sufficient to establish that a liberty interest is at stake. See Sandin v. Conner, 515 U.S. 472, 484 (1995).

JP

2. Plaintiff has failed to demonstrate that the misconduct conviction resulting in the loss of good-time credits, loss of visitation and disciplinary segregation has previously been invalidated in an appropriate *mandamus* or *habeas corpus* action. Consequently, under the holdings of Heck v. Humphrey, 512 U.S. 477, 483-87 (1994), and Edwards v. Balisock, --- U.S. ---, 117 S. Ct. 1584, 1587-88 (1997), all of Plaintiff's § 1983 claims must be dismissed.

ACCORDINGLY, IT IS HEREBY ORDERED that this case is **dismissed**.

SO ORDERED THIS 29 day of October 1997.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED
OCT 28 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

BOYD ROSENE AND ASSOCIATES, INC.,)
)
Plaintiff,)
)
vs.)
)
KANSAS MUNICIPAL GAS AGENCY, an)
interlocal municipal agency, and)
CITY OF WINFIELD, KANSAS, a)
municipality,)
)
Defendants.)

Case No. 95-C-674-B

ENTERED ON DOCKET

DATE ~~OCT 29 1997~~

JUDGMENT

In keeping with the Court's Order granting an attorney fee in favor of Defendant Kansas Municipal Gas Agency and Defendant City of Winfield, Kansas, entered contemporaneous herewith, the Court hereby enters judgment in favor of Defendant Kansas Municipal Gas Agency and against Plaintiff Boyd Rosene and Associates, Inc., in the amount of One Hundred Thousand Three Hundred Sixty Five Dollars and Eighty Eight Cents (\$100,365.88), said amount constituting a reasonable attorney fee in the underlying action. The Court hereby enters judgment in favor of Defendant City of Winfield, Kansas, and against Plaintiff Boyd Rosene and Associates, Inc., in the amount of Thirty Three Thousand Seven Hundred Twenty Seven Dollars and Twenty Six Cents (\$33,727.26), said amount constituting a reasonable attorney fee in the underlying action.

Post-judgment interest shall accrue at the rate of 5.49% from the date of filing of this Judgment until satisfaction.

Dated this 28 day of October, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

120

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

FILED

OCT 28 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BOYD ROSENE AND ASSOCIATES, INC.,)
)
Plaintiff,)
)
)
vs.)
)
KANSAS MUNICIPAL GAS AGENCY, an)
interlocal municipal agency, and)
CITY OF WINFIELD, KANSAS, a)
municipality,)
)
Defendants.)

Case No. 95-C-674-B ✓

ENTERED ON DOCKET
DATE OCT 29 1997

ORDER

On remand from *en banc* consideration of the Tenth Circuit Court of Appeals, this Court, sitting in diversity, must determine whether Oklahoma substantive law, including its choice-of-law rules, allows an award of attorney fees to Defendants-Appellees-Cross-Appellants, Kansas Municipal Gas Agency ("KMGA") and City of Winfield, Kansas ("Winfield"), the prevailing parties in the underlying action. See Order On Petition For Rehearing And Suggestion For Rehearing *En Banc*, Docket # 104.

I.

Plaintiff Boyd Rosene ("Rosene") brought the instant breach of contract and tort action against KMGA and, subsequently, Winfield. Rosene, a Tulsa-based company, filed its action in the Northern District of Oklahoma, as opposed to a district court in Kansas, despite serious personal jurisdiction questions as to Winfield. In its Complaint, First Amended Complaint, and Second

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Amended Complaint, Rosene sought, *inter alia*, an award of a reasonable attorney fee. The written contract at the core of this dispute, the KMGA/Rosene Agreement, called for Kansas law to govern any dispute arising from the contract. The contract did not address the issue of attorney fees. The undersigned granted summary judgment in favor of KMGA and Winfield and ordered each party to pay its own attorney fees. The decision was affirmed on appeal.

Defendants successfully petitioned for rehearing *en banc* on the issue of their entitlement to an award of attorney fees.¹

II.

In the Tenth Circuit, the matter of attorney fees in a diversity suit is substantive and controlled by state law. See Public Serv. Co. of Colorado v. Continental Cas. Co., 26 F.3d 1508, 1520 (10th Cir. 1994); Missouri Pacific RR. Co. v. Kansas Gas and Elec. Co., 862 F.2d 796, 801 (10th Cir. 1988). In determining whether KMGA and Winfield are entitled to an award of attorney fees, this court must apply the law of Oklahoma, including Oklahoma's choice-of-law rules. See Klaxon v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487, 495-97 (1941); Barrett v. Tallon, 30 F.3d 1296, 1300 (10th Cir. 1994).

Under Oklahoma choice-of-law rules, parties to a contract can choose another state's substantive law to govern the contract, unless the applicable law of the chosen state is contrary to the law or public policy of Oklahoma. See Pate v. MFA Mutual Ins. Co., 649 P.2d 809, 811 (Okl.Ct.App. 1982) (citing Telex Corp. v. Hamilton, 576 P.2d 767 (Okla. 1978) and Clark v. First Nat. Bank, 59 Okl. 2, 157 P.2d 96 (1916)). Here, KMGA and Rosene chose Kansas substantive law

¹The parties agree that if Kansas law applies KMGA and Winfield would not be entitled to an award of attorney fees. See KMGA Brief, at 3 n. 2; Winfield Brief, at 9; Rosene Brief, at 1.

to govern the contract interpretation. Accordingly, the Court applied Kansas contract law (substantive law) to the merits and adjudicated the matter in favor of KMGA and Winfield. The application of Kansas contract law (substantive law) to the merits has been upheld and is not at issue here.

However, a choice-of-law analysis must not end once it is determined which state's substantive law applies. The issue of which state's procedural law applies must next be addressed. Despite any discussion to the contrary in Bill's Coal Co., Inc. v. Board of Public Utilities, 887 F.2d 242 (10th Cir. 1989) or Hess Oil Virgin Islands Corp. v. UOP, Inc., 861 F.2d 1197 (10th Cir. 1988), in a choice-of-law analysis, matters of procedure are governed by the law of the forum. See Veiser v. Armstrong, 688 P.2d 796, 799 n. 6 (Okla. 1984) (citing Northern Pacific Railway Co. v. Babcock, 154 U.S. 190, 194, 14 S.Ct. 978, 981, 38 L.Ed. 958 (1894) and Shimonek v. Tillman, 150 Okl. 177, 1 P.2d 154 (1931) (syllabus 4)); Flanders v. Crane Co., 693 P.2d 602 (Okla. 1984) (tort case); Stephens v. Household Finance Corp., 566 P.2d 1163, 1165 (Okla. 1977) (contract case).

Applicable case law holds Oklahoma's attorney fee statutes are procedural, not substantive. See McCormack v. Town of Granite, 913 P.2d 282, 285 (Okla. 1996); Qualls v. Farmers Ins. Co., 629 P.2d 1258, 1259 (Okla. 1981); Cox v. American Fidelity Assurance Co., 581 P.2d 1325, 1327 (Okla.Ct.App. 1977); Jeffcoat v. Highway Contractors, Inc., 508 P.2d 1083 (Okla.Ct.App. 1972); Gable & Gotwals Pension Plan and Trust v. Southwest Medical Center-Moore, Inc., No. 84,241 (Okla.Ct.App. Apr. 26, 1996).

As to Rosene's breach of contract claim, the relevant attorney fee statute, Okl.St. Ann. tit. 12, § 936 (West 1988), states:

Attorney fees taxed as costs in actions on certain accounts, bills and contracts.

In any civil action to recover on an open account, a statement of account, account stated, note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, unless otherwise provided by law or the contract which is the subject [of] the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs.

Rosene's breach of contract claim falls within the scope of Okl. St. Ann. tit. 12, § 936. See R.J.B. Gas Pipeline Co. v. Colorado Interstate Gas Co., 813 P.2d 14 (Okla. Ct. App. 1990), criticized on other grounds, 874 P.2d 806 (Okla. 1994) (gas purchase contract constituted "sale of goods" within meaning of Okla. St. Ann. tit. 12, § 936).

The procedural law of the forum is applied by a federal court sitting in diversity. Oklahoma law provides for the award of a reasonable attorney fee to the prevailing party in this case, so KMGA and Winfield are entitled to a reasonable attorney fee on Rosene's breach of contract claim. The awards of an attorney fee shall include those reasonable fees incurred during both the trial court stage and on appeal. See Ellis v. Lebowitz, 799 P.2d 620 (Okla. 1990); B & P Const. Co. v. Wells, 759 P.2d 208 (Okla. 1988); Sisney v. Smalley, 690 P.2d 1048 (Okla. 1984); Hamilton v. Telex Corp., 625 P.2d 106 (Okla. 1981); Gearhart Industries, Inc. v. Grayfox Operating Co., 829 P.2d 1005 (Okla. Ct. App. 1992).

III.

The parties agree and the Court finds that Oklahoma procedural law does not provide for the award of an attorney fee to a prevailing party in a tort action. Thus, the Court, in its discretion, shall apportion and deduct from KMGA and Winfield's requests for an attorney fee an amount reflective of the time reasonably necessary to defend Rosene's tort claims.

IV.

The undersigned is of the opinion KMGA is entitled to an award of a reasonable attorney fee. The amount awarded shall be the sum of the attorney fees incurred from the date of filing of the Complaint to the filing of the Second Amended Complaint (unapportioned as no tort claims had yet been alleged), plus attorney fees incurred from the date of filing of the Second Amended Complaint to the issuance of the Tenth Circuit Court of Appeals' Order granting rehearing on the issue of attorney fees (apportioned), plus the attorney fees incurred on remand (unapportioned). The Court finds those attorney fees incurred from the filing of the Second Amended Complaint to the issuance of the Tenth Circuit's Order granting rehearing must be apportioned between time spent on contract issues and time spent on tort issues, as KMGA is not entitled to recover for attorney fees incurred in defending Rosene's tort claims.

The Court finds the hourly rate of KMGA attorney Benjamin Singletary (\$200-210/hour), based upon his specialization and experience, to be reasonable. The Court finds the hourly rates of KMGA attorneys Richard Noulles (\$185/hour), Kari McKee (\$100-110/hour), Travis Dodd (\$115-125/hour), and the rates billed for support staff employed by said attorneys, to likewise be reasonable. The Court finds the hourly rates of KMGA attorneys of the firms Gilmore & Bell (\$75/hour) and Anderson, Byrd, Richeson & Flaherty (\$125/hour) to likewise be reasonable.

The Court is of the opinion the attorney fees incurred by KMGA from the filing of the Second Amended Complaint through the Tenth Circuit's grant of rehearing should be reduced by one-sixth (16.66%). Thus, KMGA is hereby awarded a reasonable attorney fee in the amount of One Hundred

Thousand Three Hundred Sixty Five Dollars and Eighty Eight Cents (\$100,365.88) in this matter.² Said total includes those amounts billed by Gable Gotwals Mock Schwabe Kihle Gaberino, Gilmore & Bell, and Anderson, Byrd, Richeson & Flaherty. Accordingly, a Judgment in favor of KMGA and against Boyd Rosene in the amount of One Hundred Thousand Three Hundred Sixty Five Dollars and Eighty Eight Cents (\$100,365.88) will be entered contemporaneously herewith.

V.

The undersigned is of the opinion Winfield is entitled to an award of a reasonable attorney fee. The amount awarded shall be the sum of the attorney fees incurred from the date of filing of the Second Amended Complaint to the issuance of the Tenth Circuit Court of Appeals' Order granting rehearing on the issue of attorney fees (apportioned), plus the attorney fees incurred on remand (unapportioned). The Court finds those attorney fees incurred from the filing of the Second Amended Complaint to the issuance of the Tenth Circuit's Order granting rehearing must be apportioned between time spent on contract issues and time spent on tort issues, as Winfield is not entitled to recover for attorney fees incurred in defending Rosene's tort claims.

The Court finds the hourly rate of Winfield attorney David Jorgenson (\$160-170/hour) to be

KMGA Attorney Fee Calculation			
A	B	C	D
Unapportioned fees 7/21/95-12/1/95 \$17,335.00	Apportioned fees 12/2/95-8/22/97 \$73,687.75 Gilmore & Bell \$ 1,185.00 Anderson, Byrd \$ 4,302.50 Tort issues <u>\$ 5,897.50</u> \$85,072.75 Less <u>16.66%</u> \$70,899.63	Unapportioned fees 8/23/97-present \$12,131.25	Total (A+B+C) \$100,365.88

reasonable. The Court finds the hourly rate of Winfield attorney Warren Andreas of Andreas & Muret, formerly McSpadden, Andreas & Muret, to likewise be reasonable.

Winfield represented its total requested fees should be reduced by one-sixth (16.66%) to reasonably reflect the time apportioned to the contract and tort issues. The Court finds this to be reasonable. Thus, Winfield is hereby awarded a reasonable attorney fee in the amount of Thirty Three Thousand Seven Hundred Twenty Seven Dollars and Twenty Six Cents (\$33,727.26)³. The amount awarded Winfield includes those amounts billed by Baker & Hoster, Inhofe, Jorgenson, Balman & Waller, McSpadden, Andreas & Muret, and Andreas & Muret. Accordingly, a Judgment in favor of Winfield and against Boyd Rosene in the amount of Thirty Three Thousand Seven Hundred Twenty Seven Dollars and Twenty Six Cents (\$33,727.26) will be entered contemporaneously herewith.

