

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JAN 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
KAREN ALEXANDER MOORE,)
)
Defendant.)

Civil Action No. 97CV833BU(W)

ENTERED ON DOCKET

DATE 1-30-98

DEFAULT JUDGMENT

This matter comes on for consideration this 28 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, Karen Alexander Moore, appearing not.

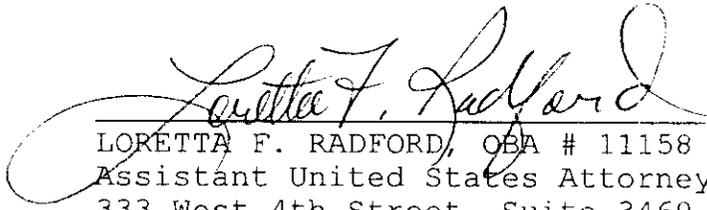
The Court being fully advised and having examined the court file finds that Defendant, Karen Alexander Moore, was served with Summons and Complaint on December 3, 1997. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. 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, Karen

Alexander Moore, for the principal amount of \$994.00, plus accrued interest of \$471.80, plus administrative charges in the amount of \$87.00, plus interest thereafter at the rate of 3 percent 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/11f

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

HAEMONETICS CORPORATION,

Plaintiff,

v.

AMERICAN NATIONAL RED CROSS
and SOUTHWEST REGION AMERICAN
RED CROSS,

Defendant.

ENTERED ON DOCKET

DATE 1-30-98

Case No. 96-CV-879-H /

FILED
JAN 29 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The parties in this matter have been ordered to arbitration and further proceedings have been stayed. It is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

The parties are ordered to notify the Court within thirty days of a final adjudication of the arbitration proceedings, as to whether this matter should be reopened or dismissed with prejudice. If the parties have not by appropriate motion reopened this matter at the conclusion of that thirty day period, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 28TH day of January, 1998.


Sven Erik Holmes
United States District Judge

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

FILED
JAN 29 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

HERMAN EUGENE MACK,)
)
 Plaintiff.)
)
 vs.)
)
 PETE SILVA; CHAD SMITH;)
 CHRISTINE FORD,)
)
 Defendants.)

No. 97-CV-1110-BU (J)

ENTERED ON DOCKET
DATE 1-30-98

ORDER

Plaintiff, a state inmate appearing pro se, filed a complaint pursuant to 42 U.S.C. § 1983 and was granted leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(b)(2) on January 8, 1998. Plaintiff has now paid the initial partial filing fee of \$2.01 to commence this action and his custodial agency has been directed to collect payment of the filing fee.

Plaintiff states that he was arraigned on charges of "larceny of merchandise from retailer after former conviction of a felony and 3 misdemeanor offenses" on or about January 8, 1997, in Tulsa County District Court. Plaintiff alleges that Defendants, each of whom is employed as a public defender, breached their professional responsibility to Plaintiff by failing or refusing to protect the "interests of the criminal indigent client." (#1, at 2).¹ Plaintiff alleges he has exhausted available administrative remedies by submitting grievances to the Oklahoma Bar Association and to the district court judge. (#1, at 8). Therefore Plaintiff requests "punitive damage from defendants . . . breach of contracts as plaintiff contract attorneys, amount of \$150,000 dollars each, request jury trial and appointment of an attorney for plaintiff, in violation of his civil rights." (#1, at 9).

¹References are to numbered documents filed of record in this case as reflected on the docket sheet.

ANALYSIS

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, and that defendant acted under color of law. 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. Screening under The Prison Litigation Reform Act.

Recently a new section was added to the in forma pauperis statute by The Prison Litigation Reform Act of 1996 (the Act), Pub.L. No. 104-134, § 805, 110 Stat. 1321 (April 26, 1996), entitled "Screening." See 28 U.S.C. § 1915A. That section requires the Court to review a complaint brought by a prisoner seeking redress from a governmental entity or officer to determine if the complaint is frivolous, malicious, or fails to state a claim upon which relief may be granted. In addition, the Act provides that a district court may dismiss an action filed in forma pauperis "at any time" if the court determines that the action is frivolous, malicious, or fails to state a claim on which relief may be granted. See 28 U.S.C. § 1915(e)(2)(B).

"The term 'frivolous' refers to 'the inarguable legal conclusion' and 'the fanciful factual allegation.'" Hall v. Bellmon, 935 F.2d 1106, 1108 (10th Cir. 1991) (quoting Neitzke v. Williams, 490 U.S. 319, 325, 327 (1989)). If a plaintiff states an arguable claim for relief, even if not ultimately correct, dismissal for frivolousness is improper. Id. at 1109. Inarguable legal conclusions include those against defendants undeniably immune from suit or those alleging infringement of a legal interest which clearly does not exist. Id. A plausible factual allegation which lacks evidentiary support, even though it may not ultimately survive a motion for summary judgment, is not frivolous within the meaning of section 1915(e)(2)(B). Id.

B. Plaintiff's § 1983 claim lacks an arguable basis in law.

After liberally construing Plaintiff's pro se pleading, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's claims lack an arguable basis in law. Plaintiff cannot establish federal jurisdiction under 42 U.S.C. § 1983 to litigate this action against the named Defendants who provided legal representation to Plaintiff in their capacity as public defenders. "The conduct of counsel, either retained or appointed, in representing clients, does not constitute action under color of state law for purposes of a section 1983 violation." Bilal v. Kaplan, 904 F.2d 14, 15 (8th Cir. 1990) (per curiam); see also Tower v. Glover, 467 U.S. 914, 920 (1984) (citing Polk County v. Dodson, 454 U.S. 312, 325 (1981)) (public defender does not act under color of state law when representing an indigent defendant in a state criminal proceeding). Therefore, the Court finds that Plaintiff's § 1983 action should be dismissed as frivolous under section 1915(e). The Court further finds that because Plaintiff was allowed to proceed in forma pauperis, this dismissal should count as a "strike" as mandated by 28 U.S.C. § 1915(g).

CONCLUSION

Plaintiff's § 1983 complaint, alleging that Defendants, his appointed counsel, breached their professional responsibility to him by failing or refusing to protect his interests, lacks an arguable basis in law and should be dismissed as frivolous pursuant to 28 U.S.C. § 1915(e).

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's civil rights complaint pursuant to § 1983 is **dismissed** as frivolous.
2. The Clerk is directed to **return** the copies of the complaint, summons and USM-285 Marshal forms to Plaintiff and to "**flag**" this as a dismissal pursuant to 28 U.S.C. § 1915(e) for purposes of counting "prior occasions" under 28 U.S.C. § 1915(g).
3. Any and all pending motions are **denied as moot**.

SO ORDERED THIS 29th day of January, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (1996), instituted a "gatekeeping" procedure for second or successive habeas petitions. Pursuant to 28 U.S.C. § 2244(b)(3)(A), as amended by the AEDPA, a petitioner must first seek authorization from the appropriate Court of Appeals before filing a second or successive habeas petition in the District Court. When a petitioner fails to comply with this requirement, the District Court should transfer the habeas petition to the Court of Appeals in the interest of justice pursuant to 28 U.S.C. § 1631. Coleman v. United States, 106 F.3d 339 (10th Cir. 1997).

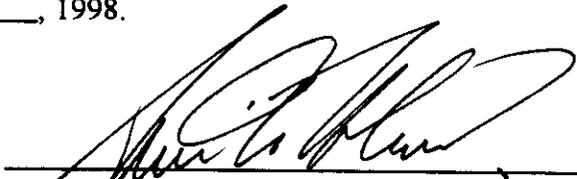
In this case, Petitioner has failed to seek authorization from the Court of Appeals before filing his petition for writ of habeas corpus in this Court. See 28 U.S.C. § 2244(b)(3)(A). Therefore, in the interest of justice and pursuant to 28 U.S.C. §§ 1631 and 2244(b)(3)(A), the Court finds that Petitioner's petition for a writ of habeas corpus should be transferred to the Tenth Circuit Court of Appeals for authorization.

ACCORDINGLY, IT IS HEREBY ORDERED that

1. Petitioner's motion for leave to proceed in forma pauperis (Docket #2) is **granted**.
2. Petitioner's application for a writ of habeas corpus is **transferred** to the Tenth Circuit Court of Appeals for authorization.

IT IS SO ORDERED.

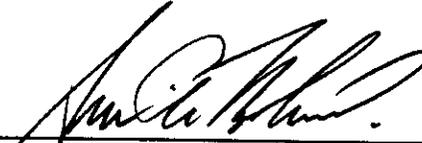
This 28TH day of JANUARY, 1998.


Sven Erik Holmes
United States District Judge

Upon review of the record, the Court finds that Plaintiff has not paid the initial partial filing fee or shown cause in writing for his failure to do so as directed. Accordingly, Plaintiff's complaint is hereby **dismissed without prejudice** for failure to pay the filing fee. See Local Rule 5.1(F).

IT IS SO ORDERED.

This 28TH day of JANUARY, 1998.



Sven Erik Holmes
United States District Judge

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

FILED

JAN 30 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TOMMY GARRISON,

Plaintiff,

v.

BAKER HUGHES OILFIELD
OPERATIONS, INC., d/b/a
CENTRILIFT,

Defendant.

Case No. 97-CV-82-H

ENTERED ON DOCKET

DATE 1-30-98

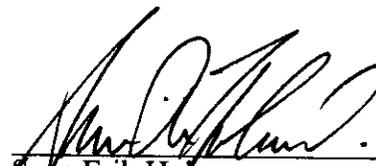
JUDGMENT

This matter came before the Court for a trial by jury on January 26-27, 1998. On January 27, 1998, the jury returned its verdict finding Defendant Baker Hughes Oil Operations, Inc., d/b/a Centrillift not liable on Plaintiff Tommy Garrison's two claimed violations of the Americans with Disabilities Act.

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

IT IS SO ORDERED.

This 28TH day of January, 1998.



Sven Erik Holmes
United States District Judge

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September, 1970 at Defendant's Tulsa, Oklahoma location. Plaintiff eventually became Chief of Maintenance at the Tulsa location. In approximately 1979, Plaintiff began to act as a copilot as well as chief of maintenance. He retained the title "Co-Pilot/Chief of Maintenance" throughout the remainder of his service with Defendant.

During most of the time Plaintiff was employed by Defendant, Defendant's air fleet consisted of two jets: a Cessna Citation I and a Cessna Citation III. However, early in 1995, in an effort to raise cash when business had slowed, Defendant decided to sell the Citation I. The plane was sold for \$1,000,000 on February 23, 1995. Concurrent with the sale of the plane, Defendant determined to reduce its pilot staff. Chief Pilot Doty and Vice President of Administration Chuck Ammann decided to terminate Plaintiff and Mr. Hilton from their duties. Defendant, pursuant to an internal policy, requires that its pilots have 5000 hours of air time to fly its Citation III. Neither Mr. Hilton nor Plaintiff possessed this many hours of flight time while Mr. Masterson and Mr. Doty did. Plaintiff also was not certified by the Federal Aviation Administration ("FAA") to fly the Citation III as pilot-in-command, as were Mr. Hilton, Mr. Masterson, and Mr. Doty. Further, Plaintiff did not have an Airline Transport Pilot ("ATP") rating, which both Mr. Masterson and Mr. Doty had. In short, neither Mr. Hilton nor Plaintiff were capable of flying Defendant's remaining plane as pilot-in-command. Both Plaintiff and Mr. Hilton were terminated on or about March 7, 1995.

Prior to his termination, Plaintiff, although retaining the title of Chief of Maintenance, spent only a small percentage of his time doing mechanic-related tasks -- ten percent by Plaintiff's account and five percent by Defendant's. Joel Hawksworth (approximately 44 years old), an outside contractor who Defendant had engaged to repair its planes, was hired as a regular, full-time employee in June 1994. Thereafter, Mr. Hawksworth performed most of Defendant's repair work.

On March 1, 1997, approximately two years after Plaintiff was discharged, Defendant hired Todd Barnes as a pilot. Defendant claims that at that time its business had increased and Defendant's aviation department experienced an increased demand for the transportation of its employees. Defendant determined that it needed an additional pilot and hired Mr. Barnes. Defendant sent Mr. Barnes to Dallas for training shortly after he was hired to become FAA-certified to fly the Citation III.

II

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

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

477 U.S. at 322.

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

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

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

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

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

III

In the absence of direct evidence, a plaintiff claiming age discrimination should proceed in accordance with the rules announced in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). To set forth a prima facie case, Plaintiff must establish that: (1) he was within the protected age group; (2) he was doing satisfactory work; (3) he was discharged despite the adequacy of his work; and (4) his position was filled by a younger person. Denison v. Swaco Geolograph Co., 941 F.2d 1416, 1420 (10th Cir. 1991). These required elements of a prima facie case have been modified to address claims where a plaintiff was fired, but no replacement was hired. In such "reduction-in-force" cases, a plaintiff sets forth a prima facie case when he establishes the first three elements outlined above and "produc[es] evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to

discriminate in reaching the decision at issue." Ingels v. Thiokol Corp., 42 F.3d 616, 621 (10th Cir. 1994) (quoting Branson v. Price River Coal Co., 853 F.2d 768, 771 (10th Cir.1988)).

Once a plaintiff establishes the elements of a prima facie case, the employer bears the burden of production to show a legitimate, nondiscriminatory reason for the challenged action. Denison, 941 F.2d at 1422. If the employer articulates such a reason, the burden shifts back to the plaintiff to demonstrate that the employer's proffered justification was pretextual and that the age of the employee was a determining factor in the employer's decision. Id.

In the instant case, there is no question that Plaintiff has established the first three elements of a prima facie case. Plaintiff was sixty-two years of age when Defendant terminated his employment. He has presented evidence that he was performing satisfactory work, which Defendant does not contest. Despite his performance, Plaintiff was terminated on or about March 7, 1995.

With respect to the fourth element, Plaintiff presents three different arguments. In his charge to the EEOC, Plaintiff contended he was "replaced" at work by mechanic Joel Hawksworth and pilot Dave Masterson. However, in his response to Defendant's motion for summary judgment, Plaintiff claims that Defendant hired pilot Todd Barnes to replace him. Although the Court is concerned that Plaintiff has changed course nearly two and one-half years after his initial charge to the EEOC, for purposes of the instant motion, the Court will consider Defendant's substantive request for relief and Plaintiff's response to that request. Accordingly, the facts will be analyzed seriatim with respect to replacement by each of Mr. Hawksworth, Mr. Masterson, and Mr. Barnes.¹

¹ Dave Masterson has been employed by Defendant as Pilot-in-Command since October, 1989. Accordingly, Plaintiff may not proceed under the traditional prima facie scheme with respect to Mr. Masterson because there is no evidence that Mr. Masterson replaced Plaintiff. In his focus on Mr. Barnes, it appears that Plaintiff has abandoned his claim as to Mr. Masterson. However, to the extent that Plaintiff contends Defendant discriminated against him by the fact that Mr. Masterson was treated more favorably as a younger employee, the Court will analyze Plaintiff's claim in accordance with the "reduction-in-force" paradigm.

A

To the extent Plaintiff's claims involve Mr. Hawksworth, Plaintiff alleges the fourth element of the prima facie case is met because Mr. Hawksworth replaced him as Chief of Maintenance.² As an initial matter, the parties dispute whether Mr. Hawksworth "replaced" Plaintiff as chief of maintenance. Even if he did not, Plaintiff's allegations amount to a contention that Plaintiff was treated less favorably than a younger employee since the younger employee, Mr. Hawksworth, was retained when Plaintiff was not.

For purposes of this motion, the Court is satisfied that Plaintiff has met his prima facie case with respect to the fourth element -- that a younger employee was treated more favorably in a reduction-in-force situation -- by the fact that Mr. Hawksworth was retained when he was not. Branson v. Price River Coal Co., 853 F.2d 768, 771 (10th Cir. 1988) (finding the fact that employer fired older employees while retaining younger ones sufficient to create a rebuttable presumption of discriminatory intent).

Accordingly, the burden shifts to Defendant to articulate a legitimate, nondiscriminatory reason for its decision to discharge Plaintiff. McDonnell Douglas Corp., 411 U.S. at 802. "The [defendant] need not persuade the court that it was actually motivated by the proffered reasons, but satisfies its burden merely by raising a genuine issue of fact as to whether it discriminated against the plaintiff." Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1425 (10th Cir. 1993) (internal quotations omitted). Defendant claims that it made an economic business decision to sell one of its two planes which made it necessary to reduce its number of pilots. Plaintiff, although

² The record indicates Mr. Hawksworth's title did not change to Chief of Maintenance after Plaintiff was laid off. However, in his deposition, Mr. Doty referred to Mr. Hawksworth as Chief of Maintenance. Mr. Doty later corrected himself and clarified that Mr. Hawksworth's current title is "mechanic." Def. Br. Exh. C at 36. Mr. Hawksworth, in his deposition, reported that he has received no promotions or salary increases while employed by Defendant. Def. Br. Exh. H at 9-10.

responsible in title for Defendant's mechanic work, in fact, did not perform much of the work. Rather, Plaintiff admits that most of that work was performed by Mr. Hawksworth and, at the time of his termination, Plaintiff functioned in fact as a co-pilot for Defendant. Defendant asserts that it did not retain Plaintiff as a mechanic because Plaintiff was in fact not a mechanic at the time; Defendant already had a mechanic and did not require another. Defendant further asserts that it made a business decision to terminate Plaintiff's employment as a co-pilot because he was not capable of flying Defendant's one remaining aircraft as a pilot-in-command. The Court finds that this satisfies Defendant's burden to articulate a legitimate, nondiscriminatory cause to discharge Plaintiff.

Once Defendant meets its burden of production by offering a legitimate rationale in support of its employment decision, the burden shifts back to Plaintiff to show that Defendant's proffered reasons were a pretext for discrimination. McDonnell Douglas, 411 U.S. at 804-05. A plaintiff can carry his burden by "showing either that a discriminatory reasons more likely motivated the employer or . . . that the employer's proffered explanation is unworthy of credence." Tomsic v. State Farm Mutual Auto. Ins. Co., 85 F.3d 1472, 1478 (10th Cir. 1996) (quoting Cone v. Longmont United Hosp. Ass'n., 14 F.3d 526, 530 (10th Cir. 1994)) (internal quotations omitted). In his attempt to discredit Defendant's articulated nondiscriminatory reason for his discharge, Plaintiff claims he was more qualified than Mr. Hawksworth as a mechanic. Evidence that an employee is as qualified as another employee treated more favorably does not raise a factual issue as to pretext. Rea v. Martin Marietta Corp., 29 F.3d 1450, 1457-58 (10th Cir. 1994). However, evidence that an employee is more qualified may cast suspicion upon an employer's articulated nondiscriminatory reason. Id. (citing Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981)). In the instant case, Plaintiff has not presented any evidence that he is more qualified for the mechanic position than Mr. Hawksworth other than his own conclusory statements. Plaintiff's allegations alone cannot support a claim that Plaintiff was

better qualified for the mechanic position. Thus, Plaintiff's comparison to Mr. Hawksworth does not raise a genuine issue of material fact regarding pretext. See Branson, 853 F.2d at 772 ("As courts are not free to second-guess an employer's business judgment, this assertion [that plaintiff was equally qualified as the person retained] is insufficient to support a finding of pretext."). Further, Plaintiff, by his own admission, agrees that he was not functioning in the same employment capacity as Mr. Hawksworth.

