

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

FILED

JAN 8 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AVTECH, INC., an Oklahoma corporation, and DONALD A. MCCANCE,

Plaintiffs,

v.

Civil Action No. 94-C-506-BU

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

Defendants.

ENTERED ON DOCKET

DATE JAN 09 1998

JUDGMENT

Judgment is hereby entered in favor of the Plaintiffs, Avtech, Inc., and Donald A. McCance, and against the Defendant Donald L. Boshears, jointly and severally with the other defendants against whom judgment was entered herein on October 15, 1997, 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.

IT IS SO ORDERED.

DATED: January 7, 1998.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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BRIAN J. RAYMENT, OBA#7441
KIVELL, RAYMENT AND FRANCIS
7666 East 61st Street, Suite 240
Tulsa, OK 74133-1138
Telephone: (918) 254-0626
Facsimile: (918) 254-7915
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 8 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff)
)
 v.)
)
 Frank Berry,)
)
 Defendant.)

Civil Action No. 97 CV 965 BU (W)

ENTERED ON DOCKET
DATE JAN 09 1998

DEFAULT JUDGMENT

This matter comes on for consideration this 7th day of January, 1998, 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, Frank Berry, appearing not.

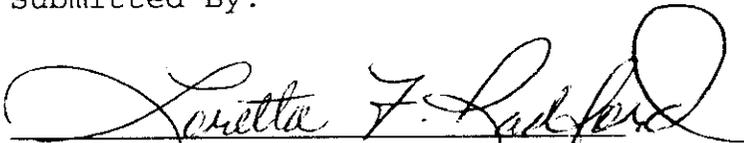
The Court being fully advised and having examined the court file finds that Defendant, Frank Berry, was served with Summons and Complaint on December 4, 1997. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant 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, Frank Berry, for the principal amount of \$2,687.82.00, plus accrued interest of \$887.23, plus administrative charges in the amount of \$52.09, plus interest thereafter at the rate of 8 percent per annum until judgment, and in the principal amount of \$670.00 plus

administrative charges in the amount of \$87.00, plus accrued interest in the amount of \$127.26, at the rate of 5% per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.34 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/sba

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 8 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff)
)
 v.)
)
 Tommy L. Billings,)
)
 Defendant.)

Civil Action No. 97 CV 966 BU ✓

ENTERED ON DOCKET

JAN 09 1998

DATE _____

DEFAULT JUDGMENT

This matter comes on for consideration this 7 day of January, 1998, 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, Tommy L. Billings, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Tommy L. Billings, was served with Summons and Complaint on December 5, 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.

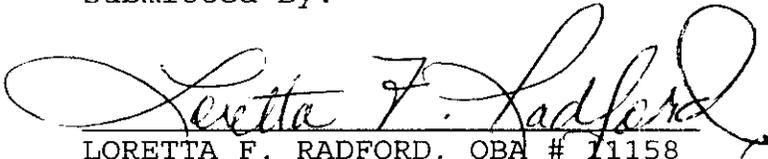
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Tommy L. Billings, for the principal amount of \$1,273.72, plus accrued interest of \$160.11, plus administrative charges in the amount of \$.00, plus interest thereafter at the rate of 8 percent per annum

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until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of ~~5~~ ³⁴ 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/sba

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

KEITH and DENISE BRUNSON,)
individually and as parents and)
next friends of Jasmine Brunson,)
a minor,)
Plaintiffs,)
v.)
STATE FARM MUTUAL AUTOMOBILE)
INSURANCE COMPANY,)
Defendant.)

ENTERED ON DOCKET

DATE 1-8-98

Case No. 97-C-1122-H

FILED

JAN 07 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on Defendant's notice of removal (Docket # 1). Plaintiffs Keith and Denise Brunson originally brought this action in the District Court of Rogers County. Plaintiffs' Petition alleges that Defendant State Farm Mutual Automobile Insurance Company ("State Farm") wrongfully breached its duty to act fairly and in good faith with Plaintiffs. In their Petition, Plaintiffs seek damages in excess of \$10,000.¹

Defendant removed this action to this Court on the basis of diversity jurisdiction. The Defendant contends that diversity jurisdiction is properly invoked here because it is a foreign insurance corporation with its principal place of business in Illinois. Defendant further contends the federal jurisdictional amount in controversy is met, stating:

Plaintiffs allege that STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY owed the duty of good faith and fair dealing and breached that duty and request damages in a sum exceeding \$10,000.00. Based upon the unlimited

¹In Oklahoma, the general rules of pleading require that:

[e]very pleading demanding relief for damages in money in excess of Ten Thousand Dollars (\$10,000) shall, without demanding any specific amount of money, set forth only that amount sought as damages is in excess of Ten Thousand Dollars (\$10,000), except in actions sounding in contract.

prayer for damages, the matter in controversy between Plaintiffs and Defendant exceeds \$75,000.00, exclusive of interest and costs. Plaintiffs are residents of Rogers County, Oklahoma. Defendant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, is a foreign insurance corporation with its principal place of business in the state of Illinois. Thus, diversity jurisdiction exists pursuant to 28 U.S.C. § 1332.

Def. Notice of Removal, ¶4 (Docket # 1).

Section 1447 requires that a case be remanded to state court if at any time before final judgment it appears the court lacks subject matter jurisdiction. 28 U.S.C. § 1447(c). Initially, the Court notes that federal courts are courts of limited jurisdiction. With respect to diversity jurisdiction, “[d]efendant’s right to remove and plaintiff’s right to choose his forum are not on equal footing; for example, unlike the rules applied when plaintiff has filed suit in federal court with a claim that, on its face, satisfies the jurisdictional amount, removal statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand.” Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994).

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

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

Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir.), cert. denied, 116 S. Ct. 174 (1995); e.g., Hughes v. E-Z Serve Petroleum Marketing Co., 932 F. Supp. 266 (N.D. Okla. 1996) (applying Laughlin and remanding case); Barber v. Albertson’s, Inc., 935 F. Supp. 1188 (N.D. Okla. 1996) (same); Martin v. Missouri Pacific R.R. Co. d/b/a Union Pacific R.R. Co., 932 F. Supp. 264 (N.D. Okla. 1996) (same); Herber v. Wal-Mart Stores, 886 F. Supp. 19, 20 (D. Wyo. 1995) (same);

Homolka v. Hartford Ins. Group, Individually and d/b/a Hartford Underwriters Ins. Co., 953 F. Supp. 350 (N.D. Okla. 1995) (same); Johnson v. Wal-Mart Stores, Inc., 953 F. Supp. 351 (N.D. Okla. 1995) (same); Maxon v. Texaco Ref. & Marketing Inc., 905 F. Supp. 976 (N.D. Okla. 1995) (same).

Further, “both the requisite amount in controversy and the existence of diversity must be affirmatively established on the face of either the petition or the removal notice.” Laughlin, 50 F.3d at 873. See Asociacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia (Anpac) v. Dow Quimica de Colombia S.A., 988 F.2d 559, 565 (5th Cir. 1993), cert. denied, 114 S. Ct. 685 (1994) (finding defendant’s conclusory statement that “the matter in controversy exceeds [\$75,000] exclusive of interest and costs” did not establish that removal jurisdiction was proper); Gaus v. Miles, Inc., 980 F.2d 564 (9th Cir. 1992) (mere recitation that the amount in controversy exceeds \$75,000 is not sufficient to establish removal jurisdiction).