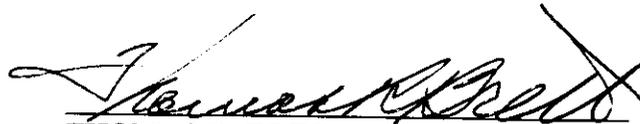
The calculation of the attorney fee awards to both KMGA and Winfield are in accord with Harolds Stores, Inc. v. Dillard Department Stores, Inc., 82 F.3d 1533, 1553 (10th Cir.), cert. denied, 117 S.Ct. 297 (1996), and State ex rel. Burk v. Oklahoma City, 598 P.2d 659 (Okla. 1979).

3

Winfield Attorney Fee Calculation

A		B	C
Apportioned fees		Unapportioned fees	Total (A+B)
12/2/95-8/22/97	\$33,804.00	8/23/97-present	
McSpadden, et al.	<u>\$ 2,545.00</u>		
	\$36,349.00		
Less	<u>16.66%</u>		
	\$30,293.26	\$3,434.00	\$33,727.26

IT IS SO ORDERED this 28th day of Oct., 1997.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

NANCY LEE WILSON,Plaintiff,)

v.)

THE STATE OF OKLAHOMA,)
ex rel. THE ATTORNEY GENERAL;)
BOBBY L. STATON, KAREN)
THOMPSON, JOHN R. RINEHART,)
R. DAREY ROBERTS, PHONG DIEM)
H. LE, DOUG BROWER, individually)
and as employees of the Attorney)
General; OKLAHOMA STATE BUREAU)
OF INVESTIGATION; MARK R. McCOY,)
individually and as an employee)
of the Oklahoma State Bureau of)
Investigation; THE UNITED)
STATES OF AMERICA, ex rel. UNITED)
STATES POSTAL SERVICE; and ROBERT)
W. MALABY, individually and as an)
employee of the United States)
Postal Service,Defendants.)

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No. CV-~~900~~-899-B (J) ✓

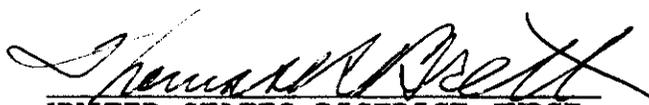
FILED
OCT 28 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE OCT 29 1997

ORDER OF REMAND

NOW, on this 28 day of October, 1997, this matter comes on before this Court upon the Plaintiff's Motion to Remand filed herein, and the Court, being fully advised in the premises, finds that for good cause shown such Motion should be granted, and pursuant thereto,

IT IS THEREFORE ORDERED by the Court that this matter be, and it is hereby, remanded back to the District Court in and for Tulsa County, State of Oklahoma.


UNITED STATES DISTRICT JUDGE

ROBERT M. BUTLER, OBA#1380
Attorney at Law
1714 South Boston Avenue
Tulsa, Oklahoma 74119

9

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of October, 1997, a true and correct copy of the above and foregoing instrument was mailed to:

NANCY LEE WILSON
8147 East 63rd Place, Suite 102
Tulsa, OK 74133

THE STATE OF OKLAHOMA, ex rel.
THE ATTORNEY GENERAL
112 State Capitol Building
2300 North Lincoln Blvd.
Oklahoma City, OK 73105-4894

BOBBY L. STATON
OFFICE OF THE ATTORNEY GENERAL
4545 North Lincoln Blvd.
Oklahoma City, OK 73105-3498

KAREN THOMPSON
OFFICE OF THE ATTORNEY GENERAL
4545 North Lincoln Blvd., Suite 24
Oklahoma City, OK 73105-3498

JOHN R. RINEHART
OFFICE OF THE ATTORNEY GENERAL
4545 North Lincoln Blvd., Suite 260
Oklahoma City, OK 73105-3498

R. DAREY ROBERTS
OFFICE OF THE ATTORNEY GENERAL
4545 North Lincoln Blvd., Suite 24
Oklahoma City, OK 73105-3498

PHONGDIEM H. LE
OFFICE OF THE ATTORNEY GENERAL
2300 North Lincoln Blvd., Suite 112
Oklahoma City, OK 73105-3498

DOUG BROWER
OFFICE OF THE ATTORNEY GENERAL
4545 North Lincoln Blvd., Suite 24
Oklahoma City, OK 73105-3498

OKLAHOMA STATE BUREAU OF INVESTIGATION
P. O. Box 11497
Oklahoma City, OK 73136

MARK R. McCOY
OKLAHOMA STATE BUREAU OF INVESTIGATION]
P. O. Box 968
Stillwater, OK 74076

PHIL PINNELL, ESQ.
ASSISTANT UNITED STATES ATTORNEY
333 West 4th Street, Suite 3460
Tulsa, OK 74103-3809
Counsel for United States of America,
for United States Postal Service and
Robert W. Malaby

with proper postage thereon.

Robert M. Butler

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

PROFESSIONAL AND TECHNICAL)
WORKERS OF AMERICA, INC. -)
LOCAL NO. 101,Plaintiff,)

v.)

THE STATE OF OKLAHOMA,)
ex rel. THE ATTORNEY GENERAL;)
BOBBY L. STATON, KAREN)
THOMPSON, JOHN R. RINEHART,)
R. DAREY ROBERTS, PHONG DIEM)
H. LE, DOUG BROWER, individually)
and as employees of the Attorney)
General; OKLAHOMA STATE BUREAU)
OF INVESTIGATION; MARK R. McCOY,)
individually and as an employee)
of the Oklahoma State Bureau of)
Investigation; THE UNITED)
STATES OF AMERICA, ex rel. UNITED)
STATES POSTAL SERVICE; and ROBERT)
W. MALABY, individually and as an)
employee of the United States)
Postal Service,Defendants.)

No. 97-CV-900-^B (J) ✓

FILED

OCT 28 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE OCT 29 1997

ORDER OF REMAND

NOW, on this 28 day of October, 1997, this matter comes on before this Court upon the Plaintiff's Motion to Remand filed herein, and the Court, being fully advised in the premises, finds that for good cause shown such Motion should be granted, and pursuant thereto,

IT IS THEREFORE ORDERED by the Court that this matter be, and it is hereby, remanded back to the District Court in and for Tulsa County, State of Oklahoma.


UNITED STATES DISTRICT JUDGE

ROBERT M. BUTLER, OBA#1380
Attorney at Law
1714 South Boston Avenue
Tulsa, Oklahoma 74119

9

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of October, 1997, a true and correct copy of the above and foregoing instrument was mailed to:

PROFESSIONAL AND TECHNICAL WORKERS
OF AMERICA, INC. - LOCAL NO. 101
8147 East 63rd Place, Suite 102
Tulsa, OK 74133

THE STATE OF OKLAHOMA, ex rel.
THE ATTORNEY GENERAL
112 State Capitol Building
2300 North Lincoln Blvd.
Oklahoma City, OK 73105-4894

BOBBY L. STATON
OFFICE OF THE ATTORNEY GENERAL
4545 North Lincoln Blvd.
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DOUG BROWER
OFFICE OF THE ATTORNEY GENERAL
4545 North Lincoln Blvd., Suite 24
Oklahoma City, OK 73105-3498

OKLAHOMA STATE BUREAU OF INVESTIGATION
P. O. Box 11497
Oklahoma City, OK 73136

MARK R. McCOY
OKLAHOMA STATE BUREAU OF INVESTIGATION]
P. O. Box 968
Stillwater, OK 74076

PHIL PINNELL, ESQ.
ASSISTANT UNITED STATES ATTORNEY
333 West 4th Street, Suite 3460
Tulsa, OK 74103-3809
Counsel for United States of America,
for United States Postal Service and
Robert W. Malaby

with proper postage thereon.

Robert M. Butler

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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

Plaintiff,

v.

WILLIAM C. URBONAS;
SHELLY M. URBONAS;
COUNTY TREASURER, Rogers County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Rogers County, Oklahoma;
ROBERT S. DAVIS;
KAYE S. DAVIS,

Defendants.

ENTERED ON DOCKET
DATE OCT 29 1997

FILED

OCT 28 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

) CIVIL ACTION NO. 97-CV-0183-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 28 day of Oct,

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, Rogers County, Oklahoma, and Board of County Commissioners, Rogers County, Oklahoma, appear by Michele L. Schultz, Assistant District Attorney, Rogers County, Oklahoma; and the Defendants, William C. Urbonas, Shelly M. Urbonas, Robert S. Davis and Kaye S. Davis appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, William C. Urbonas, was served with Summons and Amended Complaint by a United States Deputy Marshal on July 16, 1997; that the Defendant, Shelly M. Urbonas, was served with Summons and Amended Complaint by a United States Deputy Marshal on July 16, 1997; that the Defendants, Robert S. Davis, executed a Waiver of Service of Summons on

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

June 9, 1997; that the Defendant, Kaye S. Davis, executed a Waiver of Service of Summons on June 8, 1997.

It appears that the Defendants, County Treasurer, Rogers County, Oklahoma, and Board of County Commissioners, Rogers County, Oklahoma, filed their Answer on March 7, 1997; that the Defendants, William C. Urbonas, Shelly M. Urbonas, Robert S. Davis and Kaye S. Davis, 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 mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Rogers County, Oklahoma, within the Northern Judicial District of Oklahoma:

LOT 21 IN BLOCK 1 OF STONE HEDGE, A SUBDIVISION IN SECTION 29, TOWNSHIP 22 NORTH, RANGE 16 EAST OF THE I. B. & M., ROGERS COUNTY, OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that on March 12, 1993, the Defendant, William C. Urbonas, executed and delivered to Harry Mortgage Company, his mortgage note in the amount of \$98,250.00, payable in monthly installments, with interest thereon at the rate of 8 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, William C. Urbonas and Shelly M. Urbonas, husband and wife, executed and delivered to Harry Mortgage Company, a real estate mortgage dated March 12, 1993, covering the above-described property, situated in the State of Oklahoma, Rogers

County. This mortgage was recorded on March 15, 1993, in Book 0908, Page 524; in the records of Rogers County, Oklahoma.

The Court further finds that on March 17, 1993, Harry Mortgage Co. assigned the above-described mortgage note and mortgage to Metmor Financial, Inc. This Assignment of Mortgage was recorded on May 3, 1993, in Book 0913, Page 454, in the records of Rogers County, Oklahoma.

The Court further finds that on March 1, 1995, Metmor Financial, Inc. assigned the above-described mortgage note and mortgage to the Secretary of Veterans Affairs. This Assignment of Real Estate Mortgage was recorded on April 10, 1995, in Book 986, Page 84, in the records of Rogers County, Oklahoma.

The Court further finds that on April 18, 1995, the Defendants, William C. Urbonas and Shelly M. Urbonas, executed and delivered to the Secretary of Veterans Affairs, a Modification and Reamortization Agreement pursuant to which the entire debt due on April 1, 1995 was made principal and the interest rate changed to 6.75 percent.

The Court further finds that on April 24, 1996, the Defendants, William C. Urbonas and Shelly M. Urbonas, executed and delivered to the Secretary of Veterans Affairs, a Modification and Reamortization Agreement pursuant to which the entire debt due on April 1, 1996 was made principal and the interest rate remained 6.75 percent.

The Court further finds that the Defendant, William C. Urbonas, made default under the terms of the aforesaid note and mortgage, as well as the modification and reamortization agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, William C. Urbonas, is indebted to the Plaintiff in the principal sum of \$112,207.40, plus administrative

charges in the amount of \$426.50, plus penalty charges in the amount of \$178.60, plus accrued interest in the amount of \$3,698.87 as of December 26, 1996, plus interest accruing thereafter at the rate of 6.75 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 \$8.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, William C. Urbonas, Shelly M. Urbonas, Robert S. Davis and Kaye S. Davis, are in default and therefore have no right, title or interest in the subject real property.

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

IT IS THEREFORE 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 against the Defendant, William C. Urbonas, in the principal sum of \$112,207.40, plus administrative charges in the amount of \$426.50, plus penalty charges in the amount of \$178.60, plus accrued interest in the amount of \$3,698.87 as of December 26, 1996, plus interest accruing thereafter at the rate of 6.75 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.44 percent per annum until paid, plus the costs of this action in the amount of \$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 and any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, William C. Urbonas, Shelly M. Urbonas, Robert S. Davis, Kaye S. Davis and County Treasurer and Board of County Commissioners, Rogers County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, William C. Urbonas, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal 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 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. S/THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



PHIL PINNELL, OBA #7169

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



MICHELE L. SCHULTZ, OBA #13771

Assistant District Attorney
219 South Missouri, Room 1-111
Claremore, Oklahoma 74017
(918) 341-3164
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Rogers County, Oklahoma

Judgment of Foreclosure
Case No. 97-CV-0183-B (Urbonas)

PP:cs

rgb

OBA #5026

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

ENTERED ON DOCKET

NATIONAL LLOYDS INSURANCE)
COMPANY INC.,)

DATE 10-29-97

Plaintiff,)

vs.)

Case No. 96CV-12518
FILED

WILLIAM JOHN PATTERSON and)
CRAIG STEPHEN GAWLAS,)

OCT 28 1997

Defendants)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER DISMISSAL WITH PREJUDICE

On this 27 day of October 1997, the application of the plaintiff, National Lloyds Insurance Company, Inc., for an Order of Dismissal with Prejudice came on before the court for hearing. The court finds that the parties have settled all the issues herein and that releases have been executed.

It is therefore ordered that the above captioned matter is Dismissed with Prejudice.


JUDGE OF DISTRICT COURT

ENTERED ON DOCKET

DATE 10-29-97

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

CHARLES D. BURGESS,)
)
 Plaintiff,)
)
 vs.)
)
 CHARLES GUTHRIE,)
)
 Defendant.)

No. 97-CV-262-K

F I L E D

OCT 28 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff, a state prisoner represented by counsel, filed this 42 U.S.C. § 1983 civil rights action on March 21, 1997 (#1).¹ Defendant filed his answer on April 24, 1997 (#2).