It is settled law that, under circumstances such as these, the Court should neither analyze the business necessity of Defendant's actions nor attempt to gauge Defendant's business acumen. Ingels, 42 F.3d at 623 (quoting Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1426-27 (10th Cir. 1993)). Rather, the Court must examine the adequacy of the evidence Plaintiff has presented to carry its burden to show either that Defendant's proffered reason is pretextual or that age was a determining factor in its decision. The Court concludes that with respect to Plaintiff's claim regarding Mr. Hawksworth, Plaintiff has failed to offer evidence that demonstrates that Defendant's reasons for its termination of Plaintiff's employment are pretextual or that age was a determining factor in its decision so as to raise a question for the jury.

B

The same analysis applies to Plaintiff's contention that Mr. Masterson was retained as a pilot when he was not. Defendant has alleged that Mr. Masterson was retained because he could fly its remaining plane while Plaintiff could not. Plaintiff has failed to produce any evidence whatsoever that casts suspicion on Defendant's articulated reason or that tends to prove that age was a determining factor in its decision. The Court finds that there is nothing for the jury to determine with respect to Defendant's treatment of Plaintiff in comparison to Mr. Masterson.

With respect to Mr. Barnes, in Plaintiff's response to Defendant's motion, Plaintiff claims the fourth element of his prima facie case is satisfied because Defendant hired Mr. Barnes to replace him as a co-pilot. As an initial matter, it is significant that Defendant did not hire Mr. Barnes as a pilot until two years after Plaintiff was discharged. Defendant, in its reply, states that, two years after Plaintiff's termination, its business had improved, it had a need to transport employees to farther reaches, and it was necessary to hire another pilot.

At the outset, the Court notes that this hire two years after Plaintiff was fired arguably is too attenuated to satisfy the fourth element of Plaintiff's prima facie case. See Doan v. Seagate Technology, Inc., 82 F.3d 974, 977 (10th Cir. 1996) (citing Cone v. Longmont United Hosp., 14 F.3d 526, 532 (10th Cir. 1994) (to show discrimination, a plaintiff must demonstrate that a post-RIF hired employee is similarly-situated to plaintiff)). Assuming arguendo that the hiring of Mr. Barnes satisfies the fourth element of Plaintiff's prima facie case, the burden shifts to Defendant to articulate a legitimate, nondiscriminatory basis for its termination of Plaintiff. In this case, Defendant contends that the economic environment at Defendant's workplace improved substantially between the time Plaintiff was discharged and the time Mr. Barnes was hired. Accordingly, two years following Plaintiff's discharge, Defendant experienced an increased business need for pilots. Defendant further contends that Mr. Barnes was better qualified than Plaintiff and thus the two employees were not similarly-situated. Therefore, the Court finds that if Plaintiff has met his burden in establishing a prima facie case with respect to Mr. Barnes, Defendant has articulated a legitimate basis for its termination of Plaintiff's employment.

Plaintiff does not dispute that Defendant's business changed for the better. Instead, Plaintiff alleges that it may be inferred that Defendant's acts are wrongful because, in his personal judgment, it would make more sense for Defendant to have an employee such as Plaintiff who is able to function both as a mechanic and as a co-pilot. Since Mr. Barnes is only a pilot and not a

mechanic, Plaintiff argues that he is the better qualified candidate. Plaintiff then contends that the "fact" that he is better qualified than Mr. Barnes is evidence of pretext.

Again, Plaintiff's subjective opinion of his own qualifications cannot create evidence sufficient to defeat summary judgment. Plaintiff has presented no evidence that he was more qualified for the position of pilot for which Mr. Barnes was hired, other than his conclusory statement to that effect. Whether or not to hire a pilot who can also function as a mechanic is precisely the type of business decision that this Court cannot second-guess under the ADEA. Ingels, 42 F.3d at 623. Further, a mere conclusory statement by Plaintiff that attempts to cast doubt on Defendant's business decision does not constitute evidence by which a factfinder could infer that Defendant's acts are pretextual. See Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 530 (10th Cir. 1994) (conclusory allegations will not suffice to create a material issue of fact to defeat summary judgment). By contrast, Defendant contends that Mr. Barnes is a better qualified pilot than Plaintiff. Although, like Plaintiff, Mr. Barnes was not FAA-certified to fly the Citation III, he received this rating shortly after he was hired. Plaintiff does not dispute that he declined Defendant's offer to pay for him to earn this rating during his employment. Looking at both candidates at the time Mr. Barnes was hired, and viewing the facts most favorably to Plaintiff, the most that can be concluded is that Mr. Barnes and Plaintiff were similarly qualified. Under the ADEA, this conclusion does not amount to evidence of pretext sufficient to create a jury question.

The Court concludes that Plaintiff has failed to demonstrate that Defendant discriminated against Plaintiff on the basis of age because Plaintiff has not presented evidence of pretext, or evidence to show that age was even a factor in his termination, sufficient to raise an genuine issue of material fact to defeat summary judgment. For the reasons stated above, Defendant's motion for summary judgment as to Plaintiff's two ADEA causes of action is hereby granted. Moreover, because the legal paradigm for Plaintiff's state discrimination cause of action in this case is

identical to that under the ADEA, see Okla Stat. tit. 25, § 1101 (stating that the general purpose behind the state act was to provide for the execution of the policies embodied in the federal ADEA), Defendant's motion for summary judgment with respect to Plaintiff's state discrimination cause of action is also granted.

IV

In his complaint, Plaintiff alleges that "by putting the Plaintiff through the circumstances surrounding his discharge, [Defendant] intentionally inflicted emotional distress and mental anguish on [Plaintiff]." Compl. ¶ 20.

Under Oklahoma law, in order to establish a prima facie case for intentional infliction of emotional distress, a plaintiff must show that: (1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous; (3) the plaintiff actually experienced emotional distress; and that, (4) the emotional distress was severe. Daemi v. Church's Fried Chicken, Inc., 931 F.2d 1379, 1387 (10th Cir. 1991) (applying Oklahoma law).

Defendant asserts that Plaintiff has failed to present any evidence that Defendant's behavior was extreme or outrageous. Further, Defendant asserts that Plaintiff has not shown that he experienced extreme emotional distress.

Plaintiff, in his response, contends that he was suddenly and traumatically discharged from his employment of twenty-four years. He asserts that Mr. Doty, who was present when Plaintiff was fired, believed the discharge was traumatic. Plaintiff also contends that he had to have prescription medication for his nerves after he was discharged.

The Court finds that Plaintiff has failed to present a prima facie case for intentional infliction of emotional distress. Plaintiff has failed to present any evidence that Defendant's behavior rises to the level of outrageous and extreme conduct required to support a cause of action for the intentional infliction of emotional distress under Oklahoma law. Plaintiff, in his deposition, stated that he was terminated in a private meeting with Mr. Ammann and Mr. Doty

and that no one raised a voice to him during the meeting. Def.'s Reply, Exh. B at 43-44. While Plaintiff claims that Mr. Doty thought the discharge itself was traumatic, Mr. Doty, in his deposition, actually said the fact of the discharge was "upsetting" and "not a pleasant thing" to have to do. Pl. Br. Exh. 4 at 57-58. Further, Plaintiff has not offered evidence to show that he has experienced severe emotional distress. Although the doctor for Plaintiff's wife did prescribe some medication for him, Plaintiff does not contend that he needed or he ever sought medical care.

The Court observes that any termination from employment is inherently painful and unpleasant. This fact is multiplied many times over when the employee has been in continuous service for a period as long as 24 years. However, if the termination is not otherwise unlawful, and is carried out in the manner established here, the attendant unpleasantness and pain of the act of termination itself will not give rise to an Oklahoma common law claim for intentional infliction of emotional distress. Therefore, Defendant's motion for summary judgment is hereby granted as to Plaintiff's fourth cause of action.

For the reasons stated above, the Court hereby grants Defendant's motion for summary judgment.

IT IS SO ORDERED.

This 28th day of January, 1998.


Sven Erik Holmes
United States District Judge

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

MERRILL LYNCH, PIERCE, FENNER
& SMITH, INC.,

Plaintiff,

v.

C. DAN PENTECOST,

Defendant.

ENTERED ON DOCKET

DATE

1-30-98

Case No. 97-CV-217-H

FILED

JAN 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The parties in this matter have been ordered to arbitration and further proceedings have been stayed. It is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

The parties are ordered to notify the Court within thirty days of a final adjudication of the arbitration proceedings, as to whether this matter should be reopened or dismissed with prejudice. If the parties have not by appropriate motion reopened this matter at the conclusion of that thirty day period, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 28TH day of January, 1998.


Sven Erik Holmes
United States District Judge

36

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 CHARLES HAWS,)
)
 Defendant.)

Case No. 96-C-76-H

ENTERED ON DOCKET

DATE 1-30-98

FILED

JAN 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on the complaint filed by Plaintiff on February 2, 1996. On May 6, 1996, a return of service by the United States Marshals Service was returned unexecuted as to Defendant Charles Haws.

Rule 4(m) of the Federal Rules of Civil Procedure, which governs time limits for service, states in pertinent part as follows:

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice of the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend time for service for an appropriate period.

Fed. R. Civ. P. 4(m). Thus, the Court first must determine whether Plaintiff has shown good cause for the failure to timely effect service. If so, the Court must give Plaintiff a mandatory extension of time. Espinoza v. United States, 52 F.3d 838, 841 (10th Cir. 1995). However, if Plaintiff fails to show good cause, the Court "must still consider whether a permissive extension of time may be warranted. At that point the district court may in its discretion either dismiss the case without prejudice or extend the time for service." Id.

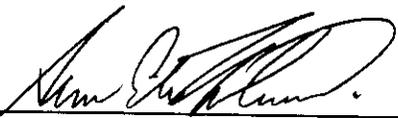
The Court finds that Plaintiff has not demonstrated good cause for failure to effect service. No action has been taken in this case, other than the attempt by the Marshals Service, for over 20

2

months. The Court further declines to grant a permissive extension of time in which to effect service. Accordingly, this case is hereby dismissed without prejudice for failure to timely effect service.

IT IS SO ORDERED.

This 28TH day of January, 1998.



Sven Erik Holmes
United States District Judge

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

FILED
JAN 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLENE H. SINCLAIR,)
)
 Plaintiff,)
)
 v.)
)
 MAPCO INC., a Delaware)
 Corporation,)
)
 Defendants.)

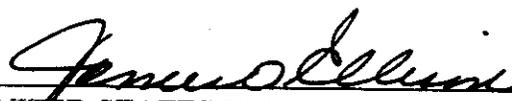
Case No. 96-CV-768-B ✓

ENTERED ON DOCKET
DATE JAN 29 1998

ORDER OF DISMISSAL WITH PREJUDICE

This matter came on before the Court this 28th day of January, 1998, upon the Joint Stipulation of Dismissal With Prejudice, filed jointly by Plaintiff and Defendant, and for good cause shown, it is therefore

ORDERED, ADJUDGED AND DECREED, that Plaintiff's causes of action against Defendant are hereby dismissed with prejudice, with each party to bear its own costs and attorneys' fees.


UNITED STATES DISTRICT JUDGE

for Thomas R. Brett, Senior Judge

26

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

~~FILED~~

~~JAN 23 1998~~

~~Phil Lombardi, Clerk
U.S. DISTRICT COURT~~

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

Case No. 97CV 462B (M) ✓

THOMAS R. BRETT

ENTERED ON DOCKET

DATE JAN 29 1998

~~FILED~~

~~JAN 28 1998~~

~~Phil Lombardi, Clerk
U.S. DISTRICT COURT~~

AGREED ORDER OF DISMISSAL WITH PREJUDICE

The Court, having been informed that the parties have settled all claims and causes of action between them and having been presented with Stipulation of Dismissal with Prejudice signed by all the parties in this case, wherein they agreed to dismiss this case with prejudice to its refiling, is of the opinion that this case should be dismissed with prejudice to refiling pursuant to Rule 41(a) of the Federal Rules of Civil Procedure.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that all claims and causes of action of all parties in this civil action be, and they hereby are, dismissed with prejudice to their refiling.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this civil action be, and it hereby is, dismissed with prejudice to refiling.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Preliminary Injunction previously issued in this civil action be, and it hereby is, dissolved and vacated.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Undertaking on Preliminary Injunction filed September 11, 1997 be, and it hereby is exonerated.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the parties' obligations set forth in Sections C and E of the Protective Order filed herein on June 5, 1997,

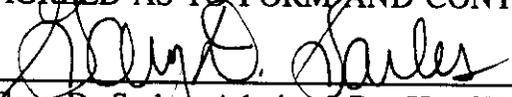
shall remain in effect after dismissal of this action unless and until otherwise agreed by the parties. The Court will retain jurisdiction over this case for the purpose of enforcing the parties' obligations to return confidential information as set forth in Section E of the Protective Order.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that each party shall bear his or its own costs.

SIGNED THIS 28th day of January, 1998.

for 
THOMAS R. BRETT
UNITED STATES SENIOR DISTRICT JUDGE

AGREED AS TO FORM AND CONTENT:


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SARLES & OUMET, L.L.P.
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(214) 573-6300

James W. Tilly , OBA No. 9019
Tilly & Associates
Suite 2220
Two West Second Street
Tulsa, OK 74101-3645
(918) 583-8868

Attorneys for Plaintiff Decision Dynamics, Inc.

AGREED AS TO FORM AND CONTENT:

Neva P. Campbell

Neva Campbell, Admitted *Pro Hac Vice*
SCHWABE, WILLIAMSON & WYATT
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Portland, OR 97204
(503) 222-9981

William E. Hughes, OBA NO. 4469
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320 South Boston Avenue
Tulsa, OK 74103

**Attorneys for Defendants TAK Industrial
Corporation and Randy A. Edgerton**

AGREED AS TO FORM AND CONTENT:


Richard P. Hix, OBA No. 4241
Russell W. Kroll, OBA No. 15281
**DOERNER, SAUNDERS, DANIEL
& ANDERSON**
320 South Boston, Suite 500
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(918) 582-1211

L. Dru McQueen, OBA No. 10100
CITGO Petroleum Corporation
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P. O. Box 3758
Tulsa, Oklahoma 74102

**Attorneys for Defendant CITGO
Petroleum Corporation**

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

DELISA ATCHLEY)

Plaintiff,)

vs.)

Case No. 96-C-344-C

THE NORDAM GROUP, INC.,)
a Delaware Corporation,)

Defendant and)
Third Party Plaintiff,)

vs.)

DESIGN SUPPORT SERVICES, INC.,)
an Oklahoma Corporation,)

Third Party Defendant.)

F I L E D

JAN 27 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE JAN 29 1998

ORDER AWARDING ATTORNEYS' FEES

NOW, on this 25th day of Jan, 1998, based upon the Stipulation of Kevin R. Kelley, attorney for Plaintiff, and Stephen L. Andrew, attorney for Defendant The NORDAM Group, Inc., the Court awards Plaintiff her attorneys' fees in the amount of \$35,556.25 for services rendered through and including December 23, 1997, together with interest at the statutory rate of 5.34 percent per annum.

IT IS SO ORDERED this 25 day of Jan, 1998.


UNITED STATES DISTRICT JUDGE

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

FILED

JAN 27 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VICTOR M. CHAPPELLE, an
individual and resident of
the State of Oklahoma,

Plaintiff,

vs.

No. 97-CV-466-E

VINSON SUPPLY COMPANY, a
Delaware corporation; and
SAMMONS CORPORATION, a Texas
corporation,

Defendants.

ENTERED ON DOCKET

DATE JAN 29 1998

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that this action has been settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within 30 days that settlement has not been completed and further litigation is necessary.

ORDERED this 26th day of January, 1998.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JAN 27 1998 *mw*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICK A. RUPERT,

Defendant.

)
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)
)
)

Civil Action No. 97CV978E(M)

ENTERED ON DOCKET

DATE JAN 29 1998

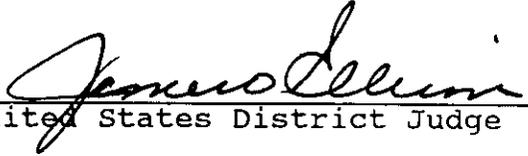
DEFAULT JUDGMENT

This matter comes on for consideration this 26th 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, Mick A. Rupert, appearing not.

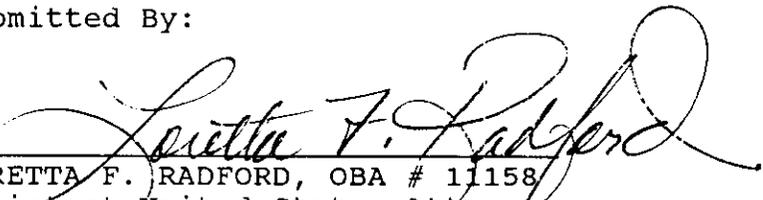
The Court being fully advised and having examined the court file finds that Defendant, Mick A. Rupert, was served with Summons and Complaint on November 14, 1997. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

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

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

ENTERED ON DOCKET

CARL HYAMS, JR.)
)
Plaintiff,)
)
-vs-)
)
CSC CREDIT SERVICES, INC.,)
)
Defendant.)

DATE JAN 29 1998

Case No. 97-C-479-K ✓

FILED
JAN 29 1998
[Signature]

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER FOR DISMISSAL WITH PREJUDICE

Considering the Motion for Dismissal With Prejudice entered into by and between Plaintiff, Carl Hyams, Jr., and Defendant, CSC Credit Services, Inc., and having considered same and finding that same is well founded:

IT IS HEREBY ORDERED that the claims and causes of action stated by Plaintiff against Defendant, CSC Credit Services, Inc., are in all respects dismissed with prejudice as to the refileing of same, with court costs to be paid by the party incurring same.

THUS DONE AND SIGNED this the 28 day of January, 1998.

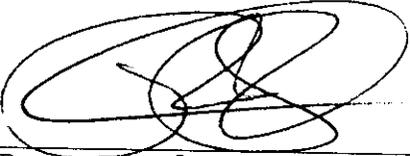
[Signature]
DISTRICT JUDGE

APPROVED FOR ENTRY:



John S. Sharp, Esq.
2512 East 21st Street, #200
Tulsa, OK 74114

ATTORNEY FOR PLAINTIFF



Ross A. Plourde, OBA #7193
McAfee & Taft
A Professional Corporation
10th Floor
Two Leadership Square
Oklahoma City, Oklahoma 73102
Telephone: (405) 235-9621

ATTORNEYS FOR CSC CREDIT
SERVICES, INC.

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

JOHNATHON STRUBLE, TOM ALLRED,)
CHUCK KING, KARMAN WHITEHOUSE)
JERRY WHITE, DOYLE JUNKER,)
RICHARD A. LEECE,)
JAQUELINE WRIGHT, and ALL)
OTHER SIMILARLY SITUATED)
EMPLOYEES)

Plaintiffs,)

vs.)

NATIONAL EDUCATION CENTERS,)
INC. d/b/a SPARTAN SCHOOL OF)
AERONAUTICS, d/b/a NATIONAL)
EDUCATION CENTER-NATIONAL)
INSTITUTE OF TECHNOLOGY CAMPUS)
d/b/a NATIONAL EDUCATION)
CENTER-SPARTAN SCHOOL OF)
AERONAUTICS CAMPUS)

Defendant.)