Where the face of the complaint does not affirmatively establish the requisite amount in controversy, the plain language of Laughlin requires a removing defendant to set forth, in the removal documents, not only the defendant’s good faith belief that the amount in controversy exceeds \$75,000, but also facts underlying defendant’s assertion. In other words, a removing defendant must set forth specific facts which form the basis of its belief that there is more than \$75,000 at issue in the case. The removing defendant bears the burden of establishing federal court jurisdiction at the time of removal, and not by supplemental submission. Laughlin, 50 F.3d at 873. See Herber, 886 F. Supp. at 20 (holding that the jurisdictional allegation is determined as of the time of the filing of the Notice of Removal). And the Tenth Circuit has clearly stated what is required to satisfy that burden. As set out in Johnson v. Wal-Mart Stores, Inc., No. 95-C-1176(H) (N.D. Okla. 1995), if the face of the petition does not affirmatively establish that the amount in controversy exceeds \$75,000.00, then the rationale of Laughlin contemplates that the

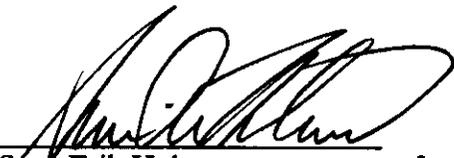
removing party will undertake to perform an economic analysis of the alleged damages with underlying facts.

In the instant case, in their Petition, Plaintiffs have asserted only one claim for relief that exceeds \$10,000. Therefore, the amount in controversy is not met by the face of the Petition. In its notice of removal, Defendant failed to set forth any specific facts that demonstrate the federal amount in controversy has been met. Accordingly, the Court finds that Defendant's conclusory assertions do not satisfy the standards set forth by the Tenth Circuit in Laughlin. The Court concludes that removal is improper on the basis of diversity jurisdiction since it has not been established, either in Plaintiffs' Petition or in Defendant's notice of removal, that the amount in controversy here exceeds \$75,000.

Based upon a review of the record, the Court holds that Defendant has not met its burden, as defined by the court in Laughlin. Thus, the Court is without subject matter jurisdiction and lacks the power to hear this matter. As a result, the Court must remand this action to the District Court of Rogers County. The Court hereby orders the Court Clerk to remand the case to the District Court in and for Rogers County.

IT IS SO ORDERED.

This 2TH day of January, 1998.


Sven Erik Holmes
United States District Judge

ENTERED ON DOCKET

DATE 1-8-98

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

MACK FREEMAN and)
DEANNA FREEMAN)

Plaintiffs,)

vs.)

ALLSTATE INSURANCE COMPANY,)
the SHERIFF OF DELAWARE)
COUNTY, OKLAHOMA, the CITY OF)
GROVE, OKLAHOMA, the CITY OF)
COMMERCE, OKLAHOMA, and the)
OKLAHOMA HIGHWAY PATROL,)

Defendants.)

JAN - 7 1998

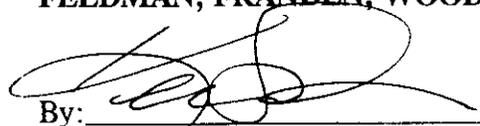
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No.: 97 CV 865 BU(J)

**NOTICE OF VOLUNTARY DISMISSAL
OF STATE TORT CLAIMS
AGAINST OKLAHOMA HIGHWAY PATROL**

Pursuant to Rule 41 (a)(1)(i), Plaintiffs Mack Freeman and Deanna Freeman hereby give notice that to the extent their complaint filed September 22, 1997 can be construed to allege state tort claims against the Oklahoma Highway Patrol, those claims only are hereby dismissed. Plaintiffs expressly reserve the federal law claims against the Oklahoma Highway Patrol.

FELDMAN, FRANDEN, WOODARD & FARRIS

By: 

R. Jack Freeman, OBA No. 3128
Kenneth E. Wagner, OBA No. 16049
1000 Park Centre
525 South Main
Tulsa, OK 74103-4514
Tel: (918) 583-7129
Fax: (918) 584-3814

ATTORNEYS FOR MACK AND DEANNA FREEMAN

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CERTIFICATE OF SERVICE

I CERTIFY that on the 6 day of January, 1998, a true and correct copy of the foregoing instrument was:

- mailed with postage prepaid thereon;
- mailed via Certified Mail,
Return Receipt No. _____;
- transmitted via facsimile; or
- hand-delivered;

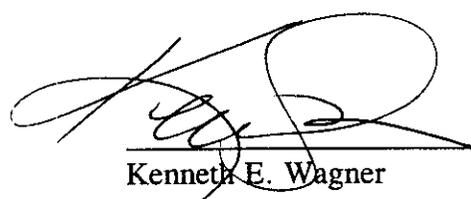
to:

J. Douglas Mann, Esq.
Rosenstein, Fist & Ringold
525 South Main, Suite 700
Tulsa, Oklahoma 74103-4508
Facsimile: (918) 583-5617

Jason Wagner, Esq.
Chris Collins, Esq.
Collins, Zorn, Jones & Wagner
429 N.E. 50th
Second Floor
Oklahoma City, OK 73105-1015
Facsimile: (405) 524-2078

James K. Secrest, II, Esq.
Secrest, Hill & Folluo
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Facsimile: (918) 494-2847

John H. Lieber, Esq.
Eller & Detrich
Suite 200
2727 East 21st Street
Tulsa, OK 74114
Facsimile: (918) 747-2665



Kenneth E. Wagner

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

VALERIE L. MORROW,)
)
 Plaintiff,)
)
 vs.)
)
 FARMERS INSURANCE COMPANY,)
 INC.,)
)
 Defendant.)

ENTERED ON DOCKET

DATE 1-7-98

No: 97-CV-63-H

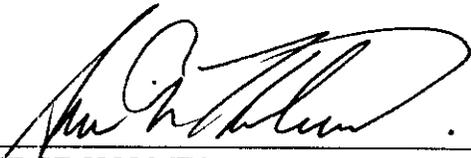
FILED
JAN 06 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to Application filed herein, the parties have stipulated that all questions and issues existing between the said parties have been fully and completely disposed of by settlement and have requested the entrance of an order of dismissal with prejudice.

IT IS SO ORDERED that the case should be and the same is hereby dismissed with prejudice and the matter fully, finally and completely disposed of.

DATED this 6TH day of January, 1997.



JUDGE HOLMES
JUDGE OF THE DISTRICT COURT

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

FILED

JAN 06 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RADCO, INC.,
an Oklahoma corporation,

Plaintiff,

vs.

Civil Action No. 93-C-1102-H

FOSTER WHEELER USA CORP.,
a Delaware corporation;
SHELL OIL COMPANY,
a Delaware corporation;
LYONDELL-CITGO REFINING COMPANY,
L.L.C.,
a Texas limited liability company;
PETRO-CHEM DEVELOPMENT CO., INC.,
a Delaware corporation; and
MARATHON OIL COMPANY,
an Ohio corporation,

Defendants.