BACKGROUND

In his complaint, Plaintiff alleges that on March 25, 1995, Defendant, a county commissioner for Craig County, Oklahoma, violated his civil rights by using sheep shears to cut his hair while Plaintiff and other inmates performed labor under the direction of the Oklahoma Department of Corrections public works program. Plaintiff states that "as a result of the willful, intentional and malicious acts of the Defendant, the Plaintiff was subjected to humiliation, embarrassment, and emotional distress, all to his damage." (#1, p. 2). Plaintiff seeks both actual and punitive damages in a sum in excess of \$50,000.00, as well as his costs.

On September 18, 1997, Plaintiff provided answers to questions submitted to him by this

¹References are to docket numbers assigned to papers as filed in the court record.

Court (#4).² These questions were designed to provide the Court with additional information concerning Plaintiff's status, his efforts to remedy his complaints, and the extent of any physical injury suffered as a result of the alleged unconstitutional conduct.

ANALYSIS

The Prison Litigation Reform Act of 1996 ("PLRA") amended section 1997e of the Civil Rights of Institutionalized Persons Act of 1980 (42 U.S.C. §§ 1997-1997j), initiating several significant changes in the management of prison litigation. Section 1997e bars a suit brought by a prisoner with respect to prison conditions³ under § 1983, or any other Federal law, until such administrative remedies as are available are exhausted. See 42 U.S.C. § 1997e(a).⁴ Thus, if a prisoner has not exhausted all available administrative remedies, the Court must dismiss the complaint for lack of subject matter jurisdiction.

In this case, Plaintiff neither admits nor denies that he has not exhausted available

²The Court notes that the handwriting of the answers is noticeably inconsistent. Specifically, the handwriting found in the answers to question #s 6 and 7 does not match the handwriting of the other answers. However, in light of the Court's decision to dismiss this action, the Court need not address the implications of the obvious inconsistency.

³A definition of "prison conditions" is found at 18 U.S.C. § 3626g(2) (part of the PLRA):

(2) the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison.

⁴Section 1997e(a) provides:

(a) No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

administrative remedies. He simply states "this action is against the administration." (#4, answer to question #6). Regardless of his explanation, Plaintiff is still obligated to pursue all levels of relief afforded by the administrative scheme. After liberally construing Plaintiff's pro se pleading, see Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's action could be dismissed for failure to exhaust administrative remedies.

However, dismissal of this action is mandated for another reason. Pursuant to 42 U.S.C. § 1997e(c)(1), a court shall dismiss "any action brought with respect to prison conditions under section 1983 . . . or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." In fact, should the court determine a § 1983 claim falls within section 1997e(c)(1), the action may be dismissed without requiring the exhaustion of administrative remedies. See 42 U.S.C. § 1997e(c)(2).

A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke v. Williams, 490 U.S. 319, 325 (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, 112 S.Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A suit is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

The Court finds that Plaintiff's suit is legally frivolous since it is based on an indisputably meritless legal theory. The PLRA amended § 1997e to bar civil rights actions brought by prisoners absent a prior showing of physical injury. 42 U.S.C. § 1997e (e) provides as follows:

Limitation on recovery. No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

Plaintiff has neither alleged nor shown any physical injury as a result of the haircut incident, and merely seeks damages for his "humiliation, embarrassment, and emotional distress." (#1, p.2). The Court specifically asked Plaintiff "[h]ow were you injured as a result of the actions alleged in Parts IV and V of your Complaint?" (#4, question #7). Plaintiff answered, "[t]here is nothing in any policy or procedure which allows or condones haircuts with sheep shears or the ridicule and harrassment (sic) endured afterwards from the looks of a haircut outside of grooming code standards." (#4, question #7). The Court finds that Plaintiff has failed to make the required showing of physical injury and cannot be allowed to recover for alleged mental and emotional injury suffered while in custody.

CONCLUSION

The Court concludes that Plaintiff's complaint must be dismissed as frivolous since it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S.Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327).

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's civil rights complaint is **dismissed** as frivolous, pursuant to 42 U.S.C. § 1997e(c)(1), since it is based on an indisputably meritless legal theory.

SO ORDERED THIS 27 day of October, 1997.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

OCT 27 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

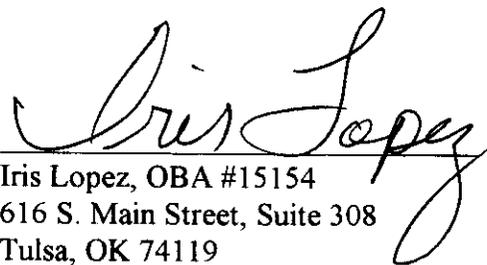
BRENDA ROBINSON, an individual,)
)
Plaintiff,)
)
vs.)
)
GRANDY'S, INC., a Texas)
Corporation,)
)
Defendant.)

Case No. 96-CV-898-E

ENTERED ON DOCKET
DATE OCT 28 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 Lopez, OBA #15154
616 S. Main Street, Suite 308
Tulsa, OK 74119

Attorney for Plaintiff


Randall J. Snapp, OBA #11169
Crowe & Dunlevy
321 S. Boston, Ste. 500
Tulsa, OK 74103

Attorney for Defendant

clj

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CERTIFICATE OF DELIVERY

I certify that on October 27, 1997, I hand delivered a copy of the foregoing
Stipulation of Dismissal With Prejudice to Randall Snapp, attorney for the Defendant.


Iris Lopez

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

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

CIVIL ACTION NO. 96-CV-845-BU ✓

PROCEEDS, INCLUDING ACCRUED)
INTEREST, IF ANY, IN ACCOUNT)
NO. 40009723269 ON DEPOSIT)
AT RESEDA BRANCH OF CITY)
FEDERAL SAVINGS BANK, FSB,)
RESEDA, CALIFORNIA, IN THE)
NAME OF LISA D. DEMEREE,)

Defendant.)

F I L E D

OCT 20 1997

OCT 27 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, the United States of America, and Lisa D. Demeree, the Claimant in the above-captioned civil action, and stipulate that this cause of action be dismissed, without prejudice and without any costs, and the defendant property, to-wit:

Proceeds, including accrued interest, if any, in Account No. 40009723269 on deposit at Reseda Branch of City Federal Savings Bank, FSB, Reseda, California, in the name of Lisa D. Demeree,

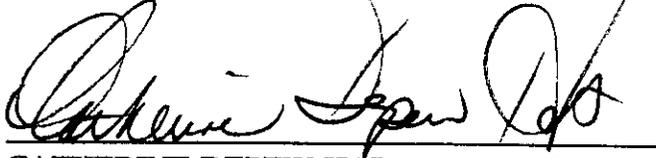
which was seized and arrested by the United States Marshals service in this action, be, and it is, likewise, dismissed from the above-captioned civil action without prejudice

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ct

Respectfully submitted,

STEPHEN C. LEWIS
United States Attorney



CATHERINE DEPEW HART OBA #3836
Assistant United States Attorney
3460 United States Courthouse
333 West Fourth Street
Tulsa, OK 74103
(918) 581-7463



STANLEY D. MONROE, Esq.
525 S. Main, Suite 600
Tulsa, OK 74103
Attorney for Claimant Lisa D. Demeree

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

MARY ELLEN SCHULTE, Individually and
as Personal Representative of the Estate of
William Schulte, Deceased; DAVID C.
SCHULTE, by and through his Mother and
Next Friend, Mary Ellen Schulte, KELLIE
F. SCHULTE, by and through her Mother
and Next Friend, Mary Ellen Schulte; and
MARY CATHERINE SCHULTE,
Individually,

Plaintiffs,

vs.

THE BLOOMFIELD MANUFACTURING
COMPANY, INC., an Indiana corporation;
HI LIFT JACK COMPANY, an Indiana
corporation or other form of business entity.
MASSEY-FERGUSON, INC., a corporation;
and AGCO CORPORATION, a corporation,
Defendants.

FILED
IN OPEN COURT

OCT 27 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-663 BU

OCT 28 1997

ORDER GRANTING DISMISSAL WITH PREJUDICE OF PLAINTIFF, MARY
CATHERINE SCHULTE, ONLY

NOW on this 27th day of Oct, 1997, this matter comes on before me, the undersigned Judge of the Court, upon the Motion To Dismiss With Prejudice Plaintiff, Mary Catherine Schulte, Only. The Court, for good cause shown, finds that same should be sustained and that Plaintiff, Mary Catherine Schulte, only, is hereby dismissed, with prejudice.


JUDGE OF THE COURT

1997

of...

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

FILED

OCT 27 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 97-CV-688-BU(J)

MARK LEE HUGHES,

Plaintiff,

vs.

SEWARD COUNTY DISTRICT
COURT, KANSAS; WOODWARD
COUNTY DISTRICT COURT,
OKLAHOMA,

Defendants.

ENTERED ON DOCKET
OCT 28 1997
DATE _____

ORDER

BEFORE the Court is the civil rights complaint (#1)¹ of the plaintiff, Mark Lee Hughes. Although Plaintiff was granted leave to proceed *in forma pauperis* on August 14, 1997 (#4), he subsequently paid the \$150.00 filing fee in full.

Plaintiff filed the instant § 1983 complaint on July 28, 1997, alleging that his federally protected rights were violated when the District Court of Woodward County, Oklahoma, and the District Court of Seward County, Kansas, "conspired to transport him across the state line without Due Process of Law," thereby subjecting him to cruel and unusual punishment in violation of the Eighth Amendment. Plaintiff further alleges that Don Scott, County Prosecutor for Seward County, Kansas, was "aware of the law on interstate compacts and totally ignored the law in an effort to deny due process of law."

The Prison Litigation Reform Act of 1996, added a new section to the *in forma pauperis* statute, entitled "Screening." See 28 U.S.C. § 1915A. That section requires the Court to review

¹Reference is to the docket number assigned to documents filed in the court record.

(5)

prisoner complaints before docketing, or as soon as practicable after docketing, and "dismiss the complaint, or any portion of the complaint, if the complaint . . . is frivolous, malicious, or fails to state a claim upon which relief may be granted. *Id.* A suit is frivolous if "it lacks an arguable basis in either law or fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (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*, 112 S. Ct. 1728, 1733 (1992) (quoting *Neitzke*, 490 U.S. at 327). A suit is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." *Id.*

A. Conspiracy under § 1983

To establish a prima facie case of a conspiracy to violate rights protected by section 1983, "a plaintiff must plead and prove not only a conspiracy, but also an actual deprivation of rights." *Snell v. Tunnel*, 920 F.2d 673, 701 (10th Cir. 1990), *cert. denied*, 499 U.S. 976 (1991) (quoting *Dixon v. City of Lawton*, 898 F.2d 1443, 1449 (10th Cir. 1990)); *see also Scherer v. Balkema*, 840 F.2d 437, 441 (7th Cir.), *cert. denied*, 486 U.S. 1043 (1988). A section 1983 conspiracy claim may arise even where a private actor conspires with a state actor to deprive a person of a constitutional right under color of state law. *See Dennis v. Sparks*, 449 U.S. 24, 29 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 149-52 (1970). In that event, the conspiracy provides the requisite state action.

After liberally construing Plaintiff's *pro se* pleading, *see Hall v. Bellmon*, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's action lacks an arguable basis in law as it is clear from the face of the complaint that Plaintiff has failed to demonstrate that the Defendants "'reached an understanding' to violate his rights." *Strength v. Hubert*, 854 F.2d 421, 425 (11th Cir. 1988) (citation omitted). Plaintiff's claim that the cumulative effect of Defendants' actions constituted a

conspiracy is unsupported by any description of particular overt acts suggesting a meeting of the minds among the alleged co-conspirators. *See Durre v. Dempsey*, 869 F.2d 543, 545 (10th Cir. 1989) (an implied agreement cannot be garnered from the nature of the conspiracy itself). Under the provisions of 28 U.S.C. § 1915A, the Court finds that Plaintiff's conspiracy claim against the District Courts of Woodward County, Oklahoma, and Seward County, Kansas, and County Prosecutor Scott, should be dismissed.

B. Immunity

Plaintiff has brought this civil rights action against the District Courts of Woodward County, Oklahoma, and Seward County, Kansas, and Seward County Prosecutor, Don Scott. To the extent that Plaintiff alleges a civil rights complaint against the district county judge or judges, his § 1983 complaint should be dismissed since a state judge is absolutely immune from civil liability for damages for acts performed in his judicial capacity. *Pierson v. Ray*, 386 U.S. 547, 553-55 (1967) (applying judicial immunity to actions under 42 U.S.C. § 1983). Similarly, prosecutors are entitled to immunity even if it leaves "the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest actions deprives him of liberty." *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976). Furthermore, within the meaning of the Civil Rights Act, a "county" is not a "person" and is therefore not a proper defendant in a civil rights suit by an individual for damages. *See* 42 U.S.C. § 1983, 1985(3), 1986.

C. Monetary damages

In *Heck v. Humphrey*, 512 U.S. 477, 487 (1994), and more recently in *Edwards v. Balisok*, 117 S.Ct. 1584, 1585 (1997), the Supreme Court extended the reach of *Preiser v. Rodriguez*, 411 U.S. 475 (1973), by holding that when a state prisoner seeks damages in a § 1983 suit, the “district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.” If so, then the civil rights action under § 1983 must be dismissed without prejudice. *Heck*, at 487. *Heck* did not engraft a state exhaustion requirement onto § 1983, but rather concluded that there is no cause of action at all under § 1983 unless the prisoner has proved that his conviction or sentence has been reversed, expunged, invalidated, or impugned by a writ of habeas corpus. *Id.*, at 489.