ENTERED ON DOCKET

DATE JAN 29 1998

No. 97-CV-384-K ✓

F I L E D

JAN 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

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

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. The Court retains complete jurisdiction to vacate this order and to reopen the action upon

cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 28 day of January, 1998.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

STANLEY D. HARPER,

Defendant.

)
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)
)

ENTERED ON DOCKET
JAN 29 1998
DATE _____

Civil Action No. 97CV979H(W) ✓

FILED

JAN 29 1998
[Signature]

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEFAULT JUDGMENT

This matter comes on for consideration this 28TH 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, Stanley D. Harper, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Stanley D. Harper, was served with Summons and Complaint on October 29, 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, Stanley D. Harper, for the principal amount of \$767.68, plus accrued interest of \$23.87, plus administrative charges in the amount of \$6.19, plus interest thereafter at the rate of 8 percent per annum

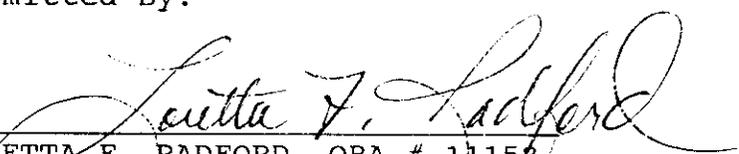
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until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.34 percent per annum until paid, plus costs of this action.



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

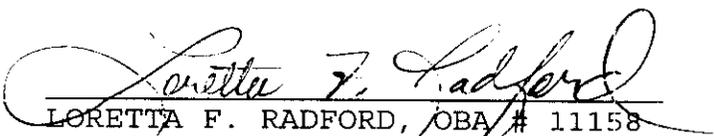
LFR/11f

the rate of 8 and 7.51 percent 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/jmo

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

ENTERED ON DOCKET

DATE 1-29-98

CLAREMORE SURGEONS, INC.,)
)
Plaintiff,)
)
vs.)
)
GROUP HEALTH SERVICES OF)
OKLAHOMA, INC.,)
)
Defendant.)

No. 97-C-963-K ✓

FILED
JAN 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the motion of the plaintiff to remand. On October 8, 1997, the plaintiff filed an action against the defendant in the small claims division of the District Court of Rogers County, State of Oklahoma, for alleged breach of contract and for the payment of indebtedness in the amount of \$2,376.00 for medical services provided to a patient. Defendant had determined that the services were not medically necessary and declined payment.

Defendant removed the state court action to this Court, arguing that the claims were preempted by the Employee Retirement Income Security Act ("ERISA"). 29 U.S.C. §1132(a)(1)(B), the enforcement provision of ERISA, only grants standing to "participants" or "beneficiaries" under an "employee welfare benefit plan".¹ See Northeast Dept. ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229, 764 F.2d 147, 152-53 (3d

¹The term "employee welfare benefit plan" is defined in 29 U.S.C. §1002(1). Neither party disputes that the plan at issue is an "employee welfare benefit plan".

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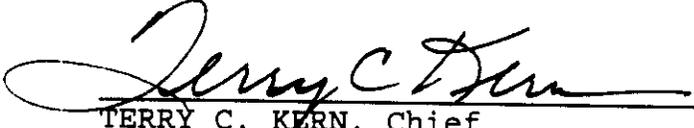
Cir.1985). In its objection to the present motion, defendant "stipulates that Plaintiff is not a participant or beneficiary . . . and has no standing to bring this action." (Defendant's Objection at 1). However, defendant argues that removal is still appropriate because plaintiff's claim "relates to" the plan, and falls within ERISA's federal preemption.

Similar arguments have been rejected. "[W]ithout standing to enforce ERISA, there can be no ERISA preemption." Curtis v. Nevada Bonding Corp., 53 F.3d 1023, 1027 (9th Cir.1995). "ERISA preemption under § 514(a), standing alone, does not, contrary to the district court's reasoning, create federal removal jurisdiction over a claim pled under state law in state court." Joyce v. RJR Nabisco Holdings Corp., 126 F.3d 166, 171 (3d Cir.1997). See also Hospice of Metro Denver v. Group Health Insurance, 944 F.2d 752 (10th Cir.1991) (rejecting the argument that any reference to an ERISA plan in a state law complaint automatically "related" the state law action to the plan).

As the party invoking application of the removal statute, the defendant has the burden of establishing that the case presents a federal question. Van Camp v. AT & T Information Systems, 963 F.2d 119, 121 (6th Cir.), cert. denied, 113 S.Ct. 365 (1992). Defendant has failed to maintain its burden.

It is the Order of the Court that the motion of the plaintiff to remand (#5) is hereby GRANTED. Pursuant to 28 U.S.C. §1447(c), this action is hereby remanded to the District Court for Rogers County, State of Oklahoma, for further proceedings.

ORDERED this 27 day of January, 1998.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

PHYLLIS R. THOMAS,

Plaintiff,

vs.

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

Defendant.

ENTERED ON DOCKET

DATE 1-29-98

Case No. 97-CV-214-K(J)

FILED

JAN 23 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

In a July 28, 1997 Order, Magistrate Sam A. Joyner ordered Plaintiff to show cause for his failure to serve Defendant. A hearing was held before the magistrate on September 25, 1997. The magistrate granted Plaintiff an additional 90 days within which to serve Defendant. To date, Plaintiff has not served Defendant. Rather, Plaintiff now seeks an administrative closing order. Plaintiff's motion for administrative closure of this case pursuant to N.D.LR 41.0 is denied. [Doc. No. 6].

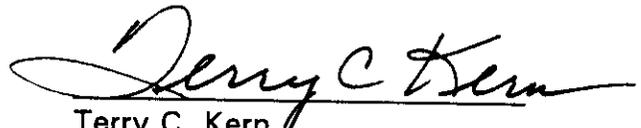
Plaintiff has not timely served Defendants as required by Fed. R. Civ. P. 4(i) and 4(m). There is also no final order for review. Plaintiff's application for benefits is currently being reviewed by the Social Security Appeals Council. Until the Appeals Council renders its decision, the Social Security Administration has not issued a final

order which this Court may review. See Fierro v. Bowen, 798 F.2d 1351, 1352 n.1 (10th Cir. 1986).^{1/}

This case is hereby dismissed without prejudice.

IT IS SO ORDERED.

Dated this 27 day of January 1998.


Terry C. Kern
United States District Judge

^{1/} The Social Security Act provides for federal court review of the final decisions of the Commissioner. 42 U.S.C. § 405(g). Pursuant to the rule-making authority provided under 42 U.S.C. § 405(a), the Appeals Council is the Commissioner's final decision-making body. See 20 C.F.R. § 404.900(a).

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

PHYLLIS R. THOMAS,

Plaintiff,

vs.

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

Defendant.

ENTERED ON DOCKET

DATE 1-29-98

Case No. 97-CV-214-K(J)

F I L E D

JAN 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

In a July 28, 1997 Order, Magistrate Sam A. Joyner ordered Plaintiff to show cause for his failure to serve Defendant. A hearing was held before the magistrate on September 25, 1997. The magistrate granted Plaintiff an additional 90 days within which to serve Defendant. To date, Plaintiff has not served Defendant. Rather, Plaintiff now seeks an administrative closing order. Plaintiff's motion for administrative closure of this case pursuant to N.D.LR 41.0 is denied. [Doc. No. 6].

Plaintiff has not timely served Defendants as required by Fed. R. Civ. P. 4(i) and 4(m). There is also no final order for review. Plaintiff's application for benefits is currently being reviewed by the Social Security Appeals Council. Until the Appeals Council renders its decision, the Social Security Administration has not issued a final

order which this Court may review. See Fierro v. Bowen, 798 F.2d 1351, 1352 n.1 (10th Cir. 1986).^{1/}

This case is hereby dismissed without prejudice.

IT IS SO ORDERED.

Dated this 27 day of January 1998.


Terry C. Kern
United States District Judge

^{1/} The Social Security Act provides for federal court review of the final decisions of the Commissioner. 42 U.S.C. § 405(g). Pursuant to the rule-making authority provided under 42 U.S.C. § 405(a), the Appeals Council is the Commissioner's final decision-making body. See 20 C.F.R. § 404.900(a).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OKLAHOMA

FILED

JAN 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DELTA t, LIMITED,)
an Oklahoma corporation,)

Plaintiff,)

vs.)

KRATZ-WILDE MACHINE COMPANY,)
a Kentucky corporation,)

Defendant.)

Case No. 97-CV-225-K

ENTERED ON DOCKET

DATE JAN 29 1998

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff Delta t, Limited and the Defendant Kratz-Wilde Machine Company, pursuant to Rule 41(a)(1) of the *Federal Rules of Civil Procedure* and hereby dismiss by joint stipulation the above-styled and numbered cause, with prejudice.

Dated this 28 day of January, 1998.

James, Potts & Wulfers, Inc.

By: _____

David W. Wulfers, OBA # 9926
2828 Mid-Continent Tower
401 South Boston Avenue
Tulsa, Oklahoma 74103-4016
(918) 584-0881 (voice)
(918) 584-4521 (facsimile)

**Attorneys for Plaintiff
Delta t, Limited**

Moyers, Martin, Santee, Imel & Tetrick

By: _____

James H. Ferris, OBA #2883
R. Scott Savage, OBA #7926
James R. Maupin, OBA #14966
320 South Boston, Suite 920
Tulsa, Oklahoma 74103
(918) 582-5281 (voice)
(918) 585-8318 (facsimile)

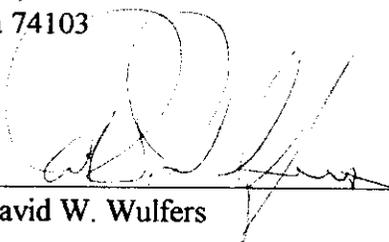
**Attorneys for Defendant
Kratz-Wilde Machine Company**

CF

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 28, 1998, a true and correct copy of the foregoing instrument was hand-delivered to the offices of:

James H. Ferris, Esq.
R. Scott Savage, Esq.
James R. Maupin, Esq.
Moyers, Martin, Santee, Imel & Tetrick
320 South Boston, Suite 920
Tulsa, Oklahoma 74103



David W. Wulfers

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

FILED

JAN 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LANA J. MASSA, LARRY W. BARRETT,)
and MICHAEL W. CHAMPION, et al.,)

Plaintiffs,)

vs.)

Case No. 97-C-611-BU

COMMERCIAL FINANCIAL SERVICES,)
INC., an Oklahoma corporation,)

WILLIAM R. BARMAN, CHARLES D.)
WELSH, and W. WAYNE LEARNED,)

Defendants.)

ENTERED ON DOCKET

DATE JAN 29 1998

ADMINISTRATIVE CLOSING ORDER

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

If the parties have not reopened this case within 60 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiffs' action shall be deemed to be dismissed with prejudice.

Entered this _____ day of January, 1998.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

JAN 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, ex rel.)
Office of Personnel Management,)
Plaintiff,)

CIVIL ACTION NO. 98CV0021BU(M)

vs.)

FREDERICK C. WEDEMEYER, JR)
Defendant.)

ENTERED ON DOCKET
DATE JAN 29 1998

ORDER OF JUDGMENT

Pursuant to the terms of the Consent Judgment entered into by the parties on 1-16-98, Judgment is entered for the Plaintiff United States of America on behalf of its client agency, the Office of Personnel Management, and against the Defendant, Frederick C. Wedemeyer, Jr. on Count II (Unjust Enrichment) of the Complaint, in the amount of \$224,080.08, plus interest accruing on the unpaid principal at the rate of 5.42 % (percent) per annum until the balance is paid; Count I of the Complaint is dismissed with prejudice; and both parties will bear their own costs of litigation and attorney fees.

IT IS SO ORDERED THIS 28 day of January, 1998.

Michael Bunge
UNITED STATES DISTRICT COURT JUDGE

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

FILED

JAN 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, ex rel.)
Office of Personnel Management,)
Plaintiff,)

CIVIL ACTION NO. 98CV0021BU(M)

vs.)

FREDERICK C. WEDEMEYER, JR)
Defendant.)

ENTERED ON DOCKET

DATE JAN 29 1998

CONSENT JUDGMENT

The Plaintiff, United States of America ex rel. the Office of Personnel Management (hereinafter simply the "United States"), by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, and through Loretta F. Radford, Assistant United States Attorney, and the Defendant Frederick C. Wedemeyer, Jr., by and through his attorney Mr. Allen Smallwood have consented to judgment on Count II of the Complaint and a settlement in this matter.

In memorial to this Consent Judgment the Parties agree and stipulate as follows.

1. The Parties agree and stipulate that this Court has jurisdiction over the subject matter and the parties hereto.
2. The Parties further agree and stipulate that Mr. Wedemeyer, Jr. has been wrongfully presenting for payment and receiving the benefits of his decedent father's civil service retirement benefit checks for many years.

(8)

3. The Parties further agree and stipulate that Mr. Frederick C. Wedemeyer, Jr. confesses, consents and admits to judgment against him under Count II (Unjust Enrichment) of the complaint filed January 12, 1998. The Parties further agree and stipulate that the United States will dismiss Count I (False Claims Act, 31 U.S.C. §3729 et seq.) of the Complaint with prejudice.

4. The Parties further agree and stipulate that the Defendant is indebted to and agrees to pay to the Plaintiff the principal amount of \$224,080.08 plus interest accruing on the unpaid principal at the rate of 5.42 percent per annum until the balance is paid.

5. The Parties further agree and stipulate that the Defendant will repay the indebtedness in the following manner:

a. The Defendant will make an initial lump sum payment of \$10,000.00, payable upon execution of this Consent Judgment.

b. The Defendant will begin making monthly payments of \$150.00 per month, on or before the 15th day of each month, until the balance of the principal and interest are in full.

6. The Parties further agree and stipulate that the Plaintiff and Defendant will pay their own costs, attorney fees and expenses related to this matter.

7. The Parties acknowledge that they have carefully read the foregoing agreement, know the contents thereof, and sign the same as their own free act and that they are not being coerced by anyone or under any duress.

8. This agreement represents the entire agreement between the parties, no oral representations have been made in addition to or at variance with the terms contained in this written agreement, and no other terms and conditions shall be applicable.

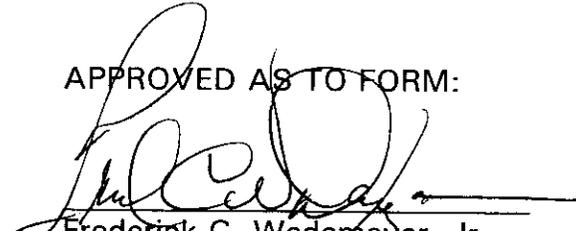
9. Should the Defendant fail to make the payments specified in this agreement, the Plaintiff shall be authorized without notice to the Defendant to pursue all legal methods of collection.

10. The Defendant agrees that the executed judgment will be submitted to the United States District Court for the Northern District of Oklahoma for filing, and the Defendant hereby waives all defenses to the entry of this judgment by the court and hereby affirmatively represents and covenants not to contest the entry of the judgment on any basis, factual or legal.

11. This Consent Judgment shall be effective January 16, 1998.

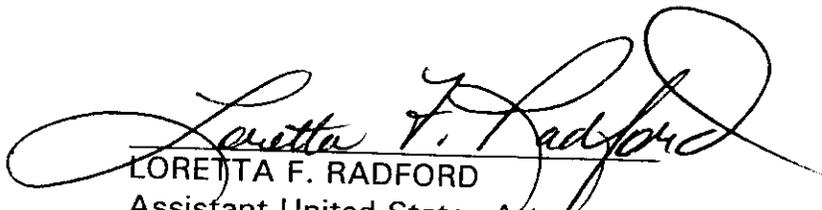

UNITED STATES DISTRICT COURT JUDGE

APPROVED AS TO FORM:


Frederick C. Wedemeyer, Jr.
Defendant


Allen Smallwood OBA# 8308
1310 S. Denver
Tulsa, OK. 74119
918-582-1993

Attorney for the Defendant

A handwritten signature in black ink, reading "Loretta F. Radford". The signature is written in a cursive style with large, flowing loops.

LORETTA F. RADFORD
Assistant United States Attorney
3900 United States Courthouse
Tulsa, OK 74103
(918) 581-7463

wedset3.wpd
LFR/hww

UNITED DISTRICT COURT FOR THE NORTHERN DISTRICT
STATE OF OKLAHOMA

FILED
JAN 27 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

INTERSTATE EXPLORATION, INC.,)
an Oklahoma corporation,)
)
 PLAINTIFF,)
)
 vs.)
)
 FUEL RESOURCES, INC., a Delaware)
corporation, and HOUSTON)
EXPLORATION COMPANY, a Delaware)
corporation,)
)
 DEFENDANTS.)

CASE NO. 97CV 715B (M)

ENTERED ON DOCKET
DATE JAN 28 1998

NOTICE OF DISMISSAL WITHOUT PREJUDICE

Pursuant to Rule 41(a)(1), *F.R. Civ.P.*, the Plaintiff, Interstate Exploration, Inc., hereby dismisses this action without prejudice to its refiling.

Respectfully submitted,



JAMES U. WHITE, JR. OBA #9545
White, Coffey, Galt & Fite, P.C.
6520 North Western, Suite 300
Oklahoma City, Oklahoma 73116
Telephone: (405) 842-7545
Telecopier: (405) 840-9890

ATTORNEY FOR PLAINTIFF

mail
cls
lwr

2.

WHITE, COFFEY, GALT, & FITE, P.C.
ATTORNEYS AT LAW

6520 N. WESTERN, SUITE 300
OKLAHOMA CITY, OKLAHOMA 73116
TELEPHONE (405) 842-7545
TELECOPIER (405) 840-9890

JAMES U. WHITE, JR.

January 26, 1998

U.S. Court Clerk
Northern District
4411 U.S. Courthouse
333 West 4th Street
Tulsa, OK 74103

RECEIVED

JAN 27 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

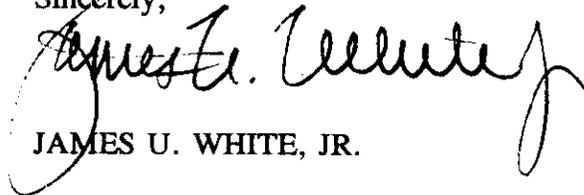
RE: *Interstate Exploration, Inc. v.*
Fuel Resources, Inc., and Houston Exploration Company
U.S. DC Northern District of Oklahoma

Dear Sir:

Enclosed please find the Notice of Dismissal Without Prejudice for filing in the above-referenced matter. Please return file-stamped copies of same to our office in the enclosed stamped envelope.

Thank you for your time and cooperation in this matter. Should you have any questions, do not hesitate to contact me.

Sincerely,



JAMES U. WHITE, JR.

JUW:jes
Enc.

F I L E D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAN 27 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BEVERLY A. HENDERSON,)
)
Plaintiff,)
)
v.)
)
PUBLIC SERVICE COMPANY OF)
OKLAHOMA,)
)
Defendant.)

Case No. 96-CV-1057-C

ENTERED ON DOCKET

DATE JAN 28 1998

ORDER

Before the Court is the Motion for Summary Judgment and Brief in Support filed by Defendant Public Service Company of Oklahoma on November 21, 1997. Plaintiff, Beverly A. Henderson, has not responded to the motion within the time prescribed by Local Rule 7.1(C). Pursuant to Local Rule 7.1(C), the Court, in its discretion, deems the motion confessed.