EDD 1/7/98

STIPULATED DISMISSAL WITH PREJUDICE

Plaintiff, Radco, Inc., and defendants, Foster Wheeler USA Corp., Shell Oil Company, and Lyondell-Citgo Refining Company, L.L.C., having settled their disputes in this action pursuant to a Settlement Agreement fully executed on December 30, 1997, stipulate that all claims and counterclaims asserted by them in this action shall be and hereby are dismissed with prejudice.

This Court shall retain continuing jurisdiction over the Settlement Agreement and any disputes arising thereunder. Each party shall bear its own costs relating to this suit.

On behalf of Radco, Inc.

for Fred P. Gilbert
Frank J. Catalano, Esq.
Scott R. Zingerman, Esq.
Catalano & Zingerman
Avanti Building, Suite 200
810 South Cincinnati
Tulsa, Oklahoma 74119-1612
(918) 584-8787

On behalf of Foster Wheeler
USA Corp., Shell Oil Company,
and Lyondell-Citgo Refining
Company, L.L.C.

Donald R. Dunner
Donald R. Dunner, Esq.
Dirk D. Thomas, Esq.
Finnegan, Henderson, Farabow,
Garrett & Dunner, L.L.P.
1300 I Street, N.W.
Washington, D.C. 20005-3315
(202) 408-4000

So Ordered:

SVEN ERIK HOLMES
Honorable Sven Holmes
U.S. District Judge

DATE 1-7-98

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

JAMES JONES,)
)
Plaintiff,)
)
vs.)
)
WAL-MART STORES INC.,)
d/b/a SAM'S CLUB, a)
Delaware corporation)
)
Defendant.)

No. 94-C-867-K ✓

FILED

JAN 06 1998

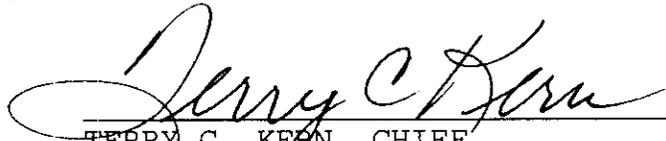
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This action came on for jury trial, the Honorable Terry C. Kern, Chief District Judge, presiding, and the issue having been duly heard and a verdict having been duly rendered,

IT IS THEREFORE ORDERED that the Plaintiff James Jones recover of the Defendant Wal-Mart Stores, Inc. the sum of 10,000.00, with interest thereon at the rate provided by law.

ORDERED this 5 day of January, 1998.



TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 6 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PATRICIA CARNER PENDERGRASS,)

Plaintiff,)

vs.)

Case No. 97-CV-674-BU(M) ✓

RON MORGAN, an individual and)

REASOR'S, d/b/a REASOR'S FOODS)

INC., an Oklahoma Corporation,)

Defendants.)

ENTERED ON DOCKET

DATE JAN 07 1998

ORDER

This is an action originally commenced in the District Court of Creek County, Oklahoma, and subsequently removed to this Court by Defendants pursuant to 28 U.S.C. §§ 1331, 1441, and 1446. In their notice of removal, Defendants have asserted that this action may be removed to this Court based upon federal question jurisdiction. Specifically, Defendants assert that Plaintiff has alleged a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.

Plaintiff has filed a motion seeking to remand this action to Creek County pursuant 28 U.S.C. § 1447(c). Plaintiff contends that Defendants have not filed their notice of removal within the time specified by 28 U.S.C. § 1446(b) because it was filed more than thirty (30) days from the date of service of Plaintiff's petition and summons. Plaintiff contends that Defendants could have ascertained from her

petition that she had a claim for sexual harassment under Title VII. Plaintiff argues that in its motion to dismiss, Defendant, Reasor's Inc., d/b/a Reasor's Foods Inc., was indeed aware that Plaintiff had a sexual harassment claim under Title VII as it argued that she had no action under state law but only federal law. In addition, Plaintiff argues that Defendant alleged in its answer that the state court lacked jurisdiction over the matter. Plaintiff states that she was not required to cite to all statutes upon which she relies; the pleading code only requires that a defendant be given fair notice of the claims being asserted against it. As Defendants, from the pleadings, were in fact aware of a Title VII claim, and did not remove the case within 30 days of service of the petition and summons, Plaintiff contends that the case must be remanded.

In response to Plaintiff's motion, Defendants assert that until July 7, 1997, Plaintiff repeatedly denied asserting a claim under federal law. Defendants contend that Plaintiff expressly pinned her cause of action on Oklahoma law. Defendants argue that under the strict construction of the federal removal statutes, they would not have been able to invoke the jurisdiction of this Court based upon Plaintiff's petition and her pre-July 7, 1997 statements. However, Defendants maintain that on July 7, 1997, during a hearing on motions, Plaintiff stated for the first time that she would assert a federal claim by stating "[w]hether or not we pursue or abandon a Title 7 claim at some point in time is something that can be done at the time of pretrial."

Defendants also state that in her response brief, Plaintiff stated “[a]ssuming for a minute that Title VII is applicable counsel for MORGAN has failed to timely remove this action to federal court.” Since the notice of removal was filed within 30 days of the hearing and the response brief, Defendants contend that removal was timely and remand of this action is inappropriate.

Although Plaintiff has sought remand of this case based upon the alleged untimeliness of Defendants’ notice of removal, the Court, upon review, concludes that this action must be remanded for another reason: lack of subject matter jurisdiction. In Franchise Tax Bd. of State of Cal. v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983), the Supreme Court held that a suit filed in state court can be removed to federal court only if the suit could have been filed originally in federal court. “If it appears before final judgment that a case was not properly removed, because it was not within the original jurisdiction of the United States district courts, the district court must remand it to state court from which it was removed.” *Id.* at 8, 103 S.Ct. at 2815. This Court agrees with Defendants that Plaintiff did not allege a federal claim in her petition. Plaintiff specifically alleged that she brought the action pursuant to Title 25 O.S. § 1302A(1) and the common law of the State of Oklahoma. Although Defendants sought dismissal of Plaintiff’s wrongful discharge claim arguing that it was barred

under Marshall v. OK Rental Leasing, Inc., 939 P.2d 1116 (Okla. 1997) and List v. Anchor Paint Mfg. Co., 910 P.2d 1011 (Okla. 1996), because Title VII provided a full and adequate remedy, Defendants' defense does not result in the action being removable.¹ Schmeling v. NORDAM, 97 F.3d 1336, 1339 (10th Cir. 1996). The Court also recognizes that even where grounds for removal do not appear on the petition, removal may still be appropriate where the defendant receives "other paper" from which it may first be ascertained that the case is removal. 28 U.S.C. § 1446(b). However, the Court has reviewed Plaintiff's statement in her response brief, referenced by Defendants, and concludes that this statement does not affirmatively and unequivocally indicate that Plaintiff is alleging a Title VII claim against Defendants. Plaintiff's response brief only states that "[a]ssuming for a minute that Title VII is applicable." Plaintiff does not acknowledge that she is in fact asserting such a claim. While Defendants also rely upon Plaintiff's counsel statements at the July 7, 1997 hearing to further support the assertion of a Title VII claim, the Court notes that the transcript of those statements were not attached to the notice of removal. Removal jurisdiction is to be affirmatively established by the petition or the

¹Plaintiff also denied in her opposition brief to Defendant, Reasor's Inc. d/b/a Reasor's Foods Inc.'s Motion to Dismiss that she was asserting a claim under Title VII. Plaintiff specifically stated that she "is not pursuing remedies under the discrimination statutes but only uses those statutes for the establishing of public policy." Plaintiff's Brief in Opposition to Defendant Reasor's Inc.'s Motion to Dismiss, pg. 5.

notice of removal. Laughlin v. K-Mart Corp., 50 F.3d 871, 872 (10th Cir.), cert. denied, ___ U.S. ___, 116, S.Ct. 174, 133 L.Ed.2d 114 (1995).