Several courts have applied the *Heck* rationale to cases where a prisoner seeks monetary damages in a § 1983 action arising from an allegedly unconstitutional extradition. *Fort v. Hailey*, 1996 WL 329748, No. 95-35820 (9th Cir. June 11, 1996) (unpublished opinion, copy attached to this Order); *Yanez v. All State Actors*, 1996 WL 754091, No. 96-4275 FMS (N.D. Calif. Dec. 30, 1996) (unpublished opinion, copy attached to this Order). Therefore, the Court finds that *Heck* applies to the instant case and in order for Plaintiff to recover damages in his § 1983 complaint, he must prove “that his conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by federal court’s issuance of writ of habeas corpus.” *Heck*, at 487. Even if Plaintiff’s complaint could survive the screening requirements of § 1915A, discussed *supra*, Plaintiff’s complaint must be dismissed since his claim for damages is not cognizable under § 1983 because a judgment in favor of

Plaintiff would "necessarily imply" the invalidity of his conviction or sentence. Therefore, Plaintiff's complaint should be dismissed without prejudice.

D. Injunctive Relief

Plaintiff is not entitled to the injunctive relief requested: "to issue an injunction to the State of Kansas forbidding them from extraditing the Plaintiff (sic) back to Kansas until this complaint is resolved." (#3, p. 6). Ordinarily, a prayer for such prospective relief will not "necessarily imply" the invalidity of a previous conviction, and so may properly be brought under § 1983. Balisok, at 1588. However, Petitioner has not shown that he meets the usual requirements for injunctive relief: that he will suffer irreparable injury and that he does not have an adequate remedy at law. O'Shea v. Littleton, 94 S.Ct. 669, 678 (1974). Nor has Plaintiff shown that he could fall victim again to the alleged unconstitutional practices he challenged. This, too, is fatal to his efforts to obtain injunctive relief. See Warth v. Seldin, 422 U.S. 490, 498-99 (1975); O'Shea, 414 U.S. at 495-96. Therefore, injunctive relief is not available as "the principles of equity, comity, and federalism" restrain a federal court from issuing an injunction "against state officers engaged in the administration of the State's criminal laws in the absence of a showing of irreparable injury which is 'both great and immediate.'" Id. (quoting Younger v. Harris, 91 S.Ct. 746, 751 (1971)).

E. State Claims

The Court declines to exercise pendent jurisdiction over any state claims Plaintiff may have. See 28 U.S.C. § 1367(c)(3); see also United Mine Workers v. Gibbs, 383 U.S. 715, 725-26 (1966).

ACCORDINGLY, IT IS HEREBY ORDERED that the above captioned case is dismissed without prejudice as frivolous and for failure to state a claim within the meaning of 28 U.S.C. § 1915(e)(2)(B)(I) and (ii).

SO ORDERED THIS 27th day of Oct, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

ABRAHAM CALAMEASE and STEPHEN)
HILL, individually and on behalf of all)
others similarly situated,,)

Plaintiffs,)

vs.)

CASH AMERICA, INC. OF OKLAHOMA,)
a corporation, and CASH AMERICA)
INTERNATIONAL, INC., a corporation,)

Defendants.)

Case No. 96 C 295 K ✓

F I L E D

OCT 27 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

Plaintiff ABRAHAM CALAMEASE, STEPHEN HILL, JO ANN FORSYTHE, RONNIE MOLINA, RODNEY MOSES, FORREST KEVIN PETTY, ROBERT STOVALL, and CHRIS SEWARD (hereinafter "Plaintiffs") announce to the Court that they have compromised, resolved and settled the matters in dispute between them and Defendants CASH AMERICA INTERNATIONAL, INC. and CASH AMERICA INC. OF OKLAHOMA (hereinafter "Defendants") and, further, Plaintiffs have requested that the Court dismiss their claims against Defendants with prejudice. After reviewing the pleadings on file, and the Parties' Compromise and Settlement Agreement and Release, the Court is of the opinion and finds that the Parties' settlement is a fair and reasonable resolution of a bona fide dispute over the Fair Labor Standards Act's provisions and that the settlement will further the Act's purposes. The Court therefore approves the settlement and finds that all matters in dispute between Plaintiffs and

Defendants have been fully and finally compromised and settled, and that all claims and causes of action asserted herein by Plaintiffs against Defendants should be dismissed with prejudice.

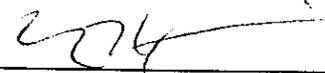
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that all claims and causes of action asserted by Plaintiffs against Defendants in the above-entitled and numbered cause shall be, and the same are hereby, dismissed with prejudice to the right of Plaintiffs to refile or reinstate same or any part thereof in this or any other court, tribunal forum, or administrative agency, with all costs to court to be taxed to the party incurring same.

All relief not herein specifically granted as to any party or issue is hereby expressly denied.

SIGNED this 24 day of October, 1997.


PRESIDING JUDGE

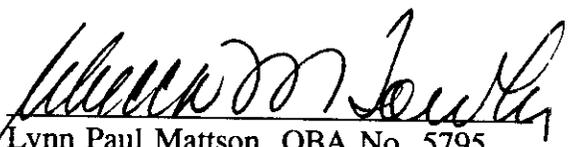
AGREED AS TO FORM AND SUBSTANCE:



Steve Hickman
Oklahoma State Bar No. 4172

FRASIER, FRASIER & HICKMAN
1700 Southwest Blvd., Suite 100
P. O. Box 799
Tulsa, Oklahoma 74101-0799
(918) 584-4724 Telephone
(918) 583-5637 Facsimile

ATTORNEY FOR PLAINTIFFS



Lynn Paul Mattson, OBA No. 5795
Rebecca M. Fowler, OBA No. 13682

DOERNER, SAUNDERS, DANIEL & ANDERSON
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Robert E. Sheeder
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W. Gary Fowler
Texas State Bar No. 07329250

JENKENS & GILCHRIST
1445 Ross Avenue, Suite 3200
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(214) 855-4500 Telephone
(214) 855-4300 Facsimile

**ATTORNEYS FOR DEFENDANTS CASH AMERICA
INTERNATIONAL, INC. and CASH AMERICA,
INC. OF OKLAHOMA**

Furthermore, since Petitioner has paid the requisite \$5.00 filing fee, the Court finds that Petitioner's motion for leave to proceed in forma pauperis (#2) should be **denied** as moot.

As to Petitioner's motion for leave to supplement the record (#4), for good cause shown, the Court finds that same should be **granted**.

However, the Court finds that Petitioner's motion for leave "to proceed in pursuit of a writ of habeas corpus absent exhaustion to the state's highest court" (#1) must be **denied**. As Petitioner is well aware, pursuant to § 2254(b)(1), an application for a writ of habeas corpus shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or there is an absence of available State corrective process, or circumstances exist that render such process ineffective to protect the rights of the applicant. See 28 U.S.C. § 2254(b)(1). While the Court may summarily dismiss a cause "if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief," the Court will defer dismissing the instant application until the Respondent has had an opportunity to respond. Therefore, Petitioner's motion (#1) is **denied**.

Accordingly, Respondent is directed to prepare his response pursuant to Rule 5 of the Rules Governing section 2254 Habeas Corpus Cases. That rule states:

The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding. The answer shall indicate what transcripts . . . are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcript as the answering party deems relevant. The court on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither

available nor procurable, a narrative summary of the evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.

As an alternative to filing a Rule 5 answer, Respondent may file a motion to dismiss based upon alleged nonexhaustion, abuse of the writ pursuant to Rule 9 of the Rules Governing § 2254 Habeas Corpus Cases, or lack of jurisdiction. If Respondent files a motion to dismiss based upon the alleged nonexhaustion, and if Petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of Petitioner's brief on appeal and of the opinion of the appellate court, if any, should be filed by Respondent with the motion to dismiss.

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) The Clerk of the Court is **directed to transfer** all documents filed in case no. **97-CV-916-H** to case no. **97-CV-716-BU** and to close case no. **97-CV-916-H** administratively. Also, the Clerk is **directed to file a copy of this Order** in case no. **97-CV-916-H**.
- (2) Petitioner's motion for leave to proceed in forma pauperis (#2) is **denied as moot**.
- (3) Petitioner's motion for case number correction (#3) is **denied as moot**.
- (4) Petitioner's motion for leave to supplement the record (#4) is **granted**.
- (5) Petitioner's motion for leave "to proceed in pursuit of a writ of habeas corpus absent exhaustion to the state's highest court" (#1) is **denied**.
- (6) The Clerk shall **file and docket in this matter, 97-CV-716-BU**, the "petition for writ of habeas corpus" and "brief in support" (previously filed in Case No. 97-CV-916-H).
- (7) The Clerk shall **mail** a copy of the petition, Brief in Support, and the "motion for

leave to supplement the record" to the Oklahoma Attorney General and to Petitioner.
See Local Rule 9.3(B).

- (8) Respondent shall **show cause** why the writ should not issue and **file** a response to the petition for a writ of habeas corpus within thirty (30) days from the date of entry of this order. Extensions of time will be granted for good cause only and in no event for longer than an additional twenty (20) days. Fed. R. Civ. P. 81(a)(2).
- (9) Petitioner may file a **reply brief** within thirty (30) days after the filing of Respondent's response. If Respondent files a motion to dismiss, Petitioner has fifteen (15) days from the filing date of the motion to respond. Failure to respond may result in the automatic dismissal of this action. See Local Rule 7.1 for the Northern District of Oklahoma.

SO ORDERED THIS 21st day of October, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DEMONTE LAMONZ OUSLEY,

Petitioner,

v.

RON WARD, Warden,

Respondent.

ENTERED ON DOCKET

DATE 10-24-97

No. 97-CV-668-H

FILED

OCT 22 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On July 22, 1997, Petitioner filed this habeas action, seeking to proceed *in forma pauperis*. Based on Petitioner's affidavit which revealed an average monthly deposits in excess of \$100 for the six months period preceding the filing of the petition, the Court denied Petitioner's request to proceed *in forma pauperis* and directed him to submit the full \$5.00 filing fee by September 25, 1997, or show cause in writing for failure to do so. Petitioner was warned that failure to comply with the terms of the August 22, 1997 Order could result in dismissal of the action without prejudice and without further notice. Petitioner has failed to comply.

In addition, the August 22, 1997 Order also directed Petitioner to submit an amended petition on or before the thirty day deadline (or by September 25, 1997), amending the allegations made in the original petition concerning exhaustion of available state remedies.¹ By letter to the Clerk, received September 15, 1997, Petitioner has advised that the "Oklahoma Supreme Court" has accepted his appeal out of time. He now seeks to stay the instant writ of habeas corpus pending a ruling from the state court. (Docket #5).

¹Initially, Petitioner had filed a motion to stay proceedings, requesting the entry of a stay in this case pending formal ruling on his state application for post-conviction relief currently pending. The Court denied this motion as moot.

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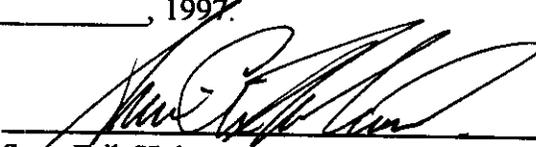
The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991); 28 U.S.C. § 2254(b) and (c). To exhaust a claim, a prisoner must have "fairly presented" that specific claim to the state courts. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

It is clear from the record in this case that the Petitioner has not exhausted his available state remedies. Because Petitioner has not paid the requisite filing fee and because "it plainly appears from the face of the petition . . . that the petitioner is not entitled to relief," the Court finds that the petition for writ of habeas corpus should be dismissed without prejudice for failure to exhaust. See Rule 4, Rules Governing Section 2254 Cases in the United States District Courts; see also 28 U.S.C. § 2254(b)(1).

ACCORDINGLY, IT IS HEREBY ORDERED that this habeas corpus action is **dismissed without prejudice** for failure to exhaust available state remedies. All other pending motions are denied as moot.

IT IS SO ORDERED.

This 21st day of October, 1997.


Sven Erik Holmes
United States District Judge

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

OCT 21 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PAULA K. LEE,
(448-48-4998)

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,^{1/}

Defendant.

Case No. 96-CV-853-J ✓

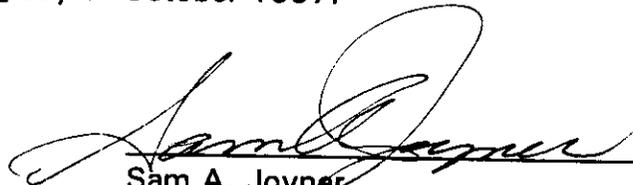
ENTERED ON DOCKET

DATE 10-24-97

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 16 day of October 1997.


Sam A. Joyner
United States Magistrate Judge

1/ 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.

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

DOUGLAS R. O'NEAL,)
)
 Plaintiff,)
 vs.)
)
 JIM EARP, Sheriff of)
 Delaware County, Oklahoma;)
 KENT VICE, Deputy of Delaware)
 County, Oklahoma; BILL STOUT,)
 Deputy of Delaware County,)
 Oklahoma; and GENA WILLIAMS,)
 Jailer for Delaware County,)
 Oklahoma,)
)
 Defendants.)

Case No. 95-CV-1241-E

FILED

OCT 23 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE OCT 24 1997

ORDER

This matter comes before the Court on Defendants' motion for summary judgment (#22).¹ Plaintiff, a state inmate appearing *pro se*, has objected (#25).

BACKGROUND

On November 21, 1995, Plaintiff brought this civil rights action, alleging that Defendants violated his First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution as well as various state constitutional rights. Plaintiff states that on or about August 19, 1992, he sustained a gunshot wound, "leaving him in a comatose" condition for approximately 10 days. Upon discharge from an Arkansas hospital, Plaintiff was placed in the custody of the Delaware County Sheriff's Department. Plaintiff alleges that on or "about September 4th, 1992," after being booked into the county jail and during the following fifteen months,²

¹Reference is to the docket number of the pleading as filed in the court record.