Upon review of the confessed motion, the Court finds that no genuine issue of material fact exists and that Defendant, Public Service Company of Oklahoma, is entitled to judgment as a matter of law.

Accordingly, Defendant Public Service Company of Oklahoma's Motion for Summary Judgment (Docket No. 23) is GRANTED. Judgment shall issue forthwith.

ENTERED this 26 day of January, 1998.



H. DALE COOK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 27 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JANICE C. CURTIS,)
)
Plaintiff,)
)
vs.)
)
DALKON SHIELD CLAIMANTS TRUST)
)
Defendant.)
)
_____)

Case No. 97-CV-187H ✓

**STIPULATION FOR
DISMISSAL WITH PREJUDICE**

ENTERED ON DOCKET

DATE 1-28-98

IT IS HEREBY STIPULATED and agreed by the parties, pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii), that the above-entitled action is dismissed with prejudice, without costs or disbursements to either party, and that a judgement of dismissal with prejudice may be entered hereto without notice.

DATED: 1/16/98

By Janice C. Curtis
Janice C. Curtis
12303 East 89th Street North
Owasso, Oklahoma 74055

PRO SE PLAINTIFF

By [Signature]
A.T. Elder, Jr. (OBA #2657)
STEWART & ELDER, P.C.
1329 Classen Drive
P.O. Box 2056
Oklahoma City, Oklahoma 73101

By Linda K. Beck
Harvey L. Kaplan
Scott W. Sayler
Linda K. Beck
SHOOK, HARDY & BACON, L.L.P.
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105
(816) 474-6550

ATTORNEYS FOR DALKON SHIELD CLAIMANTS TRUST

CT

CERTIFICATE OF MAILING

I the undersigned do hereby certify that on the 27th day of January, 1998, a true and correct copy of the above and foregoing was hand-delivered to:

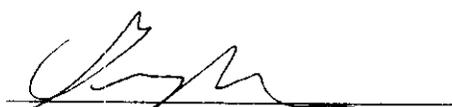
Stephen C. Lewis
U.S. Attorney for the Northern District of Oklahoma
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103

and on the 27th day of January, 1998, a copy of said instrument was also mailed by certified mail, return receipt requested, postage pre-paid to:

Janet Reno
Department of Justice
5111 Main Justice Building
10th Street and Constitution Avenue NW
Washington, DC 20530

and on the 27th day of January, 1998, a copy of said instrument was also mailed by U.S. Mail, postage pre-paid to the following:

Jess Green
Attorney at Law
301 East Main
Ada, Oklahoma 74820


ATTORNEYS FOR PLAINTIFFS

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

FILED

DEBORAH LORETT,
SSN: 440-70-6519,

Plaintiff,

v.

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

Defendant.

JAN 27 1998

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

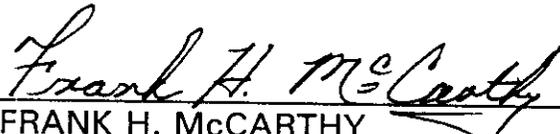
CASE NO. 96-CV-997-M

ENTERED ON DOCKET

DATE JAN 28 1998

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 27th day of JAN., 1998.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 27 1998

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

DEBORAH LORETT,
SSN: 440-70-6519,

PLAINTIFF,

vs.

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

DEFENDANT.

CASE No. 96-CV-997-M

ENTERED ON DOCKET

DATE JAN 28 1998

ORDER

Plaintiff, Deborah Loret, 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

¹ Kenneth S. Apfel was sworn in as Commissioner of Social Security on September 29, 1997. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Kenneth S. Apfel should be substituted for John J. Callahan, Acting Commissioner, who was previously substituted for Shirley S. Chater, as defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

² Plaintiff's application for supplemental security income benefits, filed on August 9, 1993, was denied initially and upon reconsideration. [R. 101-137]. A hearing was conducted December 13, 1994, after which the ALJ entered the decision dated May 4, 1995 which is the subject of this appeal. [R. 33-47]. The Appeals Council affirmed the findings of the ALJ on September 17, 1996. [R.5-6]. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

12

that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court might have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff claims disability due to "severe seizure disorder, depression, a personality disorder, and bursitis of the right shoulder." [Plaintiff's Brief, p. 1]. She claims the Commissioner's determination that she is not disabled is not supported by substantial evidence. Specifically, she contends the finding of the ALJ that she is able to work was based upon the testimony of a Vocational Expert (VE) which was elicited by improper hypothetical questions, thereby constituting reversible error. The Court agrees.

The ALJ's Decision

The ALJ determined that, because of Plaintiff's "inability to perform work that requires performing complex or detailed work tasks; or requires more than very

minimal contact with the public or co-workers", she cannot return to her past relevant work as grocery clerk/stocker. [R. 41]. The ALJ found that, despite Plaintiff's severe impairments, she had the residual functional capacity (RFC) to:

...perform the physical exertional and nonexertional requirements of work except for lifting over 25 pounds frequently or 50 pounds occasionally; work that required overhead reaching; work that would expose her to unprotected heights, dangerous moving machinery, or require her to operate motorized vehicles; work that required performing complex or detailed work tasks; or required more than very minimal contact with the public or co-workers.

[R. 42-43]. Relying upon a VE's testimony, the ALJ cited examples of medium, light and sedentary jobs that Plaintiff could perform and concluded that Plaintiff was not disabled. [R. 43-44]. 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).

Vocational Expert's Testimony

Following the testimony of Plaintiff and a witness³, a non-lawyer who also functioned as Plaintiff's representative during the hearing, the ALJ presented the VE with a series of hypothetical questions. The first hypothetical prohibited work in an environment with exposure to unprotected heights, climbing and dangerous or moving machinery and jobs requiring driving because of Plaintiff's seizure problems; an

³ Although the Commissioner stated in his brief that Plaintiff was represented at the hearing by "counsel" [Defendant's Brief, p. 4], the transcript reveals that Beverly Burton, a DHS Child Welfare Services worker, actually intended to appear as a witness on behalf of Plaintiff and indicated that she would attempt to act as Plaintiff's representative until Plaintiff's attorney arrived, but emphasized that she had no expertise in the area and had not even seen a social security hearing before. [R. 55-56, 74].

inability to reach overhead except on an occasional basis; and "with respect to the depression of this claimant, that the depression causes this claimant to have a marked inability to work with the public and only a fair ability to follow complex work instructions, but could follow simple work instructions." [R. 85-86]. The VE was asked whether Plaintiff could return to her past relevant work (PRW) with those limitations. His answer was: "No, sir. And I feel that would be mainly based on the work with the public rather than physical." [R. 86].

The VE was then asked whether there was "other work" that Plaintiff could perform with those limitations. [R. 86]. His response was mail clerk, stock and inventory clerks, shipping and receiving jobs, hand packaging jobs, unskilled assembly and time keeper. [R. 86-87].⁴

The next hypothetical presented by the ALJ to the VE included the following additional limitation:

...a fourth one, and this involves the -- also a depression related limitation and that is that the -- if the claimant has demonstrated as part of her -- demonstrates as part of the depression a confrontational nature with supervision such that she needs to be removed from close supervision and be placed in a job where the supervision would be removed so that the likelihood of confrontational situations with

⁴ In his decision, the ALJ listed these same jobs as jobs which Plaintiff could perform, with her RFC, and determined that they existed in significant numbers in the economy. [R. 43].

supervisors would be minimized more so than normal, what effect would that additional limitation have on the numbers of jobs you've identified?"

[R. 87]. The VE's response was:

Really, with the jobs I've identified, Your Honor, it seems like the lower of the skill level the more supervision is involved and like assembly and -- shipping and receiving, they're working along with other people and supervisors are generally right there. Most of these are production oriented so I feel like it would basically rule out those if this was a problem. The only exception might be the time keeping. Most of the time at this level the time keeper that I've given is a more isolated type of this job. So it would be possible that the person could do most of those, I would think.

[R. 87-88]. The ALJ's questioning of the VE regarding janitor and maid positions was also focused on the need for direct supervision rather than on contact with co-workers.

Discussion

The ALJ's hypothetical makes no mention of any restrictions related to Plaintiff's contact with co-workers. Yet, in the ALJ's decision, Finding 4 specifically includes that limitation as a reduction to Plaintiff's residual functional capacity for

medium work. [R. 42-43]. And, in the body of his decision, the ALJ specifically noted that Plaintiff could not return to her past relevant work due, in part, to her inability to perform work that requires more than very minimal contact with co-workers. [R. 41]. It is also noteworthy that the VE stated that two of the jobs he had identified, assembly and shipping and receiving, required working along with other people. [R. 88].

Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) provides that "testimony elicited by hypothetical questions that do not relate with precision all the claimant's impairments cannot constitute substantial evidence to support the Secretary's decision." The Court finds that the ALJ's hypothetical questions to the vocational expert did not precisely relate all of Plaintiff's impairments as they are listed in the ALJ's findings.

The Commissioner contends that the ALJ's omission of the limitation of "very minimal contact with co-workers" was essentially harmless. The Court cannot agree. This omission is not a simple deficiency in decision drafting. Rather, it is an omission of a material limitation in Plaintiff's ability to function in the work place. On this record, the Court cannot determine the effect, if any, this limitation will have on the number of potential jobs available to Plaintiff. Therefore, because the ALJ's decision, which relies upon the vocational expert's testimony, is not supported by substantial evidence, the decision of the Commissioner must be REMANDED for the express purpose of conducting a supplemental hearing whereupon proper hypothetical

questions are presented to a vocational expert and the claim is re-evaluated and reconsidered after receiving such testimony.

SO ORDERED THIS 27th day of JAN., 1998.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 26 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 GLORIA D. HAMER,)
)
 Defendant.)

Civil Action No. 97CV995BU (M)

ENTERED ON DOCKET
JAN 27 1998
DATE _____

DEFAULT JUDGMENT

This matter comes on for consideration this 26 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, Gloria D. Hamer, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Gloria D. Hamer, was served with Summons and Complaint on December 3, 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.

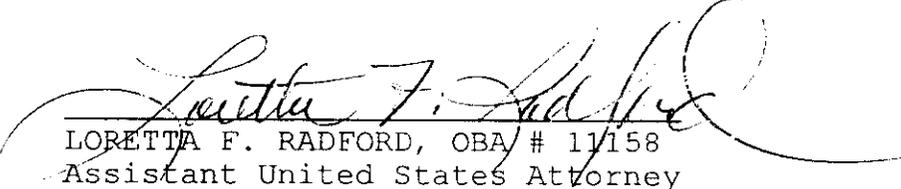
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Gloria

(6)

D. Hamer, for the principal amounts of \$1,021.86 and \$1,130.18, plus accrued interests of \$2,658.01 and \$1,658.57, plus administrative charges in the amounts of \$87.00 and \$51.74, plus interest thereafter at the rate of 7 percent 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/11f

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

CHARLENE H. SINCLAIR,)
)
Plaintiff,)
)
vs.)
)
MAPCO, INC., a Delaware)
Corporation,)
)
Defendant.)

No. 96-CV-768B

FILED

JAN 26 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

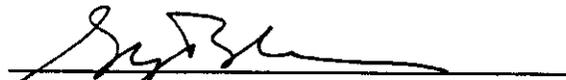
ENTERED ON DOCKET
DATE JAN 27 1998

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff and Defendant, by and through their respective attorneys, jointly stipulate that all of Plaintiff's claims herein should be dismissed with prejudice with each side to bear its own costs and attorneys' fees.

DATED this 26th day of January, 1998.
~~October, 1997.~~

Respectfully submitted,

By: 
D. Gregory Bledsoe, Esq.
1717 South Cheyenne Avenue
Tulsa, OK 74119-4664

- and -

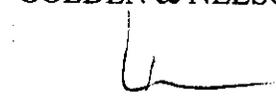
Karen Long, Esq.
Rosenstein, Fist & Ringold
525 South Main Street, Suite 700
Tulsa OK 74103-4500

ATTORNEYS FOR PLAINTIFF

36

017

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

By: 

J. Patrick Cremin, OBA #2013
Kelly S. Kibbie, OBA #16333
320 South Boston Avenue - Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0400

ATTORNEYS FOR DEFENDANT

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

MELANIE I. ALLISON,)
)
Plaintiff,)
)
vs.)
)
LEADERS LIFE INSURANCE CO., an)
Oklahoma insurance company, and)
AMERICAN FAMILY LIFE)
ASSURANCE CO. OF COLUMBUS)
(AFLAC), a foreign insurance company,)
and JUDY ROBB, an individual,)
)
Defendants.)

ENTERED ON DOCKET
DATE JAN 27 1998

No. 98-C-8-E ✓

FILED
JAN 26 1998 *plw*
Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL

Plaintiff, MELANIE I. ALLISON, and Defendant, LEADERS LIFE INSURANCE CO., an Oklahoma insurance company, file this Stipulation of Dismissal under Fed.R.Civ.P. 41(a)(1)(ii).

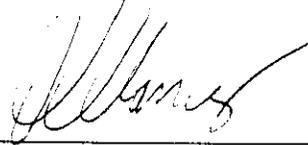
1. Plaintiff sued Defendant, LEADERS LIFE INSURANCE CO., an Oklahoma insurance company, on the 13th day of August, 1997.
2. Plaintiff moves to dismiss the suit against the Defendant, LEADERS LIFE INSURANCE CO., an Oklahoma insurance company.
3. Defendant, LEADERS LIFE INSURANCE CO., an Oklahoma insurance company, which has answered, agrees to the dismissal.
4. This case is not a class action, and a receiver has not been appointed.

5. This action is not governed by any statute of the United States that requires an order of the Court for dismissal of this case.

6. Plaintiff has not dismissed an action based on or including the same claim or claims as those presented in this suit.

7. This dismissal is without prejudice.

Respectfully submitted,



Timothy P. Clancy, OBA #14199
STOOPS & CLANCY, P.C.
2250 East 73 Street, Suite 400
Tulsa, Oklahoma 74136-6833
(918) 494-0007
(918) 488-0408 (FAX)

Attorneys for Plaintiff



Joseph H. Paulk, OBA #10110
Marilynn M. Gravis, OBA #11936
PAULK & GRAVIS, P.C.
P. O. Box 4679
Tulsa, Oklahoma 74159-4679
(918) 749-5759
(918) 749-8306 (FAX)

Attorneys for Defendant, LEADERS LIFE
INSURANCE CO., an Oklahoma insurance company

CERTIFICATE OF SERVICE

The undersigned attorney for Plaintiff certifies that a true and correct copy of the foregoing STIPULATION OF DISMISSAL was served by mail, postage prepaid, this 26th day of January, 1998, upon the following:

Attorneys for Defendant,
LEADERS LIFE INSURANCE CO.,
an Oklahoma insurance company:

Mr. Joseph H. Paulk and
Ms. Marylinn M. Gravis
Paulk & Gravis, P.C.
P. O. Box 4679
Tulsa, Oklahoma 74159-4679

Attorneys for Defendant,
AMERICAN FAMILY LIFE ASSURANCE
CO. OF COLUMBUS (AFLAC), a foreign
insurance company:

Mr. Michael P. Atkinson,
Ms. Marthanda J. Beckworth,
and Ms. Susanna M. Gattoni
Atkinson, Haskins, Nellis, Boudreaux,
Holeman, Phipps & Brittingham
1500 ParkCentre
525 South Main
Tulsa, Oklahoma 74103-4524



Timothy P. Clancy

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 26 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
MAURICE G. YOST,)
)
Defendant.)

Civil Action No. 97CV1034C

ENTERED ON DOCKET

DATE JAN 26 1998

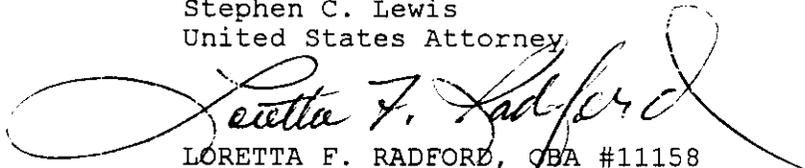
NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Loretta F. Radford, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 26th day of January, 1998.

UNITED STATES OF AMERICA

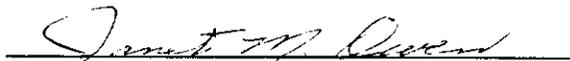
Stephen C. Lewis
United States Attorney



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

CERTIFICATE OF SERVICE

This is to certify that on the 26th day of January, 1998, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Maurice G. Yost, Rt. 1 Box 252, , Locust Grove, Oklahoma 74352.


Janet M. Owen
Financial Litigation Agent

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

JAN 23 1998 *mw*

CHARLENE H. SINCLAIR,
Plaintiff(s),
vs.
MAPCO INC.,
Defendant(s).

)
)
)
)
)
)
)
)
)
)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-C-768-B /

ENTERED ON DOCKET

DATE JAN 26 1998

ORDER DISMISSING ACTION
BY REASON OF SETTLEMENT

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

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this Order by United States mail upon the attorneys for the parties appearing in this action.

IT IS SO ORDERED this *19th* day of January, 1998.



THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

JAN 23 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DECISION DYNAMICS, INC.,)

Plaintiff,)

vs.)

CITGO PETROLEUM CORPORATION,)

RANDY A. EDGERTON, and TAK)

INDUSTRIAL CORPORATION,)

Defendants.)

Case No. 97CV 462B (M) ✓

THOMAS R. BRETT

ENTERED ON DOCKET

DATE JAN 26 1998

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, it is hereby stipulated by and between Decision Dynamics, Inc., CITGO Petroleum Corporation, Randy A. Edgerton, and TAK Industrial Corporation, subject to the approval of the Court, as follows:

1. All claims and causes of action of all parties herein shall be dismissed with prejudice to refiling.
2. This civil action shall be dismissed with prejudice to refiling.
3. The Preliminary Injunction previously issued in this civil action shall be dissolved and vacated.
4. The Undertaking on Preliminary Injunction filed September 11, 1997 shall be exonerated.
5. The parties' obligations in Sections C and E of the Protective Order filed herein on June 5, 1997, shall remain in effect after dismissal of this action unless and until otherwise agreed by the parties. The Court will retain jurisdiction over this case for the purpose of enforcing the parties' obligations to return confidential information as set forth in Section E of the Protective Order.

6. Each party shall bear his or its own costs and attorneys fees.

By: 
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Attorneys for Defendant CITGO Petroleum
Corporation

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

FILED

JAN 23 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 THE SUM OF ONE THOUSAND)
 FOUR HUNDRED FORTY AND)
 NO/100 (\$1,440.00) et. al.)
)
 Defendants.)

CIVIL ACTION NO. 96-CV-934-B

ENTERED ON DOCKET
DATE JAN 26 1998

PARTIAL JUDGMENT OF FORFEITURE BY DEFAULT

This cause having come before this Court upon the plaintiff's Motion for Partial Judgment of Forfeiture by Default as to these defendant vehicles ("Default Vehicles"):

- 1970 Chevrolet Purple Camaro, VIN #12487L513987;
- 1989 Buick Regal, VIN #2G4WB14W9K1436227;
- 1976 GMC Red & White Pickup, VIN #TLC146S524232;
- 1982 Oldsmobile Cutlass, VIN #1G3AX69Y7CM141401;
- 1981 Ford Mustang, VIN #1FABP13B4BF202451; and
- 1980 Chevrolet Impala, VIN #1L47JAC127726,

and all entities and/or persons interested in these described default vehicles, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 11th day of October, 1997, alleging that the default vehicles were subject to forfeiture pursuant to 21 U.S.C. § 881(a)(4) because they were used, or intended to be used, to transport, or to in any manner facilitate

54

the transportation, sale, receipt, possession or concealment of a controlled substance, listed chemicals or drug equipment, to facilitate a violation of Title 21 of the United States Code and/or pursuant to 21 U.S.C. § 881(a)(6) because they are proceeds of illegal drug transactions and subject to seizure and forfeiture to the United States of America.