Because it does not appear to the Court that Plaintiff has alleged a claim under Title VII against Defendants and such claim would be the only basis for this Court's exercise of removal jurisdiction,² the Court finds that this action must be remanded to the District Court for Creek County, Oklahoma.³

Accordingly, for the reasons stated above and pursuant to 28 U.S.C. § 1447(c), the Court hereby REMANDS the above-entitled action to the District Court of Creek County, Oklahoma. In light of the Court's ruling, Plaintiff's Motion to Remand (Docket Entry #3) is MOOT. The Clerk of the Court is directed to mail a certified copy of this order to the Clerk of the District Court of Creek County, Oklahoma.

ENTERED this 6th day of January, 1998.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

²The allegations of Plaintiff's petition reveal that the parties to this suit are not diverse in their citizenship and thus jurisdiction exists only if this suit raised a federal question, that is, one "arising under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331.

³The Court notes that Plaintiff has stated in her Motion to Remand and the Case Management Plan that she has a claim under Title VII against Defendants. However, removal jurisdiction must be affirmatively established on the petition or notice of removal. Laughlin, supra. Plaintiff's statements in her state court pleading does not, as stated, affirmatively establish that she is pursuing a Title VII claim.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

IN RE:)
)
FULLER, RICK E.,)
FULLER, MARY E.)
)
DEBTORS.)
)
UNITED STATES OF AMERICA,)
)
APPELLANT,)
)
vs.)
)
FULLER, RICK E. and MARY E.,)
)
APPELLEES.)

FILED
JAN 05 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CASE No. 97-CV-661-H (M)

ENTERED ON DOCKET
DATE 1-6-98

REPORT AND RECOMMENDATION

JURISDICTION

This is an appeal from the March 3, 1997, order of the United States Bankruptcy Court for the Northern District of Oklahoma granting Debtors' Amended Motion To Determine Tax Liability. Jurisdiction of the district court is established by 28 U.S.C. § 158. The matter is before the undersigned United States Magistrate Judge for report and recommendation.

BACKGROUND

The Bankruptcy Court was called upon to consider the validity of the IRS's Proof of Claim for taxes, interest and penalties for the debtors' 1993 and 1994 tax years. These assessments were made against the debtors following an audit because the debtors could not produce documentation to support the various deductions on

their returns. At the commencement of the hearing before the Bankruptcy Court, the parties presented the following stipulation:

MR. McWILLIAMS: Yes, Your Honor. In our discussions prior to now with the Internal Revenue Service I think we have agreed that the issue to be presented to the Court is not one of numbers or amounts but as to substantiating whether my client was at a specific place at a specific time away from his tax home doing business. The Service has agreed to stipulate that if we can prove that fact then they will accept the revenue procedures required the IRS as to per diem rates of meals and lodging and/or mileage to and from the specific place of the job site. Therefore, we are just trying to make the hearing shorter, Your Honor, as to presentation of evidence and I would at this time call my first witness, which would be Miss Cindy Hess, Certified Public Accountant.

THE COURT: You are telling me now, what was the question you all decided you want me to try?

MR. McWILLIAMS: The issue, Your Honor, is whether or not the debtor was away from his tax home, i.e. his home, doing business for the years 1993 and 1994.

THE COURT: All right.

[R. 38, p. 4-5].¹ Thus, by agreement, the parties narrowed the scope of the hearing to this single issue.

At the hearing, Debtor Rick E. Fuller testified to various expenses incurred that were disallowed as deductions on his 1993 and 1994 tax returns. He testified that

¹ Because this Court was concerned that the stipulation as set forth above may not have set forth the full agreement between the parties, the Court conducted a supplemental hearing in this appeal to determine if there were any further terms or conditions related to the stipulation. At that supplemental hearing, the Court was advised by counsel for both parties that there was no further agreement between the parties and that the Bankruptcy Court's handling of the matter, after presentation of the evidence, did not violate any agreement between the parties.

he traveled to various places, leased a vehicle, rented rooms, and had meals in the course of performing his welding business away from his tax home. Various documentary exhibits were introduced to corroborate this testimony. Debtor Mary E. Fuller testified that records of these expenses were maintained and utilized to prepare the tax returns in question. However, prior to the IRS audit some of the documents were destroyed by fire, others were in the Debtors' vehicle when it was repossessed. The IRS did not question either Mr. or Mrs. Fuller, present any evidence in support of its Proof of Claim, or request a continuance in order to marshal its evidence.²

Following the presentation of evidence, the Court stated:

The following, as to the matter submitted, is the finding of fact and conclusions of law in this matter. Again, I am here on an amended motion of the debtors to determine the tax liability. That the issues between the parties have been narrowed, and by agreement of the parties, the issue of whether or not he was away from his tax home during the years 1993 and 1994 has been conclusively shown that he was, in fact away from his tax home during the years 1993 and 1994, and that will be the finding of the Court. I don't know what that does to the issue of the motion to determine the tax liability. You had an agreement to the other matters. If you have anything else, let's go ahead and put it into the record, or I'll recess and let you put on the rest of the evidence. I don't know what the claims or what the situation is at all.

* * *

² No argument was presented before either the Bankruptcy Court, or on this appeal, that the evidence introduced by the Debtors, specifically Exhibit No 1, the audit report, would support the IRS's Proof of Claim. The Court, therefore, need not consider what, if any, evidentiary support Debtors' Exhibit No. 1 would provide for the IRS's Proof of Claim.

What I want to do is determine the tax liability, determine the amount of the claim, and the type of the claim.

[R. 38, p. 32-33].

After a short recess, counsel for the IRS made the following statement:

Judge, with the remaining issues I have a stipulation on the debtor's motion--

* * *

--which is evidently still up in the air. Without affecting any of my client's rights to appeal the Court's finding on the issue that was just tried before the Court, I would stipulate that if the Court made a finding that the debtor was, in fact, away from home, that the Court could then apply the regulations that were testified to during the trial: That the debtor would receive .28 cents per mile for 1993 and .29 cents per mile for 1994, as to mileage rates. And as to lodging and incidentals, the debtor would receive \$66.00 per day for 1993 and 1994, and those are the only items that the debtor would be able to use for deductions on the 1993 and 1994 returns as business expenses. That's my stipulation.

[R. 33-34].