²Plaintiff actually stated "on about September 4th, 1992, after being booked into the Delaware County Jail and during the *preceeding* (*sic*) fifteen (15) months, the above named defendants flagrantly violated this plaintiff's civil rights under the 1st, 4th, 5th, 6th, 8th and 14th

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Defendants "flagrantly violated" his civil rights by denying medical care, denying access both to courts and to a law library, and denying "fundamental jail clothing." (#1). Plaintiff seeks \$25,000 for actual physical and emotional suffering as well as \$50,000 in punitive damages.

In their motion for summary judgment, Defendants urge that since all of Plaintiff's claims accrued prior to November 21, 1993, and Plaintiff did not file this action until November 21, 1995, this action is barred by the two year statute of limitations. Defendants further urge that even if Plaintiff's claims are not time-barred, they are nonetheless entitled to summary judgment because no policy or custom of the Sheriff's Department deprived Plaintiff of a constitutional right, Defendants are entitled to qualified immunity, and Plaintiff has failed to meet the deliberate indifference standard.

In his response to Defendants' motion for summary judgment (#25), Plaintiff cites no authority that even arguably supports his position that the two-year statute of limitations does not apply. He merely states he is "confident he can prove his case" and "these acts were a continuing deprivation." (#25). In addition, Plaintiff does not dispute Defendants' statement of uncontroverted facts and provides no evidence to refute the evidence provided by Defendants in their summary judgment motion.

ANALYSIS

A. Summary Judgment Standard

The court may grant summary judgment "if the pleadings, depositions, answers to

Amendments of the United States Constitution and in violation of Article II, Section 20, 21, and 30 of the Oklahoma Constitution..." The Court liberally construes this *pro se* pleading to allege a claim for those fifteen (15) months immediately following September 4, 1992, the date Plaintiff was booked into the county jail. See Hall v. Bellmon, 935 F.2d 1109, 1110 (10th Cir. 1991).

interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Id. Although the court cannot resolve material factual disputes at summary judgment based on conflicting affidavits, Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991), the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, viewed in the light most favorable to the nonmovant, fails to show that there exists a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

B. Dismissal for Failure to State a Claim

Title 42 U.S.C. § 1983 provides individuals a federal remedy for deprivation of their rights secured by the Constitution and laws of the United States. See Dixon v. City of Lawton, 898 F.2d 1443, 1447 (10th Cir. 1990). For a complaint under section 1983 to be sufficient a plaintiff must allege two prima facie elements: that defendant deprived him of a right secured by the Constitution

and laws of the United States,³ and that defendant acted under color of law.⁴ Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970). Federal Rule of Civil Procedure 8(a) sets up a liberal system of notice pleading in federal courts. This rule requires only that the complaint include a short and plain statement of the claim sufficient to give the defendant fair notice of the grounds on which it rests. Leatherman v. Tarrant Cty. Narcotics Unit, 113 S.Ct. 1160, 1163 (1993) (rejecting heightened pleading requirements in civil rights cases against local governments). If plaintiff's complaint demonstrates both substantive elements it is sufficient to state a claim under section 1983. Id.; Meade v. Grubbs, 841 F.2d 1512, 1526 (10th Cir. 1988).

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade, 841 F.2d at 1526 (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards than pleadings

³The rights set forth in the Bill of Rights are held exclusively by the states, secured from infringement by the federal government. Flagg Bros. v. Brooks, 436 U.S. 149 (1978). Therefore, constitutional civil rights claims of individuals apply to the states only through the Fourteenth Amendment and require state action to afford relief under section 1983. See Monroe v. Pape, 365 U.S. 167 (1961), overruled on other grounds, Monell v. Dept. of Social Services, 436 U.S. 658 (1978). The state action test requires: (1) that the deprivation be caused by the exercise of a right or privilege created by the state or by a person for whom the state is responsible, and (2) that the actor must be someone who is a state actor. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982). A state official, such as a sheriff, clearly meets this test. Cf. id.

⁴There is an overlap between the state action requirement under the Fourteenth Amendment and action under color of law. See Lugar, 457 U.S. at 926. Where the plaintiff has already demonstrated state action under the first element the necessity to show action under color of law is also satisfied.

drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110.

C. Statute of Limitations

Because there is no federal statute of limitations for a civil rights action, the time in which such action must be filed is determined by the applicable state statute of limitations for personal injury actions. Wilson v. Garcia, 471 U.S. 261, 266-67 (1985). The applicable statute of limitations under Oklahoma law is the two-year limitations period for "an action for injury to the rights of another." Meade v. Grubbs, 841 F.2d 1512, 1523 (10th Cir. 1988).

As stated supra, Plaintiff has cited no authority that even arguably supports his position that the two-year statute of limitations does not apply. He merely states that "these acts were a continuing deprivation." (#25). In addition, Plaintiff has provided absolutely no evidence to refute Defendants' summary judgment motion. Nor does Plaintiff's inmate status provide sufficient justification for tolling the statute of limitations. Hudson v. McCormick, 1994 WL 237520, *1 (10th Cir. June 3, 1994) (unpublished opinion). See also Hardin v. Straub, 490 U.S. 536, 540 n.8 (1989) (Oklahoma has no tolling provision for civil lawsuits filed by prisoners).

In the instant case, Plaintiff was booked into the Delaware County Jail on September 4, 1992. He was transferred to the custody of the Oklahoma Department of Corrections on December 16, 1993. Plaintiff filed the instant lawsuit on November 21, 1995. Therefore, any claim which accrued prior to November 21, 1993 is time-barred. Defendants assert, and Plaintiff does not dispute, that only those claims which accrued within the last three weeks of Plaintiff's sixteen month incarceration in the Delaware County Jail are timely. Defendants assert, and Plaintiff does not dispute, that all of

Plaintiff's claims accrued prior to November 21, 1993, and are therefore time barred. The Court agrees with Defendants that to the extent Plaintiff's claims accrued prior to November 21, 1993, this action is time-barred.

D. Failure to State a Claim

As to any claim accruing during the time period between November 21, 1993 and December 16, 1993, the Court finds that Plaintiff has failed to state a claim against Defendants, all named in their official capacities as employees of Delaware County. Nowhere in the complaint or in the response to Defendants' motion for summary judgment does Plaintiff specify the conduct supposedly violative of his constitutional rights which occurred during this period. Plaintiff merely makes conclusory statements which the Court finds inadequate at this stage of the litigation. Therefore, the Court concludes that Defendants are entitled to judgment as a matter of law.

CONCLUSION

To the extent Plaintiff's claims accrued prior to November 21, 1993, this action is barred by the two year statute of limitations. To the extent Plaintiff's claims accrued between November 21, 1993 and December 16, 1993, the Court finds that Plaintiff has failed to state a claim against Defendants. Therefore, Defendants' motion for summary judgment (#22) should be granted.

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants' motion for summary judgment (#22) is **granted**. Any and all pending motions are **denied as moot**.

SO ORDERED THIS 23rd day of October, 1997.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

CARL DOUGLAS RUNNELS,)
)
Petitioner,)
)
vs.)
)
RITA MAXWELL,)
)
Respondent.)

No. 97-CV-855-E (J)

F I L E D

OCT 23 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE OCT 24 1997

O R D E R

Petitioner, a state prisoner appearing *pro se*, has paid the filing fee to commence this habeas corpus action pursuant to 28 U.S.C. § 2254.

Petitioner is presently in custody of Respondent at the Jess Dunn Correctional Center, Taft, Oklahoma. He is serving an 8-year sentence imposed and entered on October 2, 1995, by the District Court of Tulsa County in Case No. CF-TU-95-4059 for attempted larceny of an auto. Petitioner states he remained in prison until July 31, 1996, at which time he was release to the Electronic Monitoring Program ("EMP"). However, on November 15, 1996, his participation in the EMP was canceled. Petitioner now attacks the allegedly unconstitutional termination of his participation in the EMP.

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.

In the instant case, Petitioner has not presented his due process claim to the state courts of Oklahoma. The State of Oklahoma does provide a remedy whereby Petitioner may challenge the due process afforded at the time his participation in the EMP was canceled. He may seek a writ of mandamus, or, if he would be entitled to immediate release, a writ of habeas corpus, in the appropriate state district court. See Canady v. Reynolds, 880 P.2d 391 (Okla. Crim. App. 1994) (citing Waldon v. Evans, 861 P.2d 311 (Okla. Crim. App. 1993), for the proposition that a writ of mandamus must lie against appropriate prison officials when a prisoner's minimum due process rights have been violated). If his application is denied in the state district court, he must appeal that denial to the Oklahoma Court of Criminal Appeals in order to exhaust state remedies for purposes of seeking federal habeas corpus review.

Under Rule 4 of the *Rules Governing Section 2254 Cases in the United States District Court*, "if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is

not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified." See Rule 4, *Rules Governing Section 2254 Cases*. The Court finds that in this case, it is plain from the face of the petition that Petitioner has not exhausted available state remedies. 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). Therefore, this action should be dismissed without prejudice for failure to exhaust state remedies.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for writ of habeas corpus be dismissed without prejudice for failure to exhaust state remedies.

SO ORDERED THIS 23rd day of October, 1997.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

CAROL STONE,)
Plaintiff,)
vs.)
ALLSTATE INSURANCE COMPANY,)
an Illinois corporation,)
Defendant.)

Number 97-C-940E

FILED
OCT 23 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT
ENTERED ON DOCKET
DATE OCT 24 1997

NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE

COMES NOW, Plaintiff Carol Stone, and pursuant to 41(a) F.R.C.P., not having been served with an Answer or Motion for Summary Judgment by Defendant, Dismisses without Prejudice the above styled matter retaining her right to re-file same.

Respectfully submitted,

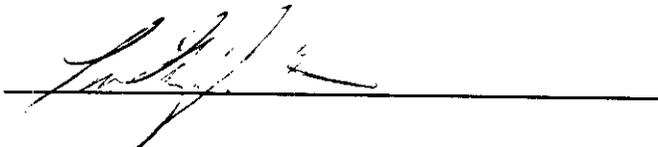


George Gibbs, OBA#11843
Timothy S. Harmon, OBA#11333
GIBBS & HARMON
4606 South Garnett, Suite 310
Tulsa, Oklahoma 74146
Telephone (918) 644-7292
Telecopier (918) 664-0302

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing pleading have been served on the following counsel of record, by placing same in the U.S. Postal Service, postage pre-paid, this 23 day of October, 1997.

Michael P. Atkinson, OBA #374
Galen L. Brittingham, OBA #12226
1500 Park Centre
525 South Main
Tulsa, OK 74103-4524



C:\OFFICE\WPWIN\TSH\STONE\MOT.DIS

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

FILED

OCT 23 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VICKIE WROTEN,

Plaintiff,

v.

FIRST DATA RESOURCES,

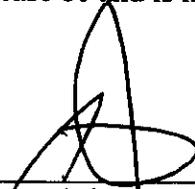
Defendants.

Case No. 96-CV-00938-C

ENTERED ON DOCKET

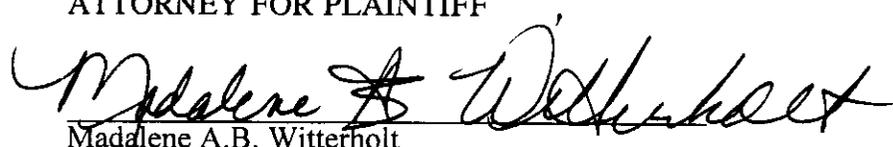
STIPULATION FOR DISMISSAL WITH PREJUDICE DATE OCT 24 1997

The parties hereto stipulate that this case be and is hereby dismissed with prejudice to the bringing of another action.



M. Scott Ash
The Ash Law Firm
2500 Mid-Continent Tower
401 South Boston Ave.
Tulsa, OK 74103

ATTORNEY FOR PLAINTIFF



Madalene A.B. Witterholt

- Of the Firm -

CROWE & DUNLEVY
A Professional Corporation
320 South Boston Avenue
Suite 500
Tulsa, Oklahoma 74103
(918) 592-9800
(918) 592-9802 FAX

ATTORNEY FOR DEFENDANT

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

PROFESSIONAL AND TECHNICAL)
WORKERS OF AMERICA, INC. -)
LOCAL NO. 101,Plaintiff,)
v.)
THE STATE OF OKLAHOMA,)
ex rel. THE ATTORNEY GENERAL;)
BOBBY L. STATON, KAREN)
THOMPSON, JOHN R. RINEHART,)
R. DAREY ROBERTS, PHONG DIEM)
H. LE, DOUG BROWER, individually)
and as employees of the Attorney)
General; OKLAHOMA STATE BUREAU)
OF INVESTIGATION; MARK R. McCOY,)
individually and as an employee)
of the Oklahoma State Bureau of)
Investigation; THE UNITED)
STATES OF AMERICA, ex rel. UNITED)
STATES POSTAL SERVICE; and ROBERT)
W. MALABY, individually and as an)
employee of the United States)
Postal Service,Defendants.)

ENTERED ON DOCKET

DATE OCT 24 1997

No. 97-CV-900-B (J)

FILED

OCT 23 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RECEIVED

OCT 23 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL AS TO THE UNITED STATES
OF AMERICA, ex rel. UNITED STATES POSTAL SERVICE
and ROBERT W. MALABY, individually and as an
employee of the United States Postal Service

COMES now the Plaintiff herein, and pursuant to Fed. R. Civ.
P. 41, does hereby request this Court to dismiss the above-numbered
cause on the basis of the dismissal of the said United States of
America, ex rel. United States Postal Service, and Robert W.
Malaby, individually and as an employee of the United States Postal
Service from these proceedings. The United States Attorney's

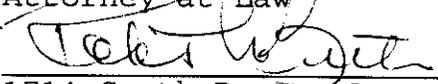
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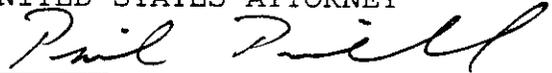
Office, by and through Phil Pinnell, hereby stipulates to this dismissal.