Warrant of Arrest and Notice In Rem was issued on the 17th day of October 1996, by the Clerk of this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the default vehicles property and for publication in the Northern District of Oklahoma.

The United States Marshals Service personally served a copy of the Complaint for Forfeiture In Rem and the Warrant of Arrest and Notice In Rem on the default vehicles on:

1970 Chevrolet Purple Camaro, VIN #12487L513987:
Served December 10, 1996;

1989 Buick Regal, VIN #2G4WB14W9K1436227:
Served February 7, 1997;

1982 Oldsmobile Cutlass, VIN #1G3AX69Y7CM141401:
Served December 10, 1996;

1981 Ford Mustang, VIN #1FABP13B4BF202451:
Served February 7, 1997;

1980 Chevrolet Impala, VIN #1L47JAC127726:
Served December 10, 1996;

Lawanda Denham, Leon Denham, Misty Bilby, Money Tree Finance, Ron Tolbert, David Stevens, Bonnie Banks, John D. Mills, Natasha Irving, Crystal Pophir, Ron Hunter and Melron Hunter were determined to be the only individuals with possible standing to file a claim to the default vehicles, and, therefore the only individuals to be served with process in this action, and were served as follows:

Lawanda Denham: Served December 2, 1996;

Leon Denham: Served December 2, 1996;
Misty Bilby: Served December 3, 1996;
Money Tree Finance: Served November 27, 1996;
Ron Tolbert: Served November 14, 1996;
Bonnie Banks: Served February 25, 1997;
John D. Mills: Served November 14, 1996;
Natasha Irving: Served December 23, 1996;
Crystal Pophir: Served November 14, 1996;
Ron Hunter: Served December 6, 1996;
Melron Hunter: Served November 14, 1996;

Service on David Stevens by summons was attempted at the last known address, 2447 E. 64th St., Tulsa, OK 74104. The United States Marshal's Service was advised by the current resident that David Stevens moved out "a couple of months ago." The government has attempted to locate David Stevens, but has been unable to do so. Service on David Stevens has been completed by publication as set forth below.

Plaintiff's Complaint for Forfeiture In Rem was filed in this Court on October 11, 1996.

All persons and/or entities interested in the default vehicles were required to file their claims herein within ten (10) days after service upon them of the Warrant of Arrest and Notice In Rem, publication of the Notice of Arrest and Seizure, or actual notice of this action, whichever occurred first, and were required to file their answer(s) to the Complaint within twenty (20) days after filing their respective claim(s).

No claims or answers have been filed of record in this action with the Clerk of the Court, in

respect to the default vehicles, and no persons or entities have plead or otherwise defended in this suit as to said default vehicles, and the time for presenting claims and answers, or other pleadings, has expired; and, therefore, upon information and belief, default exists as to the default vehicles and all persons and/or entities interested therein.

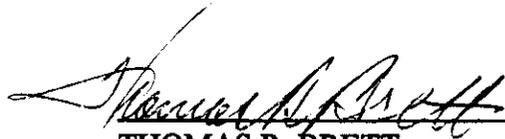
The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending and in which the default vehicles were located, on February 27, March 6 and 13, 1997. Proof of Publication was filed June 16, 1997.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the following-described default vehicles:

- 1970 Chevrolet Purple Camaro, VIN #12487L513987;
- 1989 Buick Regal, VIN #2G4WB14W9K1436227;
- 1976 GMC Red & White Pickup, VIN #TLC146S524232;
- 1982 Oldsmobile Cutlass, VIN #1G3AX69Y7CM141401;
- 1981 Ford Mustang, VIN #1FABP13B4BF202451; and
- 1980 Chevrolet Impala, VIN #1L47JAC127726,

be, and they hereby are, forfeited to the United States of America for disposition according to law.

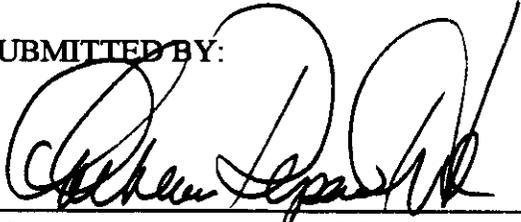
Entered this 19th day of January, 1998.



THOMAS R. BRETT

Judge of the United States District Court for the
Northern District of Oklahoma

SUBMITTED BY:

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

CATHERINE DEPEWHART
Assistant United States Attorney

NAUDDLPEADENFORFEITUSAFEHOMEJUDGMENT.DEF

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

FILED

JAN 23 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVID L. DODD, JR.,)
)
 Plaintiff,)
)
 vs.)
)
 PUBLIC DEFENDER'S OFFICE, et al.,)
)
 Defendants.)

No. 97-C-99-B ✓

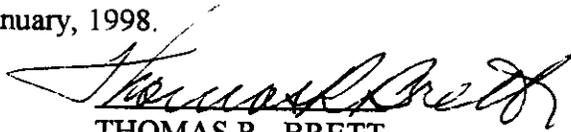
ENTERED ON DOCKET

DATE JAN 26 1998

ORDER

In the Court's Order of October 28, 1997, the Court directed plaintiff David L. Dodd to pay the filing fee on or before November 17, 1997 if he wished to prosecute this action or the Court would dismiss the case. Plaintiff has failed to do so. Therefore, the Court dismisses the case without prejudice.

ORDERED this 19th day of January, 1998.



THOMAS R. BRETT
UNITED STATES DISTRICT COURT

Plaintiff brought this *pro se* civil rights action pursuant to 42 U.S.C. § 1983. While incarcerated at the Dick Connors Correctional Center in Hominy, Oklahoma in November 1995, Plaintiff was charged with and convicted on three separate misconduct charges. Plaintiff's convictions resulted in the loss of good time credits and the imposition of disciplinary segregation. Plaintiff argues that the procedures used to determine whether he was guilty of the charged misconduct deprived him of a liberty interest without due process in violation of the Fourteenth Amendment to the United States Constitution. Plaintiff seeks actual and punitive damages for the alleged denial of his constitutional rights.

Plaintiff has also filed a *pro se habeas corpus* action pursuant to 28 U.S.C. § 2254. See Bant Bryan Baird v. Ron Ward, Warden of the Oklahoma State Penitentiary, 97-CV-107-H(J) (N.D. Okla. Feb. 4, 1997). This civil rights action was stayed pending the outcome of Plaintiff's *habeas corpus* action. [Doc. No. 1]. Plaintiff's *habeas* action was dismissed on November 7, 1997. Thus, the undersigned has turned his attention to this civil rights action, and for the reasons discussed below, the undersigned recommends dismissal of this action.

I. FACTUAL BACKGROUND^{1/}

Plaintiff argues that the process he received in connection with three disciplinary hearings did not satisfy the requirements of the Fourteenth Amendment. The three disciplinary hearings were held to determine whether Plaintiff was guilty on three

^{1/} The facts summarized in this section are taken from Plaintiff's pleadings. At this stage of the proceedings, there are no other evidentiary materials in the record.

separate charges of battering a corrections officer. The first charge was for the alleged battery of Officer Gary McClary on November 1, 1995. The second charge was for the alleged battery of Officer Eugene McCloud on November 9, 1995. The third charge was for the alleged battery of Officer Tom Phillips also on November 9, 1995.

A. McCLARY BATTERY CHARGE

On November 1, 1995, Officer McClary was conducting a shakedown of Plaintiff's cell. During the shakedown, Officer McClary discovered a package in Plaintiff's shoe. Before Officer McClary could examine the package, Plaintiff flushed the package down the toilet in his cell. Plaintiff alleges that he did so because he did not want Officer McClary to find the contraband/tobacco that was in the package. Officer McClary alleges that he attempted to retrieve the package from Plaintiff's toilet and that when he attempted to do so, Plaintiff kned him in the left cheek and forearm and shoved him against the wall. Plaintiff denies ever touching Officer McClary and alleges that he simply placed his leg against the wall to prevent Officer McClary from finding the tobacco.

Plaintiff's disciplinary hearing on the McClary battery charge was held on November 7th and 8th of 1995. Plaintiff was found guilty of battering Officer McClary and sentenced to 30 days of disciplinary segregation and 70 days of previously-accrued good time credits were revoked. Plaintiff alleges that he was not permitted to present live witnesses at the hearing. Plaintiff was permitted by the hearing officer to present a written statement of his cell mate at the time of the alleged incident and

a statement of one corrections officer present at the time of the incident. Plaintiff alleges further that he was not allowed to call as witnesses, either personally or through written statements, other inmates and officers who were near his cell at the time of the alleged incident and who could purportedly testify about what happened and about how Officer McClary looked physically right after the alleged incident.

Plaintiff also challenges the sufficiency of the evidence to support a guilty finding. Plaintiff argues that Officer McClary is lying and that Plaintiff's witnesses, who were excluded by the hearing officer, would have corroborated Plaintiff's version of the incident in question. Officers other than Officer McClary gave testimony at the hearing, which corroborated Officer's McClary's version of the incident in question. Plaintiff argues that none of these officers were in a position to see what happened during the incident in question and that they are simply lying and conspiring with Officer McClary to frame Plaintiff for the alleged battery.

B. McCLOUD BATTERY CHARGE

On November 9, 1995, Officer Eugene McCloud brought Plaintiff a sack lunch and gave it to Plaintiff through the "beanhole" in his cell door. Officer McCloud alleges that as he was handing Plaintiff the sack lunch, Plaintiff attempted to grab him through the beanhole. Plaintiff admits that he became irate when he was given a sack lunch instead of a regular tray and that he did reach for Officer McCloud through the beanhole. Plaintiff alleges, however, that Officer McCloud slammed the beanhole on Plaintiff's arm and Plaintiff never in fact touched Officer McCloud.

Plaintiff's disciplinary hearing on the McCloud battery charge was held on November 15, 1995. Plaintiff was found guilty of battering Officer McCloud and sentenced to 30 days of disciplinary segregation. No good time credits were revoked as a result of this conviction.

Plaintiff alleges that there is insufficient evidence to support a conviction for the offense charged. In particular, Plaintiff argues that the offense of battery, as defined by prison regulations and applicable Oklahoma law, requires actual, physical contact. Plaintiff points to Officer McCloud's statement in which Plaintiff alleges Officer McCloud states that Plaintiff "tried to," but did not actually, grab him.

C. PHILLIPS BATTERY CHARGE

On November 9, 1995, Officer Tom Phillips was escorting Plaintiff to the medical unit. Officer Phillips alleges that while transporting Plaintiff, Plaintiff swung his handcuffed hands and struck Officer Phillips in the left, front shoulder. Plaintiff's disciplinary hearing on the Phillips battery charge was held on November 15, 1995. Plaintiff was found guilty of battering Officer Phillips and sentenced to 30 days of disciplinary segregation. No good time credits were revoked as a result of this conviction.

Plaintiff argues that the hearing officer erred because he used evidence of Plaintiff's prior battery of Officer McCloud, which occurred on the same day as the alleged battery of Officer Phillips, to find Plaintiff guilty of battering Officer Phillips. Plaintiff argues that the hearing officer's use of his prior conviction violates prison policies. According to Plaintiff, under applicable prison policies, a prior conviction on

a misconduct charge may only be used at the punishment stage and not at the guilt/innocence stage of a disciplinary hearing. Plaintiff argues that the hearing officer's use of the prior battery conviction demonstrates that the hearing officer was biased and prejudiced against Plaintiff.

Plaintiff also alleges that there is insufficient evidence to support his conviction for battery of Officer Phillips. Plaintiff argues that the only evidence in support of the conviction is Officer Phillips' statement. Plaintiff argues that Officer Phillips' medical records do not demonstrate any injury. Plaintiff also alleges that the hearing officer failed to give detailed reasons for his decision to take Officer Phillips' word over Plaintiff's.

II. WITH REGARD TO HIS DISCIPLINARY SEGREGATION CLAIMS, PLAINTIFF HAS NOT PLEAD FACTS SUFFICIENT TO ESTABLISH A LIBERTY INTEREST UNDER SANDIN v. CONNER.

Plaintiff was convicted of battering three corrections officers on three separate occasions. Disciplinary segregation was imposed as punishment for each of the three batteries. For the McCloud and Phillips batteries, Plaintiff received only disciplinary segregation. For the McClary battery, Plaintiff received disciplinary segregation and the loss of good time credits as punishment.

To establish a claim under 42 U.S.C. § 1983, Plaintiff must demonstrate that his constitutional rights were violated by a person or persons acting under color of state law. The only constitutional right applicable under the facts of this case is Plaintiff's right to liberty as secured by the Fourteenth Amendment to the United States Constitution. Plaintiff must, therefore, demonstrate that his loss of good time

credits and/or the imposition of disciplinary segregation in some way implicate a liberty interest protected by the Fourteenth Amendment.

A. GOOD TIME CREDITS UNDER 57 OKLA. STAT. § 138

Oklahoma's good-time-credit-statute^{2/} provides that "every inmate of a state correctional facility shall have their term of imprisonment reduced monthly, based upon [the number of credits earned at] the class level to which they are assigned." 57 Okla. Stat. § 138(A). The undersigned finds that Plaintiff does have a liberty interest in the good time credits which he earned under § 138(A).^{3/} Consequently, the due process guarantees of the Fourteenth Amendment attach to any revocation of good time credits earned under § 138(A).

As punishment for his battery of Officer McClary, 70 days of Plaintiff's previously-earned good time credits were revoked. With respect to these revoked good time credits, Plaintiff has stated a claim under 42 U.S.C. § 1983. That is, Plaintiff has alleged the denial of a constitutional right (i.e., denial of liberty without due process) by persons acting under color of state law (i.e., various Oklahoma prison officials). This is, however, the only constitutional violation sufficiently pled in Plaintiff's Complaint.

^{2/} Oklahoma actually refers to good time credits as "earned credits."

^{3/} See Wolff v. McDonnell, 418 U.S. 539, 553-57 (1974) (interests of "real substance" are entitled to constitutional protection); Sandin v. Conner, 515 U.S. 472, 487 (1995) (state actions which inevitably affect the duration of a prisoner's sentence invoke the procedural guarantees of the due process clause); Wallace v. Cody, 951 F.2d 1170, 1171 n.1 (10th Cir. 1991) (a pre-Sandin case holding that Oklahoma's good-time-credit-regime creates a liberty interest); Lamb v. Hargett, Doc. No. 95-625, 1995 WL 649706, at *1-2 (10th Cir. Nov. 11, 1995) (a post-Sandin case reaffirming the Court's holding in Wallace).

B. DISCIPLINARY SEGREGATION

Discipline of an inmate by prison officials is a necessary part of and is incident to any sentence imposed on the inmate by a court of law. Disciplinary segregation in and of itself does not, therefore, implicate an inmates's liberty. Disciplinary segregation will, however, implicate an inmate's liberty if the segregation "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin v. Conner, 515 U.S. 472, 484 (1995).

Plaintiff's Complaint contains no allegations which would support a finding by the Court that the disciplinary segregation to which he was subjected was "atypical" or imposed a "significant hardship . . . in relation to the ordinary incidents of prison life." In short, Plaintiff's Complaint fails to demonstrate that the disciplinary segregation he received as punishment implicates his liberty.^{4/} Having failed to demonstrate that the disciplinary segregation violates a constitutional right, Plaintiff's Complaint does not state a claim under 42 U.S.C. § 1983 with regard to disciplinary segregation. In connection with the McCloud and Phillips batteries, Plaintiff only received disciplinary segregation as a punishment. Consequently, the current Complaint fails to state a claim in connection with the disciplinary hearings on the McCloud and Phillips batteries.

^{4/} In the September 24th Order, Plaintiff was given the opportunity to cure this defect, if he could, by detailing in a separate pleading how the disciplinary segregation in this case was "atypical" or imposed "significant hardships" as compared to ordinary prison life. The undersigned pointed out that this could be accomplished by, among other things, comparing the restrictions imposed while Plaintiff was in disciplinary segregation with those restrictions imposed while Plaintiff was part of the general population. To date, Plaintiff has filed no such pleading.

Plaintiff points out that by being in disciplinary segregation, he was not entitled to earn good time credits which he otherwise would have been able to earn. See 57 Okla. Stat. § 138(D)(1)(a) (defining inmates subject to disciplinary action as Class 1 inmates) and § 138(D)(2) (assigning 0 credits per month to Class 1 inmates). Unlike the revocation of previously-earned good time credits, the denial of an opportunity to earn good time credits does not implicate an inmate's liberty. An inmate does not have a constitutional right to be classified so as to earn good time credits.^{5/} The fact that Plaintiff's disciplinary segregation causes him to lose the opportunity to earn good time credits is simply too attenuated a consequence in and of itself to invoke the procedural protections of the due process clause.^{6/}

As discussed above, the only claim sufficiently pled under § 1983 is Plaintiff's claim that he was denied good time credits without due process of law for the alleged battery of Officer McClary. All other claims fail to state facts sufficient to demonstrate that a constitutional right is at stake. All other claims should, therefore, be dismissed for failure to state a claim upon which relief can be granted under 42 U.S.C. § 1983. See Fed. R. Civ. P. 12(b)(6). However, as discussed below, the claim which is sufficiently pled is subject to dismissal under Heck v. Humphrey, 512 U.S. 477 (1994) and Edwards v. Balisock, --- U.S. ---, 117 S. Ct. 1584 (1997).

^{5/} See Brown v. Champion, Doc. No. 95-5061, 1995 WL 433221, at *1 (10th Cir. July 24, 1995); Janke v. Price, Doc. No. 96-1493, 1997 WL 537962, at *2 (10th Cir. Sept. 2, 1997); Luken v. Scott, 71 F.3d 192, 193 (5th Cir. 1995) (all holding that the loss of the opportunity to earn good time credits does not implicate any constitutionally protected interest).

^{6/} See Sandin, 515 U.S. at 487 (holding that fact that disciplinary segregation might prevent early parole is too attenuated a consequence to invoke the procedural protections of the due process clause).

III. UNDER THE SUPREME COURT'S HOLDINGS IN HECK V. HUMPHREY AND EDWARDS V. BALISOCK, THIS CIVIL RIGHTS ACTION MUST BE DISMISSED.

When a state prisoner seeks damages in a § 1983 lawsuit for the unlawful imposition of punishment resulting in the deprivation of a liberty interest, the Court must determine whether a judgment in favor of the prisoner in his § 1983 action would necessarily imply the invalidity of the punishment imposed. If a judgment in a § 1983 action would necessarily imply the invalidity of the prisoner's punishment, the § 1983 action must be dismissed unless the prisoner can demonstrate that the punishment has previously been invalidated.^{7/} If the prisoner's success in the § 1983 action would not demonstrate the invalidity of the underlying punishment, then the § 1983 action may proceed. Heck v. Humphrey, 512 U.S. 477, 483-87 (1994); Edwards v. Balisock, --- U.S. ---, 117 S. Ct. 1584, 1587-88 (1997). With Heck and Balisock, the United States Supreme Court has sent a clear message: "[A]n inmate cannot seek money damages for alleged deprivations arising out of a prison disciplinary hearing by commencing an action under § 1983 unless the results of that hearing already have been invalidated." Burnell v. Coughlin, 97-CV-6038L, 1997 WL 548736, at *5 (W.D.N.Y. Sept. 3, 1997).