The Court then explained that although a proof of claim constitutes prima facie evidence of the validity and the amount of the claim, once a debtor introduces evidence as to the invalidity of the claim or the excessiveness of the amount, the burden shifts to the claimant to prove their claim. The Court stated it was not the Court's duty to calculate the amount of the claim, but it was "up to the Internal Revenue Service to prove up their claim." [R. 38, p. 34]. Since the IRS produced no evidence with respect to its claim, the Bankruptcy Court "grante[ed] the relief prayed for in the motion to determine tax liability, and determine[d] that the expenses were

proper, and determine[d] that the tax liability for the tax years of '93 and '94 to be as they were originally filed, and to disallow the IRS claim as filed, except as allowed by virtue of the tax liability for '93 and '94." [R. 38, p. 35]. The Court asked for the amount of the '93 and '94 taxes and was informed that the tax returns showed that the debtors overpaid in those years. Based on that information, the Court ruled: "the claim of the amount owed is zero." [R. 38, p. 36].

Order of the Bankruptcy Court

In its March 3, 1997 order, the Bankruptcy Court found that the debtor was away from his tax home for business purposes during the tax years 1993 and 1994 and that the debtor had met the burden of proof to overcome the presumption of validity of the IRS's proof of claim. In the absence of any proof by the IRS to support its Proof of Claim, the Court granted Debtors' Amended Motion To Determine Tax Liability in accordance with the relief prayed for. The practical effect of this order was to deny the IRS's Proof of Claim for taxes, interest and penalties for the tax years 1993 and 1994, in the total amount of \$32,508.16.

Assignment of Errors

In Appellant's Brief before this Court, three arguments are presented. Arguments I and II may be disposed of summarily because the Bankruptcy Court did not make, or even address, the findings referenced in those arguments.

Argument I as framed by Appellant, IRS, states:

THE FINDING BY THE BANKRUPTCY COURT THAT THE DEBTORS ARE
ENTITLED TO DEDUCTIONS FOR INSURANCE, RENT, FOR RENTAL

EXPENSES, FOR ITEMIZED DEDUCTIONS, AND FOR STOCK SALE AND DISTRIBUTION IS ERRONEOUS.

Argument II as set forth by Appellant, IRS, states:

THE FINDING BY THE BANKRUPTCY COURT THAT THE DEBTORS ARE ENTITLED TO DEDUCTIONS FOR CAR-TRUCK EXPENSES, FOR CONTRACT LABOR, AND FOR TRAVEL-MEALS IS ERRONEOUS.

As will be discussed below, the Bankruptcy Court's order was predicated exclusively upon the allocation of the burden of proof at the hearing and the IRS's failure to produce any evidence in support of its position when it had the burden of proof. Nowhere does the Bankruptcy Court address whether the debtors were "entitled" to the deductions.

Appellant IRS's final argument before this Court is stated as follows:

THE FINDING BY THE BANKRUPTCY COURT THAT THE DEBTORS HAVE MET THE BURDEN OF PROOF TO OVERCOME THE PRESUMPTION OF VALIDITY OF THE IRS' PROOF OF CLAIM IS ERRONEOUS.³

STANDARD OF REVIEW

In an appeal from an order of the Bankruptcy Court, the District Court is bound by the findings of fact of the Bankruptcy Court unless they are clearly erroneous, while conclusions of law are reviewed by the District Court de novo. *In re Fullmer*, 962 F.2d 1463 (10th Cir. 1992). The determination of whether a party has satisfied its burden of proof is reviewed under the clearly erroneous standard. *In re Brown*, 82 F.3d 801, 803 (8th Cir. 1996).

³ It is important to note that the IRS does not take the position that the evidence before the Bankruptcy Court satisfied the IRS's burden of proof. Rather, its argument is that the debtors failed to meet their burden of proof to overcome the presumption of validity of the IRS's Proof of Claim.

DISCUSSION

A properly filed Proof of Claim is *prima facie* evidence of the validity and amount of the claim. 11 U.S.C. § 502(a); Bankruptcy Rule 3001(f). This evidentiary presumption remains in force even though an objection to the claim is filed. To overcome this *prima facie* evidence, the objecting party must bring forward evidence equal in probative force to that underlying the Proof of Claim. Only then is the ultimate burden of persuasion with the proponent of the Proof of Claim. *In re Fullmer*, 962 F.2d 1463, 1466 (10th Cir. 1992).

As stipulated by the parties, the only issue that the Bankruptcy Court was asked to try was "whether or not the debtor was away from his tax home, i.e. his home, doing business for the years 1993 and 1994." [R. 35, p. 5]. In uncontroverted and unquestioned testimony, both Mr. and Mrs. Fuller testified that Mr. Fuller was away from his tax home doing business and incurring business expenses during portions of the years 1993 and 1994. By virtue of the stipulation, the IRS agreed that if the debtors could prove the only fact issue presented to the Bankruptcy Court, then the debtors would be entitled to a deduction from their 1993 and 1994 taxes in the amount of per diem rates of meals, lodging and mileage. Since the IRS Proof of Claim was based in part on the disallowance of these deductions, debtors proof that Mr. Fuller was away from his tax home during tax years 1993 and 1994 also served to establish that the amount of the Proof of Claim was inaccurate.

Once the debtors established that the amount of the Proof of Claim was inaccurate, the Bankruptcy Court determined that the debtors had brought forth sufficient evidence to overcome the presumption and the burden shifted to the IRS to prove its claim. *In re Fullmer*, 962 F.2d at 1466. This finding is not clearly erroneous. When the IRS failed to offer any evidence in support of its Proof of Claim or assert that the evidence of record established its claim, the Bankruptcy Court had no alternative but to rule for the debtors.⁴

Admission of Exhibits

The IRS also asserts error in the admission of Debtors' Exhibits 4, 5 and 6. These exhibits consist of correspondence and records from businesses where the debtor incurred expenses while away from his tax home. While the Court agrees that the introduction of Debtors' Exhibits 4, 5 and 6 was erroneous because they were not properly authenticated hearsay records of third parties, Fed. R. Evid. 802, the error was harmless. Bankruptcy Rule 9005; Fed. R. Civ. P. 61. The exhibits merely tended to corroborate the uncontested and unquestioned testimony of Mr. and Mrs. Fuller. Had this testimony been challenged by cross-examination or other evidence, this error may have dictated a different result in this appeal.

CONCLUSION

The first two arguments presented by Appellant in support of reversal address issues which were not decided by the Bankruptcy Court and therefore provide no

⁴ The Court is aware that the result will be that all of the debtors' disallowed deductions are being treated as proper without specific proof of their validity. However, in light of the manner in which the IRS chose to proceed, no other result is appropriate.

basis to disturb the Bankruptcy Court's order. The third proposition asserted by Appellant concerning the sufficiency of the evidence fails to persuade the Court that the Bankruptcy Court committed clear error. The Court, therefore, RECOMMENDS that the order of the Bankruptcy Court granting Debtors' Amended Motion To Determine Tax Liability be AFFIRMED.

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

DATED this 5th day of January, 1998.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 6th Day of January, 1998.
C. Hestley, Deputy Clerk

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

F I L E D

JAN 5 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GEORGE L. GRAYSON,
an individual,

Plaintiff,

vs.