PROFESSIONAL AND TECHNICAL
WORKERS OF AMERICA, INC. -
LOCAL NO. 101

ROBERT M. BUTLER OBA#1380
Attorney at Law


1714 South Boston Avenue
Tulsa, Oklahoma 74119
Telephone (918) 585-2797
Facsimile (918) 585-2798

STEPHEN C. LEWIS
UNITED STATES ATTORNEY


PHIL PINNELL, OBA#7169
ASSISTANT UNITED STATES ATTORNEY
333 West 4th Street, Suite 3460
Tulsa, OK 74103-3809
Counsel for United States of
America, ex rel., United States
Postal Service and Robert W.
Malaby

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of October, 1997, a true and correct copy of the above and foregoing instrument was

_____ Mailed, with proper postage thereon, to

or

_____ Mailed by certified mail, return receipt requested, with proper postage thereon, to

or

_____ Transmitted by fax, No. _____, to

or

_____ Hand-Delivered to the office of

PHIL PINNELL, ESQ.
ASSISTANT UNITED STATES ATTORNEY
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
Counsel for The United States of
America, ex rel. United States
Postal Service, and Robert W.
Malaby

W. A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
JAMES M. ROBINSON, ESQ.
ASSISTANT ATTORNEY GENERAL
4545 North Lincoln, Suite 260
Oklahoma City, Oklahoma 73105-3498
Counsel for The State of Oklahoma,
Bobby L. Staton, Karen Thompson,
John Rinehart, R. Darey Roberts,
Phong Diem H. Le, Doug Brower and
Mark McCoy



Robert M. Butler

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

ENTERED ON DOCKET

DATE OCT 24 1997

NANCY LEE WILSON, Plaintiff,)
)
v.)
)
THE STATE OF OKLAHOMA,)
ex rel. THE ATTORNEY GENERAL;)
BOBBY L. STATON, KAREN)
THOMPSON, JOHN R. RINEHART,)
DR. DAREY ROBERTS, PHONG DIEM)
H. LE, DOUG BROWER, individually)
and as employees of the Attorney)
General; OKLAHOMA STATE BUREAU)
OF INVESTIGATION; MARK R. McCOY,)
individually and as an employee)
of the Oklahoma State Bureau of)
Investigation; THE UNITED)
STATES OF AMERICA, ex rel. UNITED)
STATES POSTAL SERVICE; and ROBERT)
W. MALABY, individually and as an)
employee of the United States)
Postal Service, Defendants.)

No. 97-CV-899-B (J) ✓

FILED

OCT 23 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT
RECEIVED

OCT 23 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL AS TO THE UNITED STATES
OF AMERICA, ex rel. UNITED STATES POSTAL SERVICE
and ROBERT W. MALABY, individually and as an
employee of the United States Postal Service

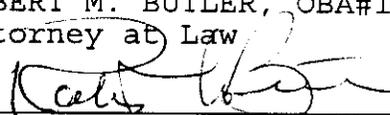
COMES now the Plaintiff herein, and pursuant to Fed. R. Civ.
P. 41, does hereby request this Court to dismiss the above-numbered
cause on the basis of the dismissal of the said United States of
America, ex rel. United States Postal Service, and Robert W.
Malaby, individually and as an employee of the United States Postal
Service from these proceedings. The United States Attorney's

CT

Office, by and through Phil Pinnell, hereby stipulates to this dismissal.

NANCY LEE WILSON

ROBERT M. BUTLER, OBA#1380
Attorney at Law



1714 South Boston Avenue
Tulsa, Oklahoma 74119
Telephone (918) 585-2797
Facsimile (918) 585-2798

STEPHEN C. LEWIS
UNITED STATES ATTORNEY



PHIL PINNELL, OBA#7169
ASSISTANT UNITED STATES ATTORNEY
333 West 4th Street, Suite 3460
Tulsa, OK 74103-3809
Counsel for United States of
America, ex rel., United States
Postal Service and Robert W.
Malaby

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of October, 1997, a true and correct copy of the above and foregoing instrument was

_____ Mailed, with proper postage thereon, to

or

_____ Mailed by certified mail, return receipt requested, with proper postage thereon, to

or

_____ Transmitted by fax, No. _____, to

or

_____ Hand-Delivered to the office of

PHIL PINNELL, ESQ.
ASSISTANT UNITED STATES ATTORNEY
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
Counsel for The United States of
America, ex rel. United States
Postal Service, and Robert W.
Malaby

W. A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
JAMES M. ROBINSON, ESQ.
ASSISTANT ATTORNEY GENERAL
4545 North Lincoln, Suite 260
Oklahoma City, Oklahoma 73105-3498
Counsel for The State of Oklahoma,
Bobby L. Staton, Karen Thompson,
John Rinehart, R. Darey Roberts,
Phong Diem H. Le, Doug Brower and
Mark McCoy



Robert M. Butler

ENTERED ON DOCKET

DATE 10-24-97

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

CHERRY COMMUNICATIONS, INC.)
an Illinois corporation,)

Plaintiff,)

vs.)

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

Defendants.)

vs.)

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

Third-Party Defendants.)

FILED

OCT 23 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-C-1102-K

AGREED JUDGMENT

Plaintiff Cherry Communications, Inc. ("Cherry"), and defendants WorldCom, Inc. ("WCI"), WorldCom Network Services, Inc. ("WNS"), and Digital Communications of America, Inc. ("DCA"), respectfully submit this Agreed Judgment with regard to all claims and counter-claims raised in this action as between such parties. Specifically, the parties hereby stipulate and agree as follows:

1. The parties are properly before the Court and the Court may exercise both personal jurisdiction over the parties and subject matter jurisdiction over the claims raised herein.

2. WNS, WCI, and DCA are each entitled to judgment on each of the claims brought against them by Cherry in this action (collectively, the "Cherry Claims"). The Cherry Claims include the following:

- a. Breach of Contract;
- b. Fraud;
- c. Consumer Fraud and Deceptive Trade Practices under Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2 and Oklahoma Consumer Protection Act, Okla. Stat. tit. 15, § 753 (1991);
- d. Uniform Deceptive Trade Practices Acts of Oklahoma (Okla. Stat. tit. 781, § 51-55 (1991)) and Illinois (ILCS 510/2);
- e. Tortious Interference of Contracts and Reasonable Expectation of Economic Benefit;
- f. Restitution;
- g. Accounting;
- h. Reformation of Contracts; and
- I. Rescission.

3. None of the defendants is the alter ego of any of the others.

4. Cherry is liable to WNS and WCI on each counter-claim brought by WNS and WCI against Cherry in this action, including those claims in their Answer to Second Amended Complaint, Amended Counterclaims and Third-Party Complaint of Defendants WorldCom, Inc. and WorldCom Network Services, Inc. (collectively, the "WorldCom Claims"). The WorldCom Claims include:

- a. Breach of contract;

- b. Foreclosure of Security Interest (under Security Agreement dated October 1, 1993, and under Security Agreement executed on or about July 20, 1995 [collectively, the "Security Interests"]);
 - c. Declaratory Judgment;
 - d. Breach of Promissory Note dated February 25, 1995;
 - e. Breach of Promissory Note dated July ____, 1995; and,
 - f. Breach of Promissory Note dated July 20, 1995.
5. WNS is entitled to an order of foreclosure, delivery and sale of Cherry's assets defined as the "Collateral" to satisfy this judgment. This Collateral includes the following:
- (a) Accounts and accounts receivable;
 - (b) All telephone accounts and accounts receivable arising from telecommunication services rendered to an end user prior to the sale, assignment, or transfer of such account (collectively, the "End User Accounts") to a regional Bell operating company, a Bell operating company, local exchange company, credit card company or provider of local telephone services (each a "LEC") for billing and collection; and rights in and to any of the telephone receivables, debts and other amounts payable to the Debtor by any LEC, and all cash and non-cash proceeds of the foregoing;
 - (c) Reimbursements, notes, contracts, contract rights, chattel paper, cash, checks, drafts, documents, instruments, and other evidence of indebtedness owed to Debtor;
 - (d) Customer lists, all documents containing the names, addresses, telephone numbers, and other information regarding the Debtor's customers, subscribers, tapes, programs, printouts, disks, and other material and documents relating to the recording, billing or analyzing of any of the foregoing, and any other right to payment;
 - (e) Any and all contract and lease rights, including network contracts, customer contracts for the furnishing by Debtor of telecommunications services, and billing and collection contracts, whether evidenced by a document or otherwise;
 - (f) All records and documents relating to any and all of the foregoing including, without limitation, records of accounts whether in the form of writing, microfilm, microfiche, tape, or electronic media; and

- (g) 1. DEX-400 Switch, w/6 equipped DTF frames and 4 unequipped DTF frames, load 30 software, and Signaling System 7 (SS7) capable;
- 2. Ericsson M13 Multiplexers;
- 3. NEC RC28D M13 Multiplexers;
- 4. Tellabs 253 Echo Canceller Shelves;
- 5. NEC Channel Banks;
- 6. DC Power Equipment;
- 7. DSX and Miscellaneous Equipment;
- 8. Spare Circuit Packs; and
- 9. Leasehold Improvements including Fire Suppression Systems and Environmental Control Systems.

(h) All products and proceeds (cash and non-cash) of all of the foregoing, and increases, accessions, renewals, replacements and substitutions of all of the foregoing.

6. Cherry is liable to DCA on each claim brought by DCA against Cherry in this action, including those claims listed in its Answer to Second Amended Complaint and Counterclaims of Digital Communications of America, Inc. (collectively, the "DCA Claims"). The DCA Claims include:

- a. Breach of contract;
- b. Third-Party Beneficiary;
- c. Quantum Meruit;
- d. Conversion;
- e. Unfair and Deceptive Trade Practices; and
- f. Misappropriation of Trade Secrets.

7. WCI, WNS, and DCA are entitled to judgment in the amount of One Hundred Sixty-Five Million Dollars (\$165,000,000) plus post-judgment interest against Cherry.

8. All invoices submitted to Cherry by WCI and WNS were timely, complete and accurate, and conformed to industry standards and practice.

9. Concurrent herewith the parties have entered into a written Settlement Agreement that, inter alia, provides for the timely satisfaction of this Agreed Judgment by Cherry. The parties hereby stipulate and agree that: (i) the terms and conditions of said Settlement Agreement shall be incorporated by reference into this Agreed Judgment, and (ii) to the continued jurisdiction of this Court with respect to the interpretation and enforcement of this Agreed Judgment and the Settlement Agreement.

10. Concurrent herewith, pursuant to Fed. R. Civ. P. 52(a), the parties have approved and the Court has entered Findings of Fact and Conclusions of Law which are hereby incorporated into this Agreed Judgment.

WHEREFORE, pursuant to Fed. R. Civ. P. 54, judgment should be, and is hereby, entered against plaintiff Cherry Communications, Inc., and in favor of defendants WorldCom, Inc., WorldCom Network Services, Inc., and Digital Communications of America, Inc., in the total amount of One Hundred Sixty-Five Million Dollars (\$165,000,000) plus post-judgment interest, with respect to the WorldCom Claims and the DCA Claims.

IT IS FURTHER ADJUDGED AND ORDERED that the security interests of WNS under the Security Agreements are declared to be a valid security interest in the Collateral. The security interests of WNS are hereby foreclosed in favor of WNS, Cherry is hereby ordered to immediately deliver the Collateral to WNS for immediate sale in compliance with the laws of the State of

Oklahoma, and WNS is hereby authorized to perform all actions provided for in the Security Agreements with respect to the marshaling, protection and possession of the Collateral.

IT IS FURTHER ADJUDGED AND ORDERED, pursuant to Fed. R. Civ. P. 54, that judgment should be, and is hereby, entered against plaintiff Cherry Communications, Inc., and in favor of defendants WorldCom, Inc., WorldCom Network Services, Inc., and Digital Communications of America, Inc., with respect to each of the Cherry Claims.

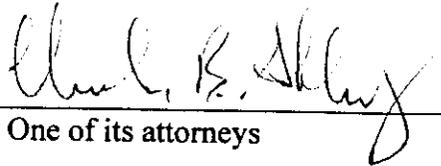
IT IS FURTHER ADJUDGED AND ORDERED that the terms and conditions of the Settlement Agreement entered into concurrent herewith by the parties are hereby incorporated herein by reference. Further, this Court specifically retains its jurisdiction over the parties and the subject matter of this Agreed Judgment and said Settlement Agreement.

DATED this 24 day of July, 1997.


Honorable Terry C. Kern
Chief United States District Court Judge

APPROVED:

JENNER & BLOCK

By: 
One of its attorneys

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

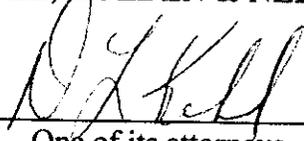
and

GABLE GOTWALS MOCK SCHWABE

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

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

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

By: 

One of its attorneys

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

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

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

LARRY PATRICK,)
)
Plaintiff,)
)
-vs-)
)
STATE FARM FIRE AND CASUALTY)
COMPANY,)
)
Defendants.)

ENTERED ON DOCKET

DATE 10-23-97

Case No. 96-CV-800-H

FILED

OCT 22 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

This matter comes before the Court on the parties' Joint Stipulation of Dismissal with Prejudice. Upon due consideration, it is hereby

Ordered, Adjudged, and Decreed that the above entitled action is hereby dismissed with **prejudice** to refiling.

Dated this 21ST day of October, 1997.



SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

72

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

JACK DALRYMPLE and ROSEMARY)
DALRYMPLE, et. al.,)
Plaintiffs,)
v.)
GRAND RIVER DAM AUTHORITY,)
Defendant.)

ENTERED ON DOCKET
DATE 10-23-97
Case No. 97-C-418-H

FILED
OCT 22 1997
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on Plaintiffs' motion to remand (Docket # 3) and Plaintiff's motions to expedite the hearing of the motion to remand (Docket # 5 and Docket # 13).

Plaintiffs originally brought this action in the District Court of Ottawa County against Defendant Grand River Dam Authority ("GRDA"). Defendant removed the case to this Court on October 9, 1994. The Court remanded this action to state court in Dalrymple v. Grand River Dam Authority, 932 F. Supp. 1311 (N.D. Okla. 1996). On April 28, 1997, GRDA again filed a notice of removal, removing the action to this Court. Plaintiffs moved to remand the action, contending that removal was untimely and thus improper. Plaintiffs assert that removal occurred more than thirty days after receiving notice that the action could be properly removed to federal court.

The removal statute states in pertinent part as follows:

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from

which it may first be ascertained that the case is one which is or has become removable

28 U.S.C. § 1446(b). Since the initial pleading did not state a removable case, the issue becomes whether Defendant received notice by some “motion, order or other paper” indicating that the case was removable more than thirty days prior to its notice of removal on April 28, 1997. If notice was received thirty days before this date, then removal to the Court is improper as untimely.

The circumstances giving rise to a second removal of this action involve the passage of the Water Resources Development Act of 1996 (“WRDA”), Pub. L. 104-303, 110 Stat. 3658. Under the WRDA, the Secretary of the Army is to conduct a study of flooding in the Grand/Neosho River Basin and tributaries in the vicinity of Pensacola Dam in Northeastern Oklahoma. Plaintiffs contend that the passage of the WRDA, as well as other instances when GRDA argued the statute’s preemption of the state court suit, began the thirty-day period of removal. Specifically, Plaintiffs point to: GRDA’s citation of the statute on January 24, 1997, in a Tenth Circuit brief appealing the Court’s ruling on the previous remand; GRDA’s reply and supplemental authorities in support of its motion to stay, filed in state court on January 31, 1997; a March 11, 1997 state court brief in support of GRDA’s motion to dismiss; the March 17, 1997 Pretrial Conference Order; and a state court order filed on March 18, 1997 denying GRDA’s motion to stay.

In contrast, GRDA states that the period of removability began on March 31, 1997, when Plaintiffs filed their supplemental response to GRDA’s motion for summary judgment and their response to GRDA’s motion to dismiss. If this motion starts the thirty-day removal period, then GRDA’s motion would have been timely when filed on April 28, 1997.

Initially, the Court notes that the thirty-day limit for removal is to be strictly construed and is not subject to extension. Barton v. Lloyd's of London, 883 F. Supp. 641, 642 (M.D. Ala. 1995). Furthermore, the removal period should “start only after the defendant is able to ascertain intelligently that the requisites of removability are present.” DeBry v. Transamerica Corp., 601 F.2d 480, 489 (10th Cir. 1979).

The Court also notes that papers or motions filed in federal court are not to be considered for purposes of determining the date of removability. “[T]he record of the state court is considered the sole source from which to ascertain whether a case originally not removable has since become removable.” Peabody v. Maud Van Cortland Hill Schroll Trust, 892 F.2d 772, 775 (9th Cir. 1989). Thus, GRDA’s citation of the statute in federal court does not determine the commencement of the thirty-day period.

Additionally, GRDA’s motion to dismiss and reply and supplemental authorities filed in state court are also not “other paper” that would begin the period of removal since those documents were not produced by Plaintiffs. It is well-settled that “a cause cannot be removed where the removability is a result of some development other than a voluntary act of plaintiff.” DeBry, 601 F.2d at 488. Accordingly, GRDA’s motions would not begin the time period in which it could remove the action.

The passage of the WRDA also would not satisfy the definition of an “other paper” for purposes of § 1446(b). Numerous courts have held that intervening statutory or case law changes do not trigger removal. Rather, to meet the “other paper” requirement in § 1446(b), the paper must be part of the underlying suit. Phillips v. Allstate Ins. Co., 702 F. Supp. 1466, 1468-69 (C.D. Cal. 1989). Thus, the mere passage of the WRDA would not trigger GRDA’s removal

period.

The Court finds, however, that another basis to commence the removal period is the “order” component of § 1446(b). The “Pretrial Conference Order” was signed by the state court judge on March 10, 1997, and was filed in Ottawa County District Court on March 17, 1997.

Page 11 of the Pretrial Conference Order states in pertinent part as follows: “**17. Settlement:**

Not possible. It is GRDA’s position that this suit has been settled by superseding federal legislative enactment; see the brief in support of GRDA’s motion to dismiss.”

The Oklahoma court rule governing pretrial orders states as follows:

After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice. The form adopted by the Oklahoma Supreme Court for pretrial conference orders shall be used by the District Court. If the judge deviates from the form, he or she shall in writing show to the Supreme Court the reasons for such deviation.

The pretrial order shall include the results of the conference and advice to the court regarding the factual and legal issues, including details of material evidence to be presented. The order shall also present all questions of law in the case. All exhibits must be marked, listed and identified in the pretrial order. If there is objection to the admission of any exhibits, the grounds for the objection must be specifically stated. Absent proper objection, the listed exhibit is admitted when offered at trial or other proceeding. Attorneys for all parties will approve the order. The order shall be presented to the District Court for signature. The contents of the pretrial order shall supersede the pleadings and govern the trial of the case unless departure therefrom is permitted by the Court to prevent manifest injustice. Proposed pretrial order shall not be filed.

Okla. Dist. Ct. Rule 5(I) (emphasis added). Thus, the pretrial order is in effect an “order” under § 1446(b) in that it is a legal mandate or a command authoritatively given by the district court. See Doe v. American Red Cross, 14 F.3d 196, 201 (3d Cir. 1993) (stating that an “order” for § 1446(b) purposes is a “mandate,” a “command or direction authoritatively given,” or “any

direction of a court or judge made or entered in writing”); Roberson v. Orkin Exterminating Co., Inc., 770 F. Supp. 1324, 1329 (N.D. Ind. 1991) (holding that a proposed pretrial order was sufficient to begin the thirty-day removal period).

Accordingly, the Court concludes that the Pretrial Conference Order is an “order” under § 1446(b) which commenced the thirty-day period of removal on March 17, 1997. The pretrial order also is a result of an act by the plaintiff since Oklahoma court rules require that all parties approve the order. The order also specifically states that “[i]t is GRDA’s position” that the state suit was preempted by federal statute. Thus, at the time of the pretrial order, GRDA not only was “able to ascertain intelligently that the requisites of removability [were] present,” DeBry, 601 F.2d at 489, but also undertook to advocate federal preemption to the court as a result. Since GRDA’s April 28, 1997 notice of removal was filed outside of the thirty-day removal period, it is untimely and is therefore barred.

Plaintiffs’ motion to remand is hereby granted (Docket # 3). Plaintiffs’ motions to expedite the hearing of the motion to remand (Docket # 5 and Docket # 13) are hereby denied as moot. The Clerk of the Court is directed to send a copy of this Order to the Clerk of the District Court of Ottawa County, Oklahoma.

IT IS SO ORDERED.

This 21st day of October, 1997.



Sven Erik Holmes
United States District Judge

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

F I L E D

OCT 20 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

EDWARD H. LEWIS,)
)
) Plaintiff,)
)
) v.)
)
) KENNETH S. APFEL,)
) COMMISSIONER OF SOCIAL)
) SECURITY,¹)
)
) Defendant.)

Case No. 96-C-523-B ✓

ENTERED ON DOCKET

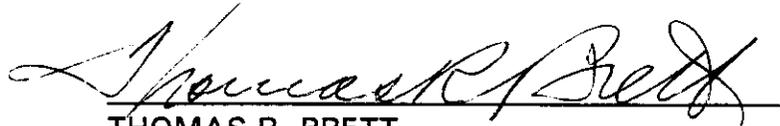
JUDGMENT

DATE OCT 22 1997

Judgment is entered in favor of the Defendant, Kenneth S. Apfel,
Commissioner of Social Security, in accordance with this court's Order filed

Oct. 20, 1997.

Dated this 20th day of October, 1997.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

¹Effective September 29, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the Defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

12

FILED

OCT 20 1997 *PL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

EDWARD H. LEWIS,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
COMMISSIONER OF SOCIAL)
SECURITY, ¹)
)
Defendant.)

Case No. 96-C-523-B ✓

ENTERED ON DOCKET

DATE OCT 22 1997

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed September 22, 1997, in which the Magistrate Judge recommended that the decision of the Administrative Law Judge should be affirmed. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

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

IT IS THEREFORE ORDERED that the decision of the Administrative Law Judge is affirmed.

¹Effective September 29, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the Defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

11

Dated this 20th day of Oct., 1997.

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

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

DONNA ROGERS,

Plaintiff,

vs.

THE TRUST COMPANY OF
OKLAHOMA, as Trustee, and
WILLIAM E. MEYER,

Defendants.

ENTERED ON DOCKET

DATE 10 22 97

Case No. 95-CV-909-H

FILED

OCT 20 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

Upon the Joint Application and Stipulation for Entry of Order and Judgment filed by the Plaintiff, Donna Rogers and Defendant William E. Meyer, and pursuant to this Court's Order approving the same,

IT IS ADJUDGED AND DECREED that Defendant William E. Meyer have judgment in his favor and against Plaintiff Donna Rogers, on Rogers' claims against Meyer alleged in her complaint filed September 12, 1995.

Dated this 17TH day of OCTOBER, 1997.


SVEN E. HOLMES
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

Doerner, Saunders, Daniel & Anderson



By: William C. Anderson
John J. Carwile
James C. Milton
320 South Boston, Suite 500
Tulsa, Oklahoma 74103

Attorneys for Defendant,
William E. Meyer

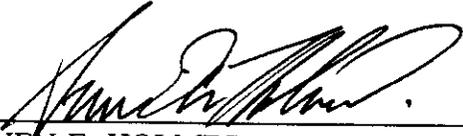
Lowrey & Lowrey

By: 

George H. Lowrey
406 South Boulder, Suite 820
Tulsa, Oklahoma 74103-3825

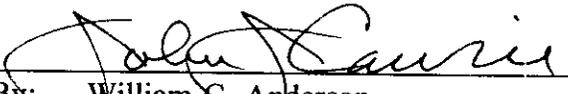
Attorneys for Plaintiff Donna Rogers

Dated this 15th day of October, 1997.


SVEN E. HOLMES
UNITED STATES DISTRICT JUDGE

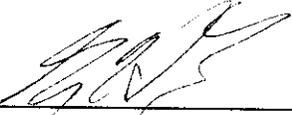
APPROVED AS TO FORM AND CONTENT:

Doerner, Saunders, Daniel & Anderson


By: William C. Anderson
John J. Carwile
James C. Milton
320 South Boston, Suite 500
Tulsa, Oklahoma 74103

Attorneys for Defendant,
William E. Meyer

Lowrey & Lowrey

By: 
George H. Lowrey
406 South Boulder, Suite 820
Tulsa, Oklahoma 74103-3825

Attorneys for Plaintiff Donna Rogers

juv

FILED

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

OCT 21 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff

v.

CHRIS C. LANCASTER,

Defendant.

)
)
)
)
)
)
)
)
)
)
)

Civil Action No. 97CV 742 BU

ENTERED ON DOCKET
DATE OCT 22 1997

DEFAULT JUDGMENT

This matter comes on for consideration this 21st 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, Chris C. Lancaster, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Chris C. Lancaster, was served with Summons and Complaint on August 25, 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.

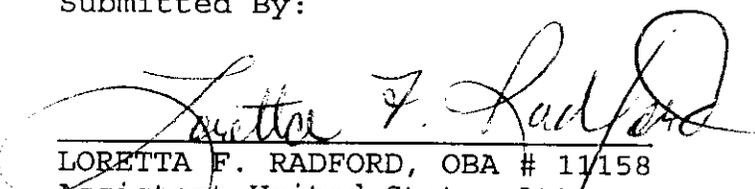
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Chris C. Lancaster, for the principal amount of \$2,676.87, plus accrued interest of \$1,450.44, plus administrative charges in the amount of \$20.42, plus interest thereafter at the rate of 8 percent per annum until judgment, plus

6

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

LFR/jmo

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

JOYCE ACHIRI,)
)
 Plaintiff,)
)
 vs.)
)
 COUNTRY MUTUAL INSURANCE)
 COMPANY,)
)
 Defendant and)
 Third-Party Plaintiff,)
)
 vs.)
)
 VICTOR R. LAGRONE,)
)
 Third-Party Defendant.)

No. 97-CV-137-BU
Burrage

FILED
 OCT 22 1997

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

DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Joyce Achiri, and hereby dismisses the above-captioned action with prejudice against the Defendant and Third-Party Plaintiff, Country Mutual Insurance Company.

Joyce Achiri

 JOYCE ACHIRI
 Plaintiff

Jeffrey L. Parker

 JEFFREY L. PARKER
 Attorney for Plaintiff

dt

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

LARRY D. SAMUELS,)
)
 Plaintiff,)
)
 v.)
)
 KENNETH S. APFEL,)
 Commissioner of Social Security,¹)
)
 Defendant.)

OCT 21 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No: 96-C-247-W

OCT 21 1997

OCT 22 1997

JUDGMENT

Judgment is entered in favor of the Defendant, Kenneth S. Apfel, Commissioner of Social Security, in accordance with this court's Order filed October 20, 1997.

Dated this 21st day of October, 1997.


JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

¹Effective September 29, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), Kenneth S. Apfel, is substituted for John J. Callahan, Commissioner of Social Security, as defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

FILED

OCT 21 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

LORI K. RIDENOUR,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of Social Security,¹

Defendant.

Case No: 96-C-184-W

OCT 22 1997

JUDGMENT

Judgment is entered in favor of the Defendant, Kenneth S. Apfel, Commissioner of Social Security, in accordance with this court's Order filed October 20, 1997.

Dated this 21st day of October, 1997.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

¹Effective September 29, 1997, pursuant to Fed.R.Civ.P. 25(d)(1), Kenneth S. Apfel, is substituted for John J. Callahan, Commissioner of Social Security, as defendant in this action. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

(16)

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

FILED

OCT 21 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AVTECH, INC., an Oklahoma Corporation, and DONALD A. McCANCE,

Plaintiffs,

vs.

Case No. 94-C-506-BU

APL INTERNATIONAL, INC., formerly APL Sales, Inc., et al.,

Defendants.

ENTERED ON DOCKET

DATE OCT 22 1997

ADMINISTRATIVE CLOSING ORDER

On October 15, 1997, this Court entered judgment in favor of Plaintiffs, Avtech, Inc. And Donald A. McCance, and against Defendants, APL International, Inc., Fambo, Inc., and Rick Boshears, joint 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. This Court, however, reserved judgment against Defendant, Donald L. Boshears, 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. BOSHEARS and MARGARET D. BOSHEARS, DEBTORS, Chapter 7, Case No. 95-01968-R, AVTECH, INC., and DONALD A. McCANCE, PLAINTIFFS v. DONALD L. BOSHEARS, DEFENDANT, Adversary No. 95-0320-R.

The Court directs the Clerk of the Court to administratively terminate this action in his records pending the resolution of the above-mentioned complaint by the Bankruptcy Court. Upon the

resolution of the Complaint, the parties may file an application to reopen this matter, if appropriate, so as to enter judgment against Defendant, Donald L. Boshears.

Entered this 21st day of October, 1997.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
DATE 10-22-97

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 aka Mike Barber;)
CHRIS BARBER aka Christine Linda Barber)
aka Christine Barber Shocklee)
aka Christine Linda Shocklee;)
BROWN, BLOYED & ASSOCIATES, INC.;)
MARY FRAZHO;)
STATE OF OKLAHOMA ex rel.)
Oklahoma Tax Commission;)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)
)
Defendants.)

F I L E D

OCT 21 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 96-CV-1198-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 20 day of October, 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, State of Oklahoma ex rel. Oklahoma Tax Commission, appears by Kim D. Ashley, Assistant General Counsel; and 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, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Michael G. Barber aka Mike Barber, executed a Waiver of Service of Summons on January 9, 1997; that the Defendant, Chris Barber aka Christine Linda Barber aka Christine Barber Shocklee aka Christine Linda Shocklee, executed a Waiver of Service of Summons on January 9, 1997; that the Defendant, Mary Frazho, executed a Waiver of Service of Summons on March 3, 1997.

The Court further finds that the Defendant, Brown, Bloyed & Associates, Inc., was 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 May 22, 1997, and continuing through June 26, 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 Defendant, Brown, Bloyed & Associates, Inc., and service cannot be made upon said Defendant by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, Brown, Bloyed & Associates, Inc. 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 party served by publication with respect to its 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 Defendant 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, State of Oklahoma *ex rel.* Oklahoma Tax Commission, filed its Answer on January 21, 1997; and 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, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on September 26, 1996, Christine Linda Shocklee-Barber filed her voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 96-03866-W. On April 18, 1997, the United States Bankruptcy Court, Northern District of Oklahoma entered its order amending Schedule A, modifying the automatic stay afforded the debtor by 11 U.S.C. § 362 and directing abandonment of the real property subject to this foreclosure action and which is described below.

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 Twenty-six (26), Block Two (2), SOUTHBROOK II, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on December 30, 1983, Michael G. Barber and Chris Barber executed and delivered to Oklahoma Mortgage Company, Inc., their mortgage note in the amount of \$64,500.00, payable in monthly installments, with interest thereon at the rate of 12.75 percent per annum.

The Court further finds that as security for the payment of the above-described note, Michael G. Barber and Chris Barber executed and delivered to Oklahoma Mortgage Company, Inc., a real estate mortgage dated December 30, 1983, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on January 3, 1984, in Book 4756, Page 308, in the records of Tulsa County, Oklahoma.

The Court further finds that the Secretary of Veterans Affairs is currently the owner of the above-described note and mortgage through mesne conveyances.

The Court further finds that on March 21, 1995, Michael G. Barber and Chris Barber executed and delivered to the Secretary of Veterans Affairs a Modification and Reamortization Agreement pursuant to which the entire debt due was made principal and the interest rate changed to 8.75 percent per annum.

The Court further finds that Michael G. Barber aka Mike Barber and Chris Barber aka Christine Linda Barber aka Christine Barber Shocklee aka Christine Linda Shocklee, 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 \$63,289.08, plus administrative charges in the amount of \$725.00, plus penalty charges in the amount of \$117.92, plus accrued interest in the amount of \$2,723.54 as of August 9, 1996, plus interest accruing thereafter at the rate of 8.75 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 \$741.08 (\$337.58 publication fees, \$75.00 fee for evidentiary affidavit; \$320.50 abstracting fee; \$8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, State of Oklahoma *ex rel.* Oklahoma Tax Commission, has liens on the property which is the subject matter of this action in the total amount of \$64,155.08, together with interest and penalty according to law, by virtue of the following tax warrants:

Tax Warrant No.	Amount	Recorded	County	Book/Page
STS9400150201	\$37,012.91	01/06/95	Tulsa	5683/1927
STS9400237001	\$13,318.43	01/06/95	Tulsa	5683/1928
ITW9400075901	\$ 9,489.77	01/06/95	Tulsa	5683/1929
ITW9400111801	\$ 4,333.97	01/06/95	Tulsa	5683/1930

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 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, are in default and therefore have no right, title or interest in the subject real property.

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 August 21, 1995, and recorded on August 28, 1995, in Book 5739, Page 2502 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 Veterans Affairs.

IT IS THEREFORE 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 Defendants, Michael G. Barber aka Mike Barber and Chris Barber aka Christine Linda Barber aka Christine Barber Shocklee aka Christine Linda Shocklee, in the principal sum of \$63,289.08, plus administrative charges in the amount of \$725.00, plus penalty charges in the amount of \$117.92, plus accrued interest in the amount of \$2,723.54 as of August 9, 1996, plus interest accruing thereafter at the rate of 8.75 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 in the amount of \$741.08 (\$337.58 publication fees, \$75.00 fee for evidentiary affidavit; \$320.50 abstracting fee; \$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, State of Oklahoma *ex rel.* Oklahoma Tax Commission, have and recover judgment *in rem* in the total amount of \$64,155.08, together with interest and penalty according to law, by virtue of the above-described tax warrants.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED 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.; Mary Frazho; County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal 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:

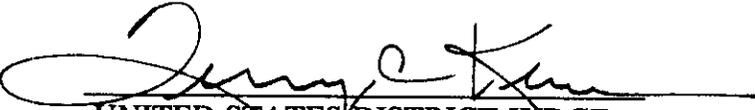
In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

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

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.

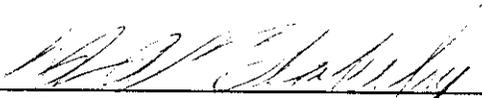

UNITED STATES DISTRICT JUDGE

APPROVED:

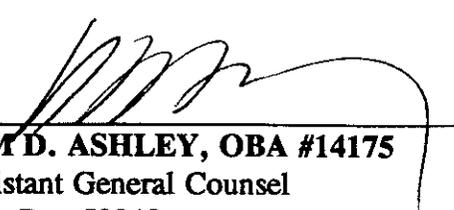
STEPHEN C. LEWIS
United States Attorney



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



DICK A. BLAKELEY, OBA #8076
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma



KIM D. ASHLEY, OBA #14175

Assistant General Counsel

P.O. Box 53248

Oklahoma City, Oklahoma 73152-3248

(405) 522-5555

Attorney for Defendant,

State of Oklahoma ex rel. Oklahoma Tax Commission

A 97-35

Judgment of Foreclosure

Case No. 96-CV-1198-K (Barber)

PP:css

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

FILED

OCT 21 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BETTY M. DeVILBISS,

Plaintiff,

vs.

DAN DeVILBISS,

Defendants.

Case No. 95-C-0026-K

ENTERED ON DOCKET

DATE

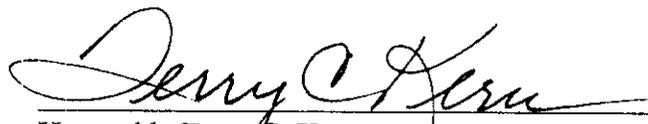
10-22-97

ORDER OF DISMISSAL

It Appearing to the satisfaction of this Court that all matters and controversies by and between Plaintiff and Defendant have been compromised and settled by and between said Plaintiff and Defendant as indicated by the signatures of their attorneys on the stipulation filed on October 17, 1997.

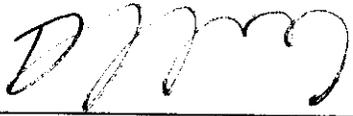
IT IS HEREBY ORDERED:

1. That the Plaintiffs complaint against Defendant is dismissed WITH PREJUDICE.
2. That the Defendant's counterclaim against Plaintiff is dismissed WITH PREJUDICE.
3. The Plaintiff and Defendant shall each bear responsibility for their respective costs including attorneys' fees.

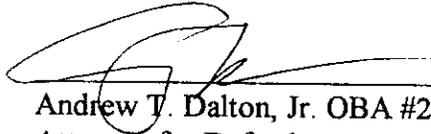


Honorable Terry C. Kern
United States District Court Judge

APPROVED AS TO FORM:



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



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

dvlbs2.dat

ENTERED ON DOCKET

DATE 10-22-97

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

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

Case No. 96-CV-1058-K ✓

FILED

OCT 22 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOINT STIPULATION OF PARTIAL DISMISSAL WITH PREJUDICE

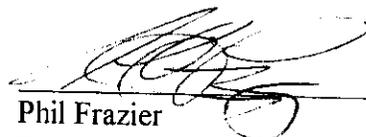
Plaintiff, Gary Lee Walker, and Defendants, Hudiburg Auto Group, Inc. and Riverside Chevrolet Inc., pursuant to Rule 41 (a)(1) of the Federal Rules of Civil Procedure, hereby jointly stipulate to the dismissal of all claims against these Defendants with prejudice.

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

DATED: October 13, 1997.


Tanya D. Humphreys
Humphreys Wallace Humphreys
1305 East Fifteenth Street, Suite 200
Tulsa, Oklahoma 74120

ATTORNEYS FOR PLAINTIFF


Phil Frazier
Frazier, Smith and Phillips
1424 Terrace Drive
Tulsa, Oklahoma 74104

ATTORNEYS FOR DEFENDANTS,
HUDIBURG AUTO GROUP, INC. and
RIVERSIDE CHEVROLET INC.

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

F I L E D

OCT 20 1997 *plw*

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.)

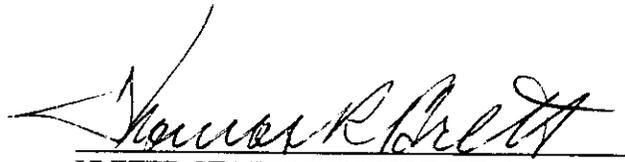
ENTERED ON DOCKET

DATE OCT 21 1997

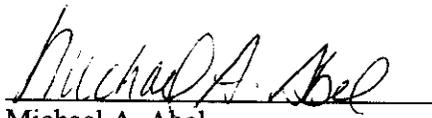
ORDER OF DISMISSAL WITH PREJUDICE

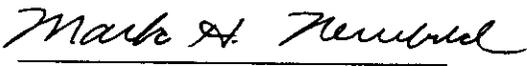
NOW, on this 20th day of Oct, 1997, the Stipulation for Dismissal filed by Plaintiff and Defendants, City of Tulsa, Buddy Visser, Jim Clark and Ron Palmer, comes on before the Court. The Court, being fully advised in the premises, finds and orders City of Tulsa, Buddy Visser, Jim Clark and Ron Palmer, be they hereby are, dismissed with prejudice.

IT IS SO ORDERED.


UNITED STATES DISTRICT JUDGE

APPROVED:


Michael A. Abel
Attorney for Plaintiff


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

15

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 21 97

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

FILED

OCT 20 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On the above Stipulation of Dismissal by both Plaintiffs and Defendants, IT IS ORDERED that this action is dismissed with prejudice. Each party is to bear their own costs and attorneys' fees. IT IS FURTHER ORDERED that this Court retains jurisdiction over the parties to resolve any disputes relating to the agreement reached between the parties resolving this matter and resulting in its dismissal.

Entered this 17th day of October, 1997.

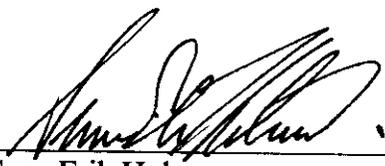

UNITED STATES DISTRICT JUDGE

no. 97-CV-749-H (J). Also, the Clerk is **directed** to file a copy of this Order in case no. 97-CV-881-K (J).

Further, the Court finds that Plaintiff's motion for leave to file an opening brief shall be, and the same is, **granted**. The Clerk of the Court is **directed** to docket the Memorandum In Support for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, attached to Petitioner's motion for leave, in case no. 97-CV-749-H (J).

IT IS SO ORDERED.

This 17TH day of October, 1997.



Sven Erik Holmes
United States District Court