The undersigned finds that a judgment favorable to Plaintiff in this § 1983 case would necessarily imply the invalidity of the punishment imposed. Plaintiff alleges that he was not allowed to present live witnesses and he was not allowed to present

^{7/} For example, the prisoner might be able to demonstrate that his punishment has been invalidated on direct appeal, in a *mandamus* action or in a state or federal *habeas corpus* action.

certain witnesses who had exculpatory information. Plaintiff argues that there is insufficient evidence to support the decisions reached in the three disciplinary hearings. Plaintiff also asserts that the hearing officer was biased and prejudiced against him and that the hearing officer failed to give adequate reasons to support the decisions he reached. In a case with facts almost identical to this case, the Tenth Circuit has found that very similar allegations would, if established, necessarily imply the invalidity of the underlying punishment.^{8/}

Throughout his pleadings, Plaintiff emphatically asserts that he is innocent of all of the misconduct charges leveled against him. Plaintiff's primary focus is on the erroneous outcome of the three disciplinary hearings. That is, Plaintiff argues that the wrong result was reached in each of his three disciplinary hearings, not just that the wrong procedures were used. Resolution of this § 1983 case would, therefore, necessarily imply the invalidity of the punishment imposed at the three disciplinary hearings.

Plaintiff has not demonstrated that the punishment imposed has previously been invalidated. Consequently, this § 1983 action must be dismissed until Plaintiff has his punishment invalidated in an appropriate *mandamus* or *habeas corpus* action. Heck, 512 U.S. at 483-87; Balisock, 117 S. Ct. at 1587-88 (1997); Janke, 1997 WL 537962, at *4-5.

^{8/} See Janke v. Price, Doc. No. 96-1493, 1997 WL 537962, at *4-5 (10th Cir. Sept. 2, 1997). See also, Balisock, 115 S. Ct. at 1586-87 (holding that allegations that the hearing officer was biased and that the hearing officer refused to allow witness testimony, if established, would necessarily imply the invalidity of the underlying punishment); Kerr v. Orellana, 969 F. Supp. 357, 358 (E.D. Va. 1997) (reaching same result based on allegations of procedural defects similar to those raised by Plaintiff in this case).

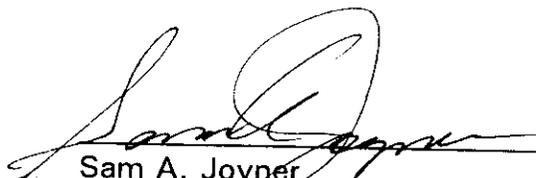
RECOMMENDATION

For the reasons discussed above, the undersigned recommends dismissal of this action.

OBJECTIONS

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

Dated this 22 day of January 1998.


Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

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

24th Day of January, 1998.

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

FILED

JAN 23 1998

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

GREGORY V. SHIELDS,)

Plaintiff,)

v.)

CASE NO. 96-CV-1118-M

KENNETH S. APFEL,)

Commissioner of the Social Security
Administration,)

Defendant.)

ENTERED ON DOCKET

JAN 23 1998

DATE _____

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 23rd day of JAN., 1998.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

JAN 23 1998

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

GREGORY V. SHIELDS,)
SSN: 445-44-7195,)

Plaintiff,)

v.)

NO. 96-CV-1118-M

KENNETH S. APFEL,)
Commissioner of the Social)
Security Administration,¹)

ENTERED ON DOCKET

DEFENDANT.)

DATE JAN 23 1998

ORDER

Plaintiff, Gregory V. Shields, 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

¹ Kenneth S. Apfel was sworn in as Commissioner of Social Security on September 29, 1997. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Kenneth S. Apfel should be substituted for John J. Callahan, Acting Commissioner, who was previously substituted for Shirley S. Chater, as defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

² Plaintiff's application for disability benefits, filed on October 25, 1994, was denied initially and upon reconsideration. A hearing was conducted October 25, 1995, after which the ALJ entered the decision dated January 5, 1996, which is the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on October 4, 1996. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

12

substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less 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). Even if the Court might have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born June 5, 1948 and was, at the expiration of his insured status on March 31, 1994, a "younger individual." [R. 87]. Plaintiff claims that he is unable to work at his usual occupation of painter and is disabled from performing any gainful substantial activity due to residual effects of two herniated discs of the lumbar spine, spondylosis and post-traumatic stress disorder. [Plaintiff's brief, p. 2]. The specific question posed in this appeal is whether there is substantial evidence in the record to support the ALJ's finding that, although Plaintiff was unable to perform his past relevant work (PRW) or the full range of light work, he was capable of making an adjustment to other work which existed in significant numbers in the national

economy and was, therefore, not disabled as that term is defined under the Social Security Act on the date his insured status expired.

Plaintiff asserts the ALJ's finding that he can perform light and sedentary work is "in direct conflict with the finding that Plaintiff suffers from two (2) herniated discs causing low back pain and numbness in the lower extremity." He argues the ALJ relied upon reports of medical examinations performed after the date he was last insured instead of his treating physicians' reports which he contends support his position that he "could not work due to the severe low back condition." [Plaintiff's brief, p. 4-5].³

It is undisputed that Plaintiff fell from a ladder while on-the-job as a painter on June 11, 1993 and sustained injury to his low back. The record contains reports of Plaintiff's treating physicians, Anthony C. Billings, M.D. and Jim Martin, M.D., which are actually reports for workers' compensation benefits purposes. Plaintiff was treated by Dr. Martin immediately following his injury and, on August 3, 1993, was determined to be "100% temporarily totally disabled" for an indefinite period of time, pending further treatment and evaluation. [R. 189]. He was referred to Dr. Billings, a neurologist, for an independent medical evaluation on November 29, 1993 by the

³ Plaintiff attached as an exhibit to his brief, a document he described as a deposition "for purposes of Plaintiff's workers compensation claim." [Plaintiff's brief, p. 4]. Defendant asserts this document has not been previously submitted and not a part of the record certified by the Commissioner for purposes of this appeal and so has been improperly submitted by Plaintiff to this Court. The Court has not reviewed the document attached as "exhibit "A" to Plaintiff's brief because to do so would be inappropriate and contrary to statute and case law. 42 U.S.C. § 405(g); *Selman v. Califano*, 619 F.2d 881, 885 (10th Cir. 1980); *Atteberry v. Finch*, 424 F.2d 36, 39 (10th Cir. 1970)(court may not evaluate new evidence in determining whether ALJ's decision is supported by substantial evidence).

workers' compensation court. [R. 199-201]. Dr. Billings also assessed Plaintiff to be temporarily totally disabled and recommended additional diagnostic studies, including X-rays and an MRI. [R. 199]. The X-rays of the cervical spine were normal; X-rays of the lower back showed evidence of intervertebral disk space narrowing; and the MRI revealed two level disk herniation. [R. 197, 198]. Dr. Billings discussed four treatment options with Plaintiff on December 8, 1993: "1) do nothing and rate him out with a 10% disability based on a two level disk herniation"; "2) weight reduction and spinal rehabilitation with physical impairment rating of 10%"; "3) weight reduction and spinal rehabilitation with surgery held as an option if he did not improve"; and, "4) surgical treatment during the next four to six months if required..." [R. 198]. Plaintiff opted for weight reduction and physical therapy with surgery held as an option. [R. 196]. After seven physical therapy sessions, Dr. Billings "rated him out" because he was unable to tolerate the physical therapy and to comply with any weight reduction. [R. 195-196]. On March 23, 1994, Dr. Billings rated Plaintiff as 14% physically impaired and opined that he will not be able to return to his former occupation as a painter because of the lifting, bending and stooping as well as climbing of ladders. [R. 195].

On May 12, 1994, Plaintiff was examined, again for workers' compensation purposes, by William R. Gillock, M.D. [R. 216-223]. In addition to conducting a physical examination of Plaintiff, Dr. Gillock reviewed medical records from Drs. Martin and Billings. [R. 221]. He assessed no permanent impairment to Plaintiff's neck or shoulders and 5% permanent partial impairment to his lumbar spine, based

on loss of motion. [R. 221-222].

The Court acknowledges that the Oklahoma Workers' Compensation scheme may apply standards that differ from Social Security standards and that the Commissioner is not bound by disability determinations made by other agencies. *Baca v. Dept. Health and Human Servs.*, 5 F.3d 476, 480 (10th Cir. 1993). Furthermore, ratings of disability under the workers' compensation system have little relevance to disability determinations under the Social Security Act as no consideration is given to whether a workers' compensation claimant has a residual functional capacity (RFC) for work at jobs other than the job he was performing when he was injured.

It is clear, however, that both Dr. Billings and Dr. Martin were Plaintiff's treating physicians and, under the Social Security Act, their opinions may be entitled to controlling weight. A treating physician may offer an opinion which reflects a judgment about the nature and severity of the claimant's impairments including the claimant's symptoms, diagnosis and prognosis, and any physical and mental restrictions. See 20 C.F.R. §§ 404.1527(a)(2), 416.927(a)(2). The Secretary will give controlling weight to that type of opinion if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record. §§ 404.1527(d)(2), 416.927(d)(2). A treating physician's opinion may be rejected if it is brief, conclusory and unsupported by medical evidence. Specific, legitimate reasons for rejection of the opinion must be set forth by the ALJ. *Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987). And, while a physician

may proffer an opinion that a claimant is totally disabled, that opinion is not dispositive because final responsibility for determining the ultimate issue of disability is reserved to the Secretary. See 20 C.F. R. §§ 404.1527(e)(2), 416.927(e)(2); *Castellano v. Secretary of Health and Human Services*, 26 F.3d 1027, 1028 (10th Cir. 1994), *Eggleston v. Bowen*, 851 F.2d 1244, 1246-7 (10th Cir. 1988).

Plaintiff asserts that it was the opinion of his treating doctors that he was unable to work due to his low back pain and numbness in the lower extremity caused by two herniated discs. However, the record shows that Drs. Billings and Martin assessed Plaintiff to be "totally disabled" temporarily, while he was being treated for his on-the-job injury, for workers' compensation benefits. There is no indication in the record that either treating physician believed Plaintiff to be totally disabled permanently for the performance of any work. It is also clear that the ALJ took into consideration the opinions of both these treating physicians in concluding that Plaintiff is not able to return to his former work as a painter but that he retains the residual functional capacity to perform other work with limitations of only occasional bending, climbing or stooping. [R. 23-24]. The opinion of Dr. Gillock that Plaintiff had a limited range-of-motion, upon which the ALJ also relied in determining Plaintiff's RFC, is consistent with the final report of Dr. Billings. [R. 195, 216-223].⁴ There is no conflict between the medical opinions of Plaintiff's treating physicians and the RFC determination by the ALJ.

⁴ Plaintiff has not challenged the finding of the ALJ regarding his non-exertional impairments, depression and impaired social adjustments, or the PRT attached to his decision.

The ALJ found that Plaintiff is impaired by residuals from a back injury and depression but that his statements regarding the impact of those impairments on his ability to work are not entirely credible. [R. 26]. The Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10 Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ listed the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20 C.F.R. 404.1529(c)(3), 20 C.F.R. 416.929(c)(3), and Social Security Ruling 88-13 and appropriately applied the evidence to those guidelines.

The Court finds that the ALJ evaluated the record, Plaintiff's credibility, and allegations of pain in accordance with the correct legal standards established by the Secretary and the courts. The Court finds that there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Commissioner finding Plaintiff not disabled before March 31, 1994 is AFFIRMED.

SO ORDERED THIS 23rd day of JAN., 1998.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

JAN 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TEREX CORPORATION,)
)
 Plaintiff,)
)
 v.)
)
 LOCAL LODGE NO. 790 OF THE)
 INTERNATIONAL ASSOCIATION OF)
 MACHINISTS AND AEROSPACE)
 WORKERS, AFL-CIO,)
)
 Defendants.)

Case No. 95-C- 412-BU

ENTERED ON DOCKET
DATE JAN 23 1998

STIPULATION AND PROPOSED ORDER FOR DISMISSAL

Plaintiff, Terex Corporation, by its undersigned counsel of record, and
Defendant, Local Lodge No. 790 of the International Association of Machinists and Aerospace
Workers, AFL-CIO, by its undersigned counsel of record, hereby stipulate and agree as
follows:

1. All claims, including all counterclaims, that were asserted or could have
been asserted arising out of or in connection with the facts alleged in the Complaint,
Counterclaim, Reply to Counterclaim, First Amended Counterclaim or Reply to First
Amended Counterclaim should be dismissed, with prejudice, and without an award of costs or
fees to either party.
2. The decision and award of Arbitrator W. Edwin Youngblood in the
matter of Grievance No. 707-94, that is attached to the Complaint as Exhibit B, shall not have
any precedential value whatsoever in any future proceedings between these parties or their

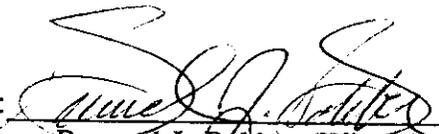
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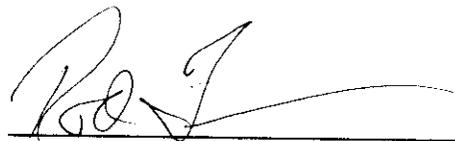
successors, including, but not limited to, future labor arbitrations, negotiations, lawsuits or disputes of any kind between these parties or their successors regarding any issue. The parties agree that they shall not refer or cite to said decision and award for any purpose in any proceeding or matter between them.

3. The attached proposed Order approving of this stipulation and dismissing all claims with prejudice and without an award of costs or fees to either party can be entered without further notice to any party.

TEREX CORPORATION

LOCAL LODGE NO. 790 OF THE
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO

By: 
Bernard J. Bobber (Wis. 1015499)
Attorney for Plaintiff Terex Corporation

By: 
Rod Tanner (Tx Bar No. 19637500)
Attorney for Defendant Local Lodge
No. 790, International Association
Of Machinists and Aerospace
Workers, AFL-CIO

FOLEY & LARDNER
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-5367
(414) 271-2400 (general)
(414) 297-4900 (facsimile)

GILLESPIE, ROZEN, TANNER
& WATSKY, P.C.
1212 Bank One Tower
500 Throckmorton Street
Fort Worth, TX 76102
(817) 870-1212

Date: 1/19/98

Date: 1/20/98

ORDER

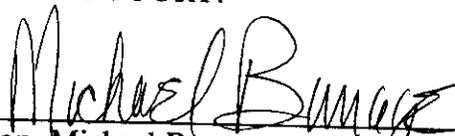
The Court having considered the foregoing stipulation of the parties and the pleadings, orders, rulings and other materials of record,

IT IS HEREBY ORDERED THAT

The foregoing stipulation of the parties is hereby approved, and all claims that were asserted or could have been asserted by any party shall be and hereby are dismissed, with prejudice, and without an award of costs or fees to any party.

Dated: January 21, 1998.

BY THE COURT:



Hon. Michael Burrage
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILMA L. CRAWFORD,
SSN: 445-50-0496

Plaintiff,

vs.

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

Defendant.

ENTERED ON DOCKET

DATE JAN 23 1998

Case No. 97-CV-318-J ✓

FILED

JAN 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Defendant has filed a motion to remand this case pursuant to sentence 4 of 42 U.S.C. § 405(g). [Doc. No. 10]. Plaintiff has no objection. Defendant's motion is, therefore, GRANTED. This action is hereby remanded to the Commissioner for further administrative action.

IT IS SO ORDERED.

Dated this 22 day of January 1998.



Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILMA L. CRAWFORD,
SSN: 445-50-0496

Plaintiff,

vs.

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

Defendant.

ENTERED ON DOCKET
DATE JAN 23 1998

Case No. 97-CV-318-J ✓

FILED

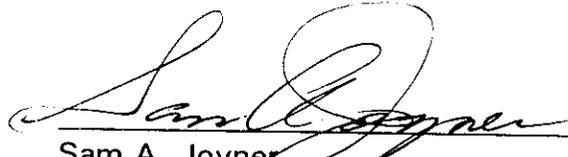
JAN 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This action has come before the Court for consideration and an Order 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 22 day of January 1998.


Sam A. Joyner
United States Magistrate Judge

12

ENTERED ON DOCKET

DATE 1-23-98

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

EDDIE DERIGNE, et al.,
Plaintiffs,
vs.
HEIDELBERGER DRUCKMASCHINEN
AKTIENGESELLSCHAFT, et al.,
Defendants.

No. 96-C-912-K

FILED

JAN 23 1998

ADMINISTRATIVE CLOSING ORDER

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

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

ORDERED this 22 day of January, 1998.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

1/24

ENTERED ON DOCKET
DATE 1-23-98

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

DELTA T LIMITED,)
)
 Plaintiff,)
)
 vs.)
)
 KRATZ-WILDE MACHINE COMPANY,)
)
 Defendant.)

No. 97-C-225-K /

FILED

JAN 23 1998, 12

ADMINISTRATIVE CLOSING ORDER

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

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

ORDERED this 22 day of January, 1998.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

A CERTIFIED TRUE COPY

JAN 5 1998

ATTEST
FOR THE JUDICIAL PANEL OF
MULTIDISTRICT LITIGATION

JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION
FILED

Dec. 18, 1997

PATRICIA D. HOWARD
CLERK OF THE PANEL

ENTERED ON DOCKET

98 JAN 12 PM 12:26

JAN 22 1998

U.S. DISTRICT COURT
N.D. OF ALABAMA

FILED

JAN 21 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DOCKET NO. 926

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE SILICONE GEL BREAST IMPLANTS PRODUCTS LIABILITY LITIGATION

(SEE ATTACHED SCHEDULE CTO-118)

CONDITIONAL TRANSFER ORDER

OKU-97-C-1048-C /
ALU-98-P-10207-S

On June 25, 1992, the Panel transferred 76 civil actions to the United States District Court for the Northern District of Alabama for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. §1407. Since that time, more than 23,620 additional actions have been transferred to the Northern District of Alabama. With the consent of that court, all such actions have been assigned to the Honorable Sam C. Pointer, Jr.

appears that the actions listed on the attached schedule involve questions of fact which are common to the actions previously transferred to the Northern District of Alabama and assigned to Judge Pointer.

Pursuant to Rule 12 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 147 F.R.D. 589, 596, the actions on the attached schedule are hereby transferred under 28 U.S.C. §1407 to the Northern District of Alabama for the reasons stated in the opinion and order of June 25, 1992, 793 F.Supp. 1098 and, with the consent of that court, assigned to the Honorable Sam C. Pointer, Jr.

This order does not become effective until it is filed in the office of the Clerk of the United States District Court for the Northern District of Alabama. The transmittal of this order to said Clerk shall be stayed fifteen (15) days from the entry thereof and if any party files a notice of opposition with the Clerk of the Panel within this fifteen (15) day period, the stay will be continued until further order of the Panel.