PHILLIP E. SNOW, an individual and in his
official capacity as a City of Tulsa police officer;
ROBERT S. JACKSON, an individual and in his
official capacity as a City of Tulsa police officer;
JOHN D. CAROLLA, an individual and in his
official capacity as a City of Tulsa police officer;
and CITY OF TULSA, a municipality,

Defendants.

No. 97-CV-769-C

ENTERED ON DOCKET

DATE JAN 06 1998

ORDER

Currently pending before the Court is a motion filed by defendant, City of Tulsa ("City"), seeking to dismiss for failure to state a claim, or in the alternative, summary judgment.

On August 22, 1997, plaintiff, George L. Grayson, filed a complaint against City alleging false imprisonment and intentional infliction of emotional distress invoking supplemental jurisdiction, pursuant to 28 U.S.C. § 1367. On September 29, 1997, City filed its motion to dismiss, or in the alternative, motion for summary judgment. For purposes of this Order, the Court will focus solely upon defendant's alternative motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

On August 23, 1996, officers of Tulsa's Police Department effectuated a warrantless arrest of plaintiff at his home. Plaintiff was accused of lewd molestation by three female minors; two of

these alleged victims completed sworn statements describing the alleged incident. Plaintiff was arrested shortly after these complaints were made. After being placed in custody, plaintiff contends that he was subjected to outrageous behavior.

In his complaint, plaintiff claims a violation of his Fourth and Fourteenth Amendment right to privacy as he was subjected to a warrantless arrest in his home. Additionally, plaintiff argues that the police lacked probable cause, and thus, his arrest constituted false imprisonment. Plaintiff further maintains that the arresting officers' actions and manner in which he was arrested caused him severe emotional distress. Defendant counters that probable cause existed, and therefore, the arrest was valid, thereby barring plaintiff's false imprisonment claim. Defendant further contends that, as a political subdivision of the State of Oklahoma, plaintiff's allegations of intentional infliction of emotional distress are barred by sovereign immunity.

The standard for granting summary judgment is rather strict. Rule 56(c) of the F.R.C.P. provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Furthermore, the "trial court has no real discretion in determining whether to grant summary judgment. . . . A moving party must establish his right to a summary judgment as a matter of law, and beyond a reasonable doubt." U.S. v. Gammache, 713 F.2d 588, 594 (10th Cir.1983). "Pleadings and documentary evidence are to be construed liberally in favor of a party opposing a Rule 56 motion." First Western Government Securities, Inc. v. U.S., 796 F.2d 356, 357 (10th Cir.1986). "However,

it is not enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative;' . . . the nonmovant must come forward with specific facts showing a genuine issue for trial." Frank v. U.S. West, Inc., 3 F.3d 1357, 1361 (10th Cir.1993).

At this point, the Court need not address the merits of defendant's motion as it appears that the Court lacks jurisdiction to entertain plaintiff's state tort claims. Grayson attempts to invoke supplemental jurisdiction which grants Federal Courts jurisdiction over "all other claims," in civil actions, where the court has original jurisdiction and the "other claims . . . are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution " 28 U.S.C. § 1367(a). That is, the Court must have original jurisdiction before it may exercise supplemental jurisdiction over plaintiff's state tort claims.

In the present case, plaintiff pleads a violation of his Fourth and Fourteenth Amendment right to privacy under section 1983 which would confer original jurisdiction on the Court. Plaintiff however fails to name City as a defendant in his section 1983 prayer for relief.¹ Consequently, the Court has no original jurisdiction upon which to base supplemental jurisdiction over plaintiff's state tort claims of false imprisonment and intentional infliction of emotional distress. Hence, the Court must grant summary judgement in favor of City of Tulsa and against Grayson. See, Panis v. Mission Hills Bank, N.A., 60 F.3d 1486, 1492 (10th Cir. 1995).

¹ Plaintiff filed suit against three City of Tulsa Police officers, as individuals and in their official capacity, and City of Tulsa. However, in his section 1983 "Prayer for Relief," plaintiff "prays for judgment in his favor against defendants; Snow, Jackson and Carolla for violation of [his] Civil Rights pursuant to 42 U.S.C. § 1983. (Grayson's Complaint, p. 6).

Accordingly, City of Tulsa's motion for summary judgement, pursuant to Rule 56 of the Federal Rules of Civil Procedure, is hereby GRANTED.

IT IS SO ORDERED this 5th day of January, 1998.

A handwritten signature in black ink, appearing to read "H. Dale Cook", written over a horizontal line.

H. Dale Cook
Senior U.S. District Judge

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

FILED

JAN - 5 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THRIFTY RENT-A-CAR SYSTEM, INC.,)
an Oklahoma corporation,)
)
Plaintiff,)

vs.)

LEE HAMPTON, INC., a foreign corporation;)
KENNETH L. KARSTEN, an individual;)
and JOHN H. HOULT, an individual,)

Defendants.)

Case No. 91-C-839-E

ENTERED ON DOCKET

DATE JAN 06 1998

DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Thrifty Rent-A-Car System, Inc., and hereby dismisses its
claims against the Defendants with prejudice.

Respectfully submitted,

CONNER & WINTERS

By: Mark E Dreyer
Mark E. Dreyer, OBA #14998
3700 First Place Tower
15 East 5th Street, Suite 3700
Tulsa, OK 74103-4344
(918) 586-5711

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on the 5 day of January, 1998, a true and correct copy of the foregoing was placed in the United States mail, postage prepaid, addressed as follows:

Randall T. Duncan, Esq.
DOYLE & HARRIS
2431 East 61st Street, Suite 260
Tulsa, OK 74136



H:\WP51\TRAC\Hampton - Dismissal With Prejudice.wpd

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

F I L E D

JAN 5 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES M. AUSTIN, d/b/a)
MIKE AUSTIN,)

Plaintiff,)

vs.)

Case No. 96-CV-985-C

STATE FARM MUTUAL AUTOMOBILE)
INSURANCE CO., STATE FARM LIFE)
INSURANCE CO., STATE FARM FIRE)
AND CASUALTY CO., and STATE FARM)
GENERAL INSURANCE CO.,)

Defendants.)

ENTERED ON DOCKET
DATE JAN 06 1998

JUDGMENT

This matter came before the Court on defendants' motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the order filed simultaneously herein,

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, that judgment is rendered in favor of the defendants State Farm Companies, and against the plaintiff, James M. Austin, d/b/a/ Mike Austin on plaintiff's claims for breach of contract, wrongful discharge, breach of a duty of good faith and fair dealings, constructive fraud, and prima facie tort.

IT IS SO ORDERED this 5th day of January, 1998.



H. DALE COOK
Senior, United States District Judge

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

F I L E D

JAN 5 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES M. AUSTIN, d/b/a)

MIKE AUSTIN,)

Plaintiff,)

vs.)

Case No. 96-CV-985-C

STATE FARM MUTUAL AUTOMOBILE)
INSURANCE CO., STATE FARM LIFE)
INSURANCE CO., STATE FARM FIRE)
AND CASUALTY CO., and STATE)
FARM GENERAL INSURANCE CO.,)

Defendants.)

ENTERED ON DOCKET

DATE JAN 06 1998

ORDER

Before the Court is the motion for summary judgment filed by the defendants pursuant to Rule 56 F.R.Cv.P. Defendants contend that there exists no genuine issue of material fact and that they are entitled to summary judgment as a matter of law.

The following material facts are undisputed and established by the record herein:

1. Since 1977, plaintiff was a licensed independent agent of State Farm under a written Agent's Agreement.
2. Plaintiff signed the "Agent's Acceptance of Agreement" in 1977.
3. The Agent's Agreement is the exclusive agreement between plaintiff and State Farm, and any modification required a written agreement. The agreement provides: "This Agreement constitutes the sole and entire Agreement between the parties hereto, and no change, alteration, or modification of the terms of this Agreement may be made except by agreement in writing signed

by an authorized representative of the Companies and accepted by you." Agent Agreement, Section VI-General Provision E.

4. Under the terms either party retained the right to terminate the Agent's Agreement at will. The agreement provides: "You or State Farm have the right to terminate this Agreement by written notice delivered to the other or mailed to the other's last known address." Agent Agreement, Section III-Termination of Agreement A.

5. The Agent's Agreement provides that plaintiff was an independent contractor, rather than an employee of State Farm. The agreement provides: "You are an independent contractor for all purposes. As such you have full control of your daily activities, with the right to exercise independent judgment as to time, place, and manner of soliciting insurance, servicing policyholders, and otherwise carrying out the provisions of this Agreement." Agent Agreement, Section 1-Mutual Conditions and Duties B.

6. State Farm reserved the right to set the rules governing the acceptance, renewal or rejection of risks and payment of losses. The agreement provides: "We retain the right to prescribe all policy forms and provisions, premiums, fees, and charges for insurance; and rules governing the binding, acceptance, renewal, rejection, or cancellation of risks, and adjustment and payment of losses." Agent's Agreement, Section 1-Mutual Conditions and Duties L.

7. The obligations, responsibilities and duties under the Agent's Agreement were personal to the agent and could not be assigned or pledged to another. The agreement provides: "Since each party is relying upon the other or others to carry out the provisions of this Agreement, neither the Agreement nor any interest thereunder can be sold, assigned, or pledged . . . without

the prior written consent of the Companies." Agent's Agreement, Section VI-General Provision A.

8. In May 1992, after a meeting with State Farm's managers, plaintiff agreed to participate in a "Management For Quality Plan" (MFQ Plan). The MFQ Plan was designed to increase the company's profits and to minimize the payment on losses.

9. By letter dated August 13, 1993, State Farm advised plaintiff that his agency's losses were "so great" that State Farm managers wanted to get involved to help get plaintiff's "agency under control."

10. In April 1993, pursuant to the MFQ Plan State Farm advised plaintiff that he must submit all new and reinstated auto and fire applications to the company on a non-binding basis.

11. Plaintiff objected to State Farm placing his agency on "non-bind" status. Plaintiff then refused to sign State Farm's proposed written acceptance of the "MFQ Plan".

12. State Farm notified plaintiff that between June 1, 1993 and October 1, 1993, he submitted 96 insurance applications in violation of its "non-bind" submission requirement.

13. On October 13, 1993, Jerry McAhren, State Farm's Regional Vice President, sent plaintiff a letter which stated: "Mike, your continued refusal to accept the total Managing For Quality Action Plan is a serious violation of our relationship. I am personally requesting your assistance, cooperation, and leadership as we move forward."

14. On April 25, 1996, plaintiff agreed to comply with the terms of State Farm's revised "Managing For Quality High Priority Program Auto Plan of Action", (HPP) by signing the agreement submitted to him by State Farm. The terms of the agreement are as follows:

Core Requirements:

1. Agent submits all auto business through an underwriter assigned by the High Priority Program Task Force.
2. All new and reinstated applications must be personally produced.
3. Staff cannot bind coverage on raw new business.
4. Personal inspection and photos of all risks must be submitted with application.
5. Agent and Agency field Office to reunderwrite a risk after two or more claims have been submitted by the policyholder within 36 months.
6. Specific Regional office program to reunderwrite the agent's book.

Additional Requirements:

1. Photos and verification of ownership are required for all new, reinstated and added car applications. Ownership verification may include any one of the following: Copy of Title, Bill of Sale, Application for Title, or Registration.
2. No split households.

15. Plaintiff was advised by State Farm that between July 1996, and September 1996, on 31 occasions, plaintiff violated the provisions of his written agreement to comply with the HPP.

16. In a letter dated August 8, 1996, addressed to Katherine Preisler, Vice President-Agency with State Farm, plaintiff states: "Also you discussed your requirement that I 'personally' produce all raw, and new auto business. Again it is not a matter of not wanting to submit or comply. I personally feel some of the company programs that I have been placed on are discriminatory and prejudicial at best. Some even violate state law. Again I am just an Agent, but these are my honest feelings and concerns."

17. In a letter dated August 8, 1996, one of State Farm's managers advised plaintiff that any future failure to comply with the requirements of the HPP would result in a recommendation State Farm's upper management that plaintiff's association with State Farm be terminated.

18. On August 12, 1996, State Farm advised plaintiff that his authority to bind raw, new and reinstated auto insurance with State Farm was suspended and that the action was based on his failure to cooperate with the requirements of the HPP, specifically that the agent will personally produce raw, new and reinstated auto insurance.

19. At a meeting on September 26, 1996, Plaintiff advised State Farm that he would not comply with the terms of the HPP because the provision prohibiting "no split households" was illegal. State Farm advised plaintiff that he was being terminated for failure to comply with the non-bind provisions and the provision that he "personally produce new auto business." State Farm advised that the provision regarding "no split households" was not a factor considered in his termination.

20. Plaintiff was allowed to select two of State Farm's "Lifetime Member of the President's Club" as two of the four members of a committee assembled to review his termination.

The committee entered two Findings of Fact:

1. Mike Austin agreed to comply with the High Priority Program and has repeatedly failed to comply by failing to personally produce and personally inspect raw new auto business, and allowing his staff to bind raw new auto business.
2. Numerous attempts to bring agent to compliance failed to achieve a change in his behavior.

21. State Farm terminated its Agent's Agreement with the plaintiff on September 26, 1996, effective October 26, 1996.

The Court finds and concludes as follows:

1. Under the Agent's Agreement, State Farm reserved the right to prescribe the rules governing the "binding, acceptance, renewal, rejection, or cancellation of risks and adjustments

and payment of losses." As such, State Farm's implementation of the "Managing For Quality" Plan does not violate the terms of the Agent's Agreement as an independent contractor. Contrary to plaintiff's contention the MFQ Plan does not violate his right to independent judgment as to the time, place and manner of soliciting insurance because State Farm specifically reserved the right to regulate the profit and losses faced by its company.