FOR THE PANEL:

Patricia D. Howard
Clerk of the Panel

Inasmuch as no objection regarding
at this time the stay is lifted and
this order becomes effective

JAN 6 1998

Patricia D. Howard
Clerk of the Panel

A TRUE COPY
Dawn Cooper
DEPUTY CLERK

2224

Cases Transferred Per CTO 118

Transferor Court	ALN Caseno	Caption	
ALS	1:97-01087	98-P-10037-S	STROECKER v. BAXTER HEALTHCARE
ALS	2:97-01027	98-P-10038-S	BENDER v. CLARK M. PAGE
ARE	3:97-00441	98-P-10039-S	RAGAN v. MEDICAL ENGINEERING
ARE	5:97-00529	98-P-10040-S	GOMORI v. MEDICAL ENGINEERING
ARW	2:97-02276	98-P-10041-S	WOOD v. HEYER-SCUTLTE
AZ	3:97-02428	98-P-10042-S	SMITH v. CUI
CAC	2:97-07802	98-P-10043-S	HILL v. BAXTER HEALTHCARE
CAC	2:97-08042	98-P-10044-S	HAYWARD v. MINNESOTA MINING & MFG
CAC	2:97-08043	98-P-10045-S	MOORE v. CUI
CAC	8:97-00848	98-P-10046-S	KELLEY v. BAXTER HEALTHCARE
CAE	1:97-06053	98-P-10047-S	OGANS v. MINNESOTA MINING & MFG
CAE	1:97-06147	98-P-10048-S	LEE v. MEDICAL ENGINEERING
CAE	1:97-06148	98-P-10049-S	KERNS v. MEDICAL ENGINEERING
CAE	1:97-06149	98-P-10050-S	AVOLEDO v. MEDICAL ENGINEERING
CAN	3:95-03470	98-P-10051-S	KATZ v. COX-UPHOFF INTERNATIONAL
CAN	3:97-03816	98-P-10052-S	PETERSON v. BRISTOL-MYERS SQUIBB
CAN	3:97-04179	98-P-10053-S	BIRDSONG v. MINNESOTA MINING & MFG
CAN	3:97-04180	98-P-10054-S	MANH v. MCGHAN MEDICAL
CAN	3:97-04181	98-P-10055-S	COSTELLO v. BRISTOL-MYERS SQUIBB
CAN	3:97-04219	98-P-10056-S	CARRUTHERS v. BRISTOL-MYERS SQUIBB
CAN	4:97-04182	98-P-10057-S	HUDDLESTON v. BRISTOL-MYERS SQUIBB
CAS	3:97-01453	98-P-10058-S	GILBREATH v. BRISTOL-MYERS SQUIBB
CAS	3:97-01913	98-P-10059-S	DEPEW v. BAXTER HEALTHCARE
CAS	3:97-02046	98-P-10060-S	MORRIS v. BRISTOL-MYERS SQUIBB
CAS	3:97-02095	98-P-10061-S	KERLEY v. BAXTER HEALTHCARE
CO	1:97-02542	98-P-10062-S	WEHBA v. SURGITEK
CT	3:97-02514	98-P-10063-S	SAMPSON v. MCGHAN MEDICAL
DC	1:97-02689	98-P-10064-S	TEMPLE v. DOW CHEMICAL
DC	1:97-02782	98-P-10065-S	KOVALENKO v. BRISTOL-MYERS SQUIBB
DC	1:97-02783	98-P-10066-S	ABRAMS v. BRISTOL-MYERS SQUIBB
DC	1:97-02784	98-P-10067-S	COLLINS v. BAXTER HEALTHCARE
DC	1:97-02785	98-P-10068-S	ADAMS v. BRISTOL-MYERS SQUIBB
DC	1:97-02804	98-P-10069-S	CURTIN v. DOW CHEMICAL
FLM	8:97-02514	98-P-10070-S	MULCUNRY v. AMERICAN HEYER-SCHULTE
FLM	8:97-02556	98-P-10071-S	PURSIFULL v. MEDICAL ENGINEERING
FLM	8:97-02608	98-P-10072-S	SHULTZ v. AMERICAN HEYER-SCHULTE
FLM	8:97-02632	98-P-10073-S	SCHEMBARI v. MEDICAL ENGINEERING
FLM	8:97-02633	98-P-10074-S	MAXWELL v. MEDICAL ENGINEERING
FLM	8:97-02643	98-P-10075-S	CATANZARO v. AMERICAN HEYER-SCHULTE
FLM	8:97-02644	98-P-10076-S	WANINSKI v. AMERICAN HEYER-SCHULTE
FLM	8:97-02645	98-P-10077-S	KAHN v. MEC SUBSIDIARY
FLM	8:97-02831	98-P-10078-S	RADICE v. BRISTOL-MYERS SQUIBB
FLS	0:97-07401	98-P-10079-S	CHARLTON v. CUI
FLS	1:97-03642	98-P-10080-S	MARCELO v. MINNESOTA MINING & MFG
GAN	1:97-02507	98-P-10081-S	WARREN v. 3M
GAN	1:97-03366	98-P-10082-S	HODGENS v. BAXTER HEALTHCARE
GAN	1:97-03367	98-P-10083-S	LOCKERT v. BAXTER HEALTHCARE
GAN	1:97-03406	98-P-10084-S	DECKER v. BRISTOL-MYERS SQUIBB
GAN	1:97-03407	98-P-10085-S	HODGES v. MINNESOTA MINING & MFG
GAN	1:97-03408	98-P-10086-S	PICKLESIMER v. BAXTER HEALTHCARE
GAN	1:97-03409	98-P-10087-S	SHEA v. BAXTER HEALTHCARE
GAN	1:97-03410	98-P-10088-S	WALINSKI v. MINNESOTA MINING & MFG
GAN	1:97-03433	98-P-10089-S	ADAMS v. 3M
GAN	1:97-03475	98-P-10090-S	HENNEBERGER v. BRISTOL-MYERS SQUIBB
GAN	1:97-03476	98-P-10091-S	PHANEUF v. BRISTOL-MYERS SQUIBB
GAN	1:97-03477	98-P-10092-S	ROBERTS v. BRISTOL-MYERS SQUIBB
GAN	4:97-00353	98-P-10093-S	SCOTT v. 3M
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WVS	2:97-01048	98-P-10245-S	VEALEY v. MCGHAN MEDICAL

A CERTIFIED TRUE COPY

JAN 6 1998

ATTESTY *[Signature]*
FOR THE JUDICIAL PANEL OF
MULTIDISTRICT LITIGATION

JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION
FILED

Dec. 18, 1997

PATRICIA D. HOWARD
CLERK OF THE PANEL

FILED

98 JAN 12 PM 12:26

ENTERED ON DOCKET
U.S. DISTRICT COURT
DATE JAN 22 1998 N.D. OF ALABAMA

FILED

JAN 21 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DOCKET NO. 926

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE SILICONE GEL BREAST IMPLANTS PRODUCTS LIABILITY LITIGATION

(SEE ATTACHED SCHEDULE CTO-118)

CKN-97-C-1047-E

CONDITIONAL TRANSFER ORDER

ALN-98-P-10206-S

On June 25, 1992, the Panel transferred 76 civil actions to the United States District Court for the Northern District of Alabama for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. §1407. Since that time, more than 23,620 additional actions have been transferred to the Northern District of Alabama. With the consent of that court, all such actions have been assigned to the Honorable Sam C. Pointer, Jr.

It appears that the actions listed on the attached schedule involve questions of fact which are common to the actions previously transferred to the Northern District of Alabama and assigned to Judge Pointer.

Pursuant to Rule 12 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 147 F.R.D. 589, 596, the actions on the attached schedule are hereby transferred under 28 U.S.C. §1407 to the Northern District of Alabama for the reasons stated in the opinion and order of June 25, 1992, 793 F.Supp. 1098 and, with the consent of that court, assigned to the Honorable Sam C. Pointer, Jr.

This order does not become effective until it is filed in the office of the Clerk of the United States District Court for the Northern District of Alabama. The transmittal of this order to said Clerk shall be stayed fifteen (15) days from the entry thereof and if any party files a notice of opposition with the Clerk of the Panel within this fifteen (15) day period, the stay will be continued until further order of the Panel.

FOR THE PANEL:

[Signature of Patricia D. Howard]

Patricia D. Howard
Clerk of the Panel

Inasmuch as no objection is pending
at this time the stay is lifted and
this order becomes effective

JAN 6 1998

Patricia D. Howard
Clerk of the Panel

A JUSTICE
CLERK OF THE COURT
NORTHERN DISTRICT OF ALABAMA

[Signature of Dawn Cooper]
DEPUTY CLERK

2224

Cases Transferred Per CTO 118

Transferor Court	ALN Caseno	Caption
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ALS 2:97-01027	98-P-10038-S	BENDER v. CLARK M. PAGE
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A CERTIFIED TRUE COPY

JAN 5 1998

ATTEST
FOR THE JUDICIAL PANEL OF
MULTIDISTRICT LITIGATION

JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION
FILED

Dec. 18, 1997

PATRICIA D. HOWARD
CLERK OF THE PANEL

FILED

98 JAN 12 PM 12:26

FILED
U.S. DISTRICT COURT
N.D. OF ALABAMA

DATE JAN 22 1998

DOCKET NO. 926

FILED

JAN 21 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE SILICONE GEL BREAST IMPLANTS PRODUCTS LIABILITY LITIGATION

(SEE ATTACHED SCHEDULE CTO-118)

CONDITIONAL TRANSFER ORDER

OKN-97-C-1046-H ✓

ALN-98-P-10205-S

On June 25, 1992, the Panel transferred 76 civil actions to the United States District Court for the Northern District of Alabama for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. §1407. Since that time, more than 23,620 additional actions have been transferred to the Northern District of Alabama. With the consent of that court, all such actions have been assigned to the Honorable Sam C. Pointer, Jr.

appears that the actions listed on the attached schedule involve questions of fact which are common to the actions previously transferred to the Northern District of Alabama and assigned to Judge Pointer.

Pursuant to Rule 12 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 147 F.R.D. 589, 596, the actions on the attached schedule are hereby transferred under 28 U.S.C. §1407 to the Northern District of Alabama for the reasons stated in the opinion and order of June 25, 1992, 793 F.Supp. 1098 and, with the consent of that court, assigned to the Honorable Sam C. Pointer, Jr.

This order does not become effective until it is filed in the office of the Clerk of the United States District Court for the Northern District of Alabama. The transmittal of this order to said Clerk shall be stayed fifteen (15) days from the entry thereof and if any party files a notice of opposition with the Clerk of the Panel within this fifteen (15) day period, the stay will be continued until further order of the Panel.

FOR THE PANEL:

Patricia D. Howard
Clerk of the Panel

Inasmuch as no objection is being
at this time the stay is lifted and
this order becomes effective

JAN 6 1998

Patricia D. Howard
Clerk of the Panel

A TRUE COPY
FILED
U.S. DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

Dawn Cooper
DEPUTY CLERK

2224

Cases Transferred Per CTD 118

Transferor Court	ALN Caseno	Caption
ALS 1:97-01087	98-P-10037-S	STROECKER v. BAXTER HEALTHCARE
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CAN 4:97-04182	98-P-10057-S	HUDDLESTON v. BRISTOL-MYERS SQUIBB
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MD	1:97-03764	98-P-10134-S	DELLA v. MCGHAN MEDICAL
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MD	1:97-03768	98-P-10137-S	CHARPIAT v. MCGHAN MEDICAL
MD	1:97-03854	98-P-10138-S	WINTER v. MCGHAN MEDICAL
MD	1:97-03857	98-P-10139-S	DEZMON v. MCGHAN MEDICAL
MD	1:97-03883	98-P-10140-S	MEADOWS v. MCGHAN MEDICAL
MD	1:97-03954	98-P-10141-S	MATTISON v. BRISTOL-MYERS SQUIBB
MD	8:97-03649	98-P-10142-S	DAVIS v. MCGHAN MEDICAL
MD	8:97-03661	98-P-10143-S	TILLERY v. DOW CHEMICAL
MD	8:97-03753	98-P-10144-S	STEWART v. MCGHAN MEDICAL
MD	8:97-03754	98-P-10145-S	MARTINI v. MCGHAN MEDICAL
MD	8:97-03757	98-P-10146-S	HUNGERFORD v. MCGHAN MEDICAL
MD	8:97-03766	98-P-10147-S	FISHMAN v. MCGHAN MEDICAL
MD	8:97-03886	98-P-10148-S	SARANG v. BRISTOL-MYERS SQUIBB
MD	8:97-03887	98-P-10149-S	BYWATER v. MCGHAN MEDICAL
ME	2:97-00348	98-P-10150-S	HAROUTUNIAN v. DOW CHEMICAL
ME	2:97-00351	98-P-10151-S	CHAISSON v. DOW CHEMICAL
ME	2:97-00354	98-P-10152-S	BONSAINT v. DOW CHEMICAL
ME	2:97-00357	98-P-10153-S	DAHL v. CUI
ME	2:97-00358	98-P-10154-S	TAYLOR v. MCGHAN MEDICAL
MIE	2:97-30413	98-P-10155-S	ARNOLD v. DOW CHEMICAL
MIE	2:97-74850	98-P-10156-S	RHOADS v. HEYER SCHULTE
MIE	2:97-75324	98-P-10157-S	PALA v. MINNESOTA MINING & MFG
MN	0:97-02516	98-P-10158-S	CAPIZ v. MEC SUBSIDIARY
MN	0:97-02581	98-P-10159-S	MICHEL v. BAXTER HEALTHCARE
MN	0:97-02597	98-P-10160-S	PATTERSON v. BAXTER HEALTHCARE
MN	0:97-02603	98-P-10161-S	AGRE v. MEC SUBSIDIARY
MN	0:97-02609	98-P-10162-S	NORWICH v. MEDICAL ENGINEERING
MN	0:97-02610	98-P-10163-S	VENN v. MEDICAL ENGINEERING
MN	0:97-02611	98-P-10164-S	LENZ v. MEDICAL ENGINEERING
MN	0:97-02612	98-P-10165-S	NEIL v. MEDICAL ENGINEERING
MN	0:97-02613	98-P-10166-S	FJELD v. MEDICAL ENGINEERING
MN	0:97-02614	98-P-10167-S	HEISS v. MEDICAL ENGINEERING
MN	0:97-02615	98-P-10168-S	PALMER v. BRISTOL-MYERS SQUIBB
MN	0:97-02646	98-P-10169-S	SCHREYER v. MEDICAL ENGINEERING
MN	0:97-02647	98-P-10170-S	BERGSTROM v. MEDICAL ENGINEERING
MN	0:97-02648	98-P-10171-S	ATWATER v. MEDICAL ENGINEERING
MN	0:97-02649	98-P-10172-S	BALDRICA v. MEDICAL ENGINEERING
MN	0:97-02650	98-P-10173-S	SAMUELSON v. MEDICAL ENGINEERING
MN	0:97-02651	98-P-10174-S	DUFFEY v. BRISTOL-MYERS SQUIBB

MN	0:97-02724	98-P-10175-S	FARINHA v. MEDICAL ENGINEERING
MN	0:97-02743	98-P-10176-S	THIES v. MEDICAL ENGINEERING
MOW	4:97-01514	98-P-10177-S	CANNOVA v. HEYER SCHULTE
MOW	4:97-01515	98-P-10178-S	OWENS v. MEDICAL ENGINEERING
MOW	4:97-01516	98-P-10179-S	CUNNINGHAM v. HEYER-SCHULTE
MOW	4:97-01530	98-P-10180-S	RESCHKE v. BRISTOL-MYERS SQUIBB
MOW	4:97-01531	98-P-10181-S	ARROW v. BRISTOL-MYERS SQUIBB
MOW	4:97-01541	98-P-10182-S	CALVERT v. BAXTER INTERNATIONAL
MOW	4:97-01552	98-P-10183-S	HOEGLER v. BAXTER INTERNATIONAL
MOW	4:97-01559	98-P-10184-S	HILLS v. BAXTER INTERNATIONAL
MOW	4:97-01560	98-P-10185-S	DODSON v. BAXTER INTERNATIONAL
MOW	4:97-01562	98-P-10186-S	PICKMAN v. BAXTER INTERNATIONAL
MOW	6:97-06541	98-P-10187-S	COMPTON v. MINNESOTA MINING & MFG
NCW	1:97-00314	98-P-10188-S	SILVERS v. AMERICAN HOSP. SUPPLY
NCW	1:97-00320	98-P-10189-S	BENGSTON v. MINNESOTA MINING & MFG
NCW	1:97-00321	98-P-10190-S	KENNEDY v. MCGHAN MEDICAL
NCW	1:97-00322	98-P-10191-S	JILES v. MINNESOTA MINING & MFG
NCW	1:97-00324	98-P-10192-S	TRACHSEL v. MINNESOTA MINING & MFG,
ND	1:97-00139	98-P-10193-S	TIBOR v. MINNESOTA MINING & MFG
NE	8:97-00566	98-P-10194-S	FINK v. DOW CHEMICAL
NE	8:97-00583	98-P-10195-S	JACKMAN v. BRISTOL-MYERS SQUIBB
NH	1:97-00616	98-P-10196-S	DUCHARME v. MINNESOTA MINING & MFG
NJ	2:97-05579	98-P-10197-S	ROUNDTREE v. UNION CARBIDE
NJ	2:97-05580	98-P-10198-S	RYAN v. INAMED
NJ	2:97-05581	98-P-10199-S	MCKINNEY v. INAMED
NJ	2:97-05582	98-P-10200-S	O'CALLAGHAN v. INAMED
NJ	2:97-05596	98-P-10201-S	LIVERSIDGE v. INAMED
NV	2:97-01689	98-P-10202-S	MACKENZIE v. MEDICAL ENGINEERING
OHS	1:97-00223	98-P-10203-S	ROBERTS v. MEC SUBSIDIARY
OHS	1:97-00929	98-P-10204-S	BILLINGSLEY v. BRISTOL-MYERS SQUIBB
OKN	4:97-01046	98-P-10205-S	MORGAN v. MEDICAL ENGINEERING
OKN	4:97-01047	98-P-10206-S	LEE v. MEDICAL ENGINEERING
OKN	4:97-01048	98-P-10207-S	HESS v. MEDICAL ENGINEERING
OKW	5:97-01856	98-P-10208-S	GUTIERREZ v. MEC SUBSIDIARY
OKW	5:97-01908	98-P-10209-S	KUNSTEL v. HEYER-SCHULTE
OKW	5:97-01909	98-P-10210-S	NIXON v. MEDICAL ENGINEERING
OR	3:97-01686	98-P-10211-S	DURKIN v. SURGITEK
SC	4:97-03583	98-P-10212-S	FUNDERBURK v. BYERLY HOSP.
SC	6:97-03595	98-P-10213-S	BELL v. BRISTOL-MYERS SQUIBB
SC	6:97-03596	98-P-10214-S	MOSS v. BRISTOL-MYERS SQUIBB
SC	6:97-03646	98-P-10215-S	VILCHECK v. BRISTOL-MYERS SQUIBB
SC	7:97-03750	98-P-10216-S	WOOD v. CUI
SC	8:97-03594	98-P-10217-S	THOMPSON v. BRISTOL-MYERS SQUIBB
SC	9:97-03615	98-P-10218-S	DIETZE v. DOW CHEMICAL
TNE	2:97-00471	98-P-10219-S	TICHENOR v. BRISTOL-MYERS SQUIBB
TNW	2:97-02842	98-P-10220-S	PLANTAMURA v. DOW CHEMICAL
TNW	2:97-02937	98-P-10221-S	BARTON v. CUI
TNW	2:97-02981	98-P-10222-S	LEDFOUR v. 3M
TXN	3:97-02879	98-P-10223-S	SCAMINACI v. MEDICAL ENGINEERING
TXS	4:97-01631	98-P-10224-S	CUNNINGHAM v. BAXTER HEALTHCARE
TXS	4:97-02258	98-P-10225-S	BURNS v. SURGITEK
TXS	4:97-03336	98-P-10225-S	ADAMS v. DOW CHEMICAL
TXW	1:95-00604	98-P-10227-S	DYKE v. DOW CORNING
VAE	1:97-01793	98-P-10228-S	BOHN v. BAXTER HEALTHCARE
VAE	1:97-01816	98-P-10229-S	LUCCI v. MCGHAN MEDICAL
VAW	1:97-00142	98-P-10230-S	MCCROSKEY v. AMERICAN HEYER-SCHULTE
VI	3:97-00179	98-P-10231-S	MINDEY v. SURGITEK
VI	3:97-00210	98-P-10232-S	RAMIREZ v. SURGITEK
WAE	2:97-00443	98-P-10233-S	SEIGLE v. CUI
WAW	2:97-01752	98-P-10234-S	ANEST v. 3M
WAW	2:97-01753	98-P-10235-S	HUNTLEY v. CUI
WAW	2:97-01755	98-P-10236-S	ABADILLA v. CUI
WAW	2:97-01756	98-P-10237-S	TWO-FEATHERS v. 3M
WAW	2:97-01760	98-P-10238-S	ANDERSON v. 3M
WAW	2:97-01852	98-P-10239-S	SULLER v. MEDICAL ENGINEERING
WAW	3:97-05689	98-P-10240-S	BURTON v. CUI
WAW	3:97-05691	98-P-10241-S	KARBO v. CUI
WIW	3:97-00635	98-P-10242-S	JENSEN v. MEDICAL ENGINEERING
WVS	2:97-01013	98-P-10243-S	MITCHELL v. MCGHAN MEDICAL
WVS	2:97-01014	98-P-10244-S	FOSTER v. MCGHAN MEDICAL
WVS	2:97-01048	98-P-10245-S	VEALEY v. MCGHAN MEDICAL

ENTERED ON DOCKET

DATE 1-22-98

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

WALTER BANKS,)
)
 Petitioner,)
)
 vs.)
)
 RONALD J. CHAMPION, Warden,)
)
 Respondent.)

JAN 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 95-CV-1074-K

ORDER

On October 3, 1997, this Court filed its Order conditionally granting the writ of habeas corpus, the condition being that within 60 days of the entry of the Order, the State of Oklahoma was to grant Petitioner an appeal out of time of the Tulsa County District Court's denial of his application for post-conviction relief (Docket #25). Pursuant to the terms of a subsequent Order (Docket #29), the deadline imposed by the October 3, 1997 Order was extended to January 20, 1998. On January 15, 1998, the Oklahoma Court of Criminal Appeals entered its Order denying the appeal out of time, indicating that pursuant to its post-conviction procedural rules, a petitioner who believes he has been denied an appeal through no fault of his own in a post-conviction proceeding must first file an application for post-conviction relief requesting an appeal out of time in the state trial court. Rules 5.2(A) and 2.1(E), *Rules of the Court of Criminal Appeals of the State of Oklahoma*; Smith v. State, 611 P.2d 276 (Okla. Crim. App. 1980). On January 16, 1998, upon receipt of the Order issued by the Oklahoma Court of Criminal Appeals, Respondent immediately filed an "emergency motion to reconsider or stay order of unconditional release" (Docket #32). For the reasons stated herein, the Court finds that Respondent's emergency motion to reconsider should be granted.

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Respondent requests reconsideration of the October 3, 1997 Order. Because that Order conditioned the granting of habeas corpus relief on an action inconsistent with procedures established by the *Rules of the Court of Criminal Appeals of the State of Oklahoma*, that Order should be vacated.

Furthermore, under the doctrine of exhaustion, a state prisoner must generally exhaust available state court remedies before filing a federal habeas corpus action. 28 U.S.C. § 2254(b). Exhaustion of a federal claim may be accomplished by showing either (a) that the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) that at the time he filed his federal petition, he had no available means for pursuing a review of his conviction in state court. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Demarest v. Price, 130 F.3d 922 (10th Cir. 1997); Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). In this case, Petitioner has an available state remedy, i.e., to file an application for post-conviction relief requesting an appeal out of time in Tulsa County District Court as required by the *Rules of the Court of Criminal Appeals of the State of Oklahoma*. Therefore, Petitioner's petition for writ of habeas corpus should be dismissed without prejudice for failure to exhaust state remedies.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to reconsider (Docket #32) is **granted**.
2. This Court's Order of October 3, 1997 (Docket #25), is **vacated**.
3. Petitioner's petition for writ of habeas corpus is **dismissed without prejudice** for failure to exhaust state remedies.
4. Any pending motion is **denied as moot**.

IT IS SO ORDERED this 22 day of January, 1998.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED
JAN 21 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CONSTRUCTORES TECNICOS, S. DE R.L.,)
)
Plaintiff,)
)
vs.)
)
ENGINEERING DESIGN GROUP, INC.,)
)
Defendant.)

Case No. 97 CV 822 H (W) ✓

ENTERED ON DOCKET

DATE 1-22-98

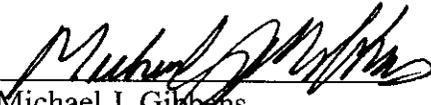
STIPULATION FOR DISMISSAL WITH PREJUDICE

The Plaintiff, Constructores Tecnicos, S. de R.L., and the Defendant, Engineering Design Group, Inc., hereby stipulate that the above-captioned cause has been settled and that it may be dismissed with prejudice, each party to bear its own costs and attorneys fees.

Respectfully submitted,

CROWE & DUNLEVY

NICHOLS, WOLFE, STAMPER, NALLY,
FALLIS & ROBERTSON, INC.

By: 
Michael J. Gibbens
Cheryl L. Cooper
321 South Boston
500 Kennedy Building
Tulsa, Oklahoma 74103
(918) 592-9800

By: 
Thomas P. Nally, OBA #6575
Steven M. Kobos, OBA #14263
Old City Hall Building, Suite 400
124 East 4th Street
Tulsa, Oklahoma 74103-5010
(918) 584-5182

ATTORNEYS FOR PLAINTIFF

ATTORNEYS FOR DEFENDANT

Handwritten marks on the left margin: a checkmark at the top, a horizontal line, and a checkmark at the bottom.

Handwritten initials "CS" in the bottom right corner.

ENTERED ON DOCKET
DATE 1-22-98

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

SAMUEL D. VANOVER,
an individual,

Plaintiff,

vs.

HAZEL O'LEARY, Secretary of
the Department of Energy,

Defendant.

No. 96-C-1039-K

F I L E D

JAN 21 1998 *PL*

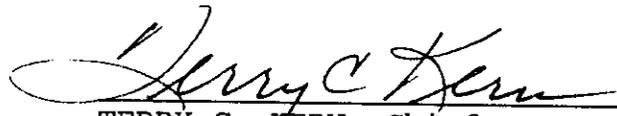
Phil Lombardi, Clerk
U.S. DISTRICT COURT

O R D E R

By Order of February 4, 1997, this case was consolidated with case no. 95-C-916-K. By Order of June 17, 1997, the Court entered summary judgment in 95-C-916-K. The Court notes that the present case number has inadvertently remained open as a pending action.

It is hereby ORDERED that case number 96-C-1039-K be administratively closed by the Court Clerk's office.

ORDERED this 20 day of January, 1998.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 21 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

DATE JAN 22 1998

ORDER

Upon the Motion of the United States of America, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, by Loretta F. Radford, Assistant United States Attorney, acting on behalf of the Department of Education, and for good cause shown, it is hereby ORDERED that the Clerk's Entry of Default filed in this case on the 30th day of December and the Default Judgment entered on the 9th day January, 1998, are vacated and this case is dismissed with prejudice.

Dated this 21st day of January, 1998.

Michael Bunge
UNITED STATES DISTRICT JUDGE

LFR:sba

8

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

NITA BURLEIGH,)
)
)
)
Plaintiff,)
)
v.)
)
COMPOSITE INTERNATIONAL,)
INC., an Oklahoma Corporation,)
)
Defendant.)

FILED
JAN 21 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-354BU
JURY DEMAND

JAN 22 1998

ORDER

UPON Plaintiff, Nita Burleigh's, Motion to Dismiss the captioned case without prejudice,
and for good cause shown, it is hereby

ORDERED, that the Plaintiff, Nita Burleigh's, captioned case is dismissed without
prejudice. Each party will pay its own attorney fees and costs.

DATED this 20th day of January, 1998.

Michael Benage
UNITED STATES DISTRICT COURT JUDGE

Submitted by:

KATHERINE T. WALLER OBA#15051
403 South Cheyenne, Suite 1200
Tulsa, Oklahoma 74103

Attorney for Plaintiff
Nita Burleigh

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

DR. MARK HAYES, an individual;)
ED BROCKSMITH, an individual;)
the OKLAHOMA WILDLIFE)
FEDERATION, an Oklahoma)
non-profit corporation; and)
SAVE THE ILLINOIS RIVER, INC.,)
an Oklahoma non-profit corporation,)

Plaintiffs,)

v.)

CAROL M. BROWNER,)
in her capacity as Administrator of the)
United States Environmental)
Protection Agency; UNITED STATES)
ENVIRONMENTAL PROTECTION)
AGENCY REGION VI; and)
JANE SAGINAW, in her capacity as)
Regional Administrator for the)
United States Environmental Protection)
Agency Region VI,)

Defendants.)

FILED

JAN 21 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-1090 BU(J)

EOD

JAN 22 1998

DISMISSAL

COME NOW the Plaintiffs, Save the Illinois River ("STIR") and the Oklahoma Wildlife Federation ("OWF"), and pursuant to Fed. R. Civ. P. 41(a)(1) hereby dismiss their action against the Defendants without prejudice to the refiling thereof.

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015

Respectfully submitted,

By: 

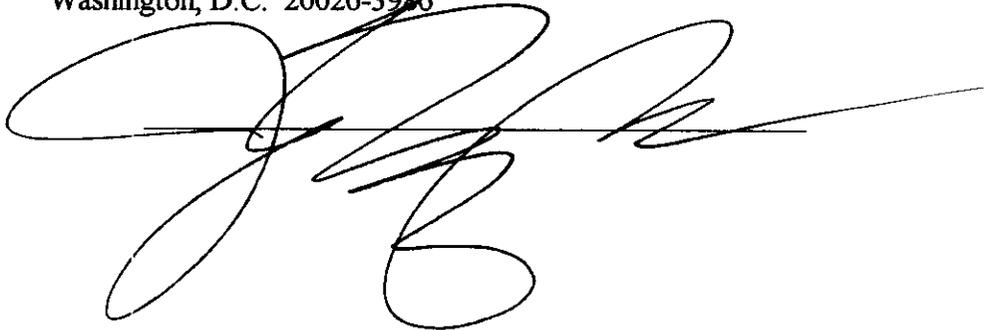
Charles W. Shipley, OBA No. 8182
Gerald L. Hilsher, OBA No. 4218
Blake K. Champlin, OBA No. 11788
Jamie Taylor Boyd, OBA No. 13659
SHIPLEY, JENNINGS & CHAMPLIN, P.C.
201 West Fifth Street, Suite 201
Tulsa, Oklahoma 74103
(918) 582-1720

ATTORNEYS FOR PLAINTIFFS,
DR. MARK HAYES and ED BROCKSMITH

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 21st day of January, 1998, a true and correct copy of the above Dismissal was mailed first class mail, postage pre-paid, to:

Eric Hostetler, Esq.
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
P. O. Box 23986
Washington, D.C. 20026-3986



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,

v.

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

Defendants.

F I L E D

JAN 20 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. CIV-96-C-0180H /

ENTERED ON DOCKET

DATE

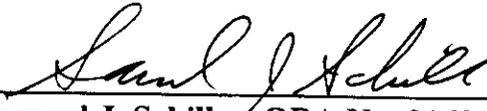
1-21-98

JOINT STIPULATION OF DISMISSAL

The plaintiffs, Paul and Karen Bull, as parents and next friend of their minor daughter, Angela Russell; Sharon Medico-Robb, as parent and next friend of her minor daughter, Melissa Ann (Annie) Medico; Joe and Linda Durham, as parents and next friend of their minor daughter, Marie Amanda (Mandy) Durham; Jerome and Mary Dawson, as parents and next friend of their minor daughter, Leslie Janel Dawson; Steve and Shirley Gidley, as parents and next friend of their minor daughter, Allison Gidley; and on behalf of all others similarly situated, and the defendant, Independent School District No. 1 of Tulsa County, Oklahoma, advise the court of a settlement agreement between the parties and pursuant to Rule 41(a)(1)(ii), FED.R.CIV.P., jointly stipulate that the plaintiffs' action against the defendant, Independent School District No. 1 of Tulsa County, Oklahoma, be dismissed with prejudice.

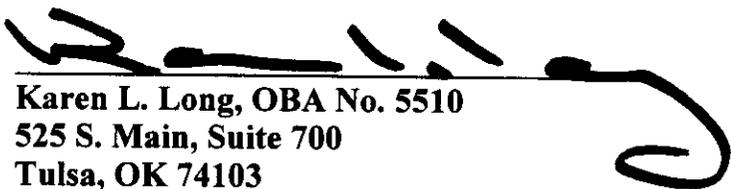
Dated this 15 day of January, 1998.

SCHILLER LAW FIRM

By 
Samuel J. Schiller, OBA No. 016067
Ray Yasser, OBA No. 009944
P. O. Box 159
Haskell, OK 74436
(918) 482-5942

Attorneys for Plaintiffs

ROSENSTEIN, FIST & RINGOLD

By 
Karen L. Long, OBA No. 5510
525 S. Main, Suite 700
Tulsa, OK 74103
(918) 585-9211

**Attorneys for Defendants, Independent
School District No. 1 of Tulsa County,
Oklahoma**

4

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

FILED

JAN 20 1998

INSURANCE COMPANY OF NORTH
AMERICA,

Plaintiff,

vs.

SANJAYLYN COMPANY, a partner-
ship, MEMOREX-TELEX, a
Delaware corporation, AMERICAN
HOME ASSURANCE COMPANY, a New
York corporation,

Defendants.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 95-1137-E

ENTERED ON DOCKET

DATE 1-21-98

ADMINISTRATIVE CLOSING ORDER

The Defendant, Memorex-Telex, having filed a petition in bankruptcy and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, within thirty (30) days of a final adjudication of the bankruptcy proceedings the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

ORDERED this 20th day of January, 1998.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

23

ENTERED ON DOCKET

DATE 1-21-98

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

FILED

JAN 20 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GEORGE CUNNINGHAM,)
)
Plaintiff,)
)
vs.)
)
ALVA THOMAS WHITE SR.,)
)
Defendant.)

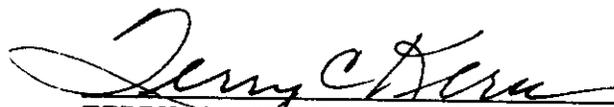
No. 94-C-719-K /

ORDER

Before the Court is the joint application of the parties for dismissal with prejudice. This action had previously been dismissed without prejudice, but in the present application the parties represent that they have settled all issues between them.

It is the Order of the Court that the application for order of dismissal is GRANTED. This action is hereby dismissed with prejudice.

ORDERED this 20 day of January, 1998.


 TERRY C. KERN, Chief
 UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 1-21-98

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

F I L E D

JAN 20 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

EDDIE G. FLEMING,

Plaintiff,

vs.

BOEING NORTH AMERICAN, INC.,

Defendant.

No. 96-C-979-K

ORDER

Before the Court is the motion of the defendant for summary judgment. Plaintiff brings this action for alleged violation of the Age Discrimination in Employment Act ("ADEA") and the Americans with Disabilities Act ("ADA"). Plaintiff commenced employment with Rockwell International Corporation¹ on September 3, 1963. Prior to May, 1993, plaintiff was a Second Shift Supervisor in maintenance and repair. In May, 1993, plaintiff was notified that, due to a reduction in force, he would no longer retain his position as supervisor. He was reassigned to Department 986 and given the title Maintenance Engineering Specialist.

Later in the same month, plaintiff suffered a heart attack, for which he underwent surgery. Plaintiff was released to work on or about July 6, 1993. At that time, plaintiff was issued a lifting restriction of 20 pounds. In 1994, management determined that a company-wide layoff was necessary to reduce operational

¹Boeing North American, Inc. purchased Rockwell's aerospace and defense divisions on December 6, 1996. Boeing has been substituted as the named defendant.

costs. The layoff affected Department 986. Harold Deitz, the Facilities Manager, was required to lay off two employees from Department 986. Deitz decided to lay off one supervisor and one maintenance engineer. Because there were only two maintenance engineers, the choice for layoff was between plaintiff and Karen Kreps. In Deitz's judgment, Kreps had better potential for contributing to the department because she had experience in the important functions of the tool crib area and also had better clerical skills, which enabled her to more quickly process purchase orders necessary to the buying function. Deitz decided to retain Kreps because of her tool crib experience and superior clerical skills, and because he believed she could absorb plaintiff's duties without additional training.

Deitz notified plaintiff of the layoff decision on September 26, 1994. Plaintiff was forty-nine years old at the time. After plaintiff was laid off, Kreps assumed plaintiff's job duties. In January, 1995, Kreps took a two-month leave of absence during which time Rockwell employee Barbara Kersey, age 59, was temporarily assigned to perform Kreps' job duties. In September, 1996, budgetary requirements allowed an additional maintenance engineer position. The position was posted. Kersey applied for the position and was selected. Plaintiff did not apply for the position.

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court

must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992).

Defendant initially argued that plaintiff's ADEA claim was barred by the applicable statute of limitation. In response, plaintiff pointed to 29 U.S.C. §626(e)(2), which provides for tolling of up to one year while an administrative charge pends before the EEOC. It is undisputed that plaintiff's charge was pending before the EEOC from February 10, 1995 to September 25, 1996, when plaintiff received his right-to-sue letter. Plaintiff filed the present lawsuit on October 24, 1996. Even measuring from the date of notice of termination rather than actual termination, a tolling of as little as one month would be sufficient to render the lawsuit timely. Defendant did not address plaintiff's argument in its reply brief, and the Court assumes the statute of limitation defense has been abandoned. If not, the Court denies summary judgment on this ground.

Next, defendant attacks both of plaintiff's claims on the merits. An ADEA plaintiff may establish a prima facie case under the framework set forth in McDonnell Douglas Corp. v. Green, 411

U.S. 792, 802-04 (1973), by demonstrating that (1) he was within the protected class; (2) he was doing satisfactory work; (3) he was discharged in spite of the adequacy of his work; and (4) a younger person replaced him. Greene v. Safeway Stores, Inc., 98 F.3d 554, 558 (10th Cir.1996).² In a reduction in