2. Plaintiff admits that he failed to comply with the provisions of the HPP and contends that he did not have to comply because the HPP caused his agency to be less profitable to him. State Farm argues that it implemented the HPP to increase company's profits on those agencies which were causing the company to suffer heavy losses. This disputed fact is irrelevant to the determination of defendants' motion for summary judgment. Under the Agent's Agreement, State Farm reserved the right to modify the Agent's Agreement if the modification was signed by an authorized representative of the company and accepted by the agent. Plaintiff signed the HPP indicating his willingness to be bound by its terms. It is not for this Court to determine whether plaintiff's agreement to comply with the terms of the HPP or his failure to comply with its terms caused plaintiff's agency to be unprofitable. Neither is it relevant whether State Farm accurately determined whether plaintiff's agency was more or less profitable than other State Farm Agencies. Because State Farm reserved the right to govern the rules on how the plaintiff personally could "bind policies," State Farm did not breach the terms of its agreements with plaintiff in terminating him for knowingly failing to comply with the HPP. The HPP specifically related to governing the *binding* of policies.

3. Plaintiff contends that he refused to comply with the HPP because it contained a "no split household" provision which is allegedly illegal under Oklahoma's insurance code. Plaintiff

also contends that he was terminated for his failure to comply with this illegal provision. However, there is no indication in the record that plaintiff attempted to submit split household applications to State Farm or that State Farm terminated plaintiff for that reason. State Farm furnished the sworn testimony of one of its managers who attests that State Farm only limited agents from submitting *non-binding* split household applications and that such a limitation does not constitute a violation of the state insurance code. Plaintiff offers no evidence to the contrary to refute defendant's sworn testimony. There is no evidence offered that plaintiff was discharged for his failure to comply with the no split household provision, nor has plaintiff offered any legal authority to show that submitting split household applications on a non-binding basis is a violation of the state insurance code. Accordingly the Court concludes that plaintiff has offered no evidence in support of his claim that he was terminated in violation of public policy.

4. Plaintiff argues that the HPP is unenforceable because it discriminates against certain agents, causes prejudice to their business and interferes with competition with other insurance agencies. However, defendants offer affidavit testimony of Katherine Preisler, one of State Farm's Regional Vice Presidents in which she attests that other State Farm agents with "comparable books of auto business and comparable income" as the plaintiff were placed on the HPP, and that these other agencies have complied with the terms of the Plan. Plaintiff offers no evidence to refute this evidence.

5. Plaintiff argues that the defendants unlawfully terminated his employment in order to save the cost of its contractual obligations to him and replace him with a "cheaper agent." Plaintiff offers no evidence to show that State Farm saved costs by terminating him. Once terminated, State Farm has a contractual obligation to make termination payments to plaintiff and commissions

to a replacement agent. Plaintiff admits this fact. Under the terms of the Agent's Agreement, State Farm is not obligated to make termination payments until such time as the agent has returned all State Farm's property. Plaintiff admits that State Farm commenced making termination payment to him of approximately \$7,000 per month. Plaintiff does not dispute that State Farm discontinued the termination payments when plaintiff refused to return property belonging to State Farm.

6. Finally, plaintiff contends that State Farm terminated him because he refused to sign a modified Agent's Agreement which would have resulted in him receiving lesser commissions on *future* policies. Plaintiff was terminated at-will under the Agent's Agreement that was in force. Under the terms of the Agent's Agreement, neither party could modify the terms of the agreement without their mutual written consent. It is neither a violation of the Agent's Agreement in force at the time, nor a violation of Oklahoma law for State Farm to attempt to reduce agent's commissions on future sales. Under Hall v. Farmer's Ins. Exchange, 713 P.2d 1027 (Okla.1985), it is only a violation of public policy if the company attempts to deprive its agents of commissions already earned at the time of termination.

In this action, plaintiff has asserts claims for breach of contract, wrongful termination, breach of a duty of good faith and fair dealings, breach of fiduciary duty, constructive fraud and prima facie tort. By the terms of the Pretrial Order filed herein, plaintiff has abandoned his claim for constructive fraud. Regarding the remainder of plaintiff's claims, the Agent's Agreement and the HPP executed by plaintiff control the rights and obligations of the parties. The terms of a parties' contract, if unambiguous, clear and consistent, are accepted in their plain and ordinary sense and the contract will be enforced to carry out the intention of the parties. Dodson v. St.

Paul Insurance Co., 812 P.2d 372 (Okla.1991). "Ordinarily, there would be no liability for termination of a general agency contract pursuant to such a provision, regardless of the motive."

Baker v. Penn Mutual Life Ins., 788 F.2d 650, 656 (10th Cir.1986).

The Court finds and concludes that State Farm terminated plaintiff pursuant to the terms of the Agent's Agreement and that plaintiff has failed to provide this Court with any evidence sufficient to support a claim that his termination was in bad faith, unlawful or in violation of public policy. Accordingly, defendant's motion for summary judgment is hereby granted.

IT IS THEREFORE ORDERED that the motion for summary judgment filed by the defendants is hereby GRANTED. This order renders all other outstanding motions moot. The Clerk of the Court is directed to strike any hearings previously set in this case.

IT IS SO ORDERED this 5th day of January, 1998.



H. DALE COOK
Senior U.S. District Judge

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

FILED

JAN - 5 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RUFORD HENDERSON, *et al.*,)
)
Plaintiffs,)
)
vs.)
)
AMR CORPORATION, AMERICAN)
AIRLINES, INC. and THE SABRE)
GROUP, INC.,)
)
Defendants.)

Case No. 97-CV-457-K(W) ✓

ENTERED ON DOCKET
DATE JAN 06 1998

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Marsha Johnson, and Defendants, AMR Corporation, American Airlines, Inc. and The SABRE Group, Inc., pursuant to Rule 41(a)(I) of the Federal Rules of Civil Procedure stipulate to the dismissal of this action, with prejudice, each party to bear their respective attorney's fees and costs.

MARSHA JOHNSON
PLAINTIFF, *PRO SE*



DAVID R. CORDELL, OBA #11272
JOHN A. BUGG, OBA #13665

By: 

OF COUNSEL:

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Attorneys for Defendants
AMR CORPORATION, AMERICAN AIRLINES,
INC. and THE SABRE GROUP, INC.

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

F I L E D

JANET E. SNEAD,)
)
Plaintiff,)
)
v.)
)
JOHN J. CALLAHAN, Acting)
Commissioner, Social Security)
Administration,)
)
Defendant.)

NO. 95-CV-645-M

DEC 31 1997
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE JAN 01 1998

ORDER

This case is hereby reversed and remanded in accordance with the 10th
Circuit Court of Appeals' ORDER AND JUDGMENT dated October 31, 1997 and filed in
this Court on December 30, 1997.

SO ORDERED this 31st day of December, 1997.


FRANK H. MCCARTHY
UNITED STATES MAGISTRATE JUDGE

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

DEC 31 1997

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEAN KNIGHT,

Plaintiff,

v.

Case No. 97-CV-816K(J)

NORTH AMERICAN VAN LINES, INC.,
and A-1 FREEMAN NORTH AMERICAN,

Defendant.

ENTERED ON DOCKET

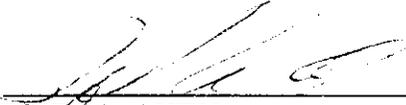
DATE JAN 01 1998

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Fed. R. Civ. P. 41, the parties hereto, through their counsel of record, agree and stipulate that all claims and counterclaims in the above-captioned matter are hereby dismissed with prejudice.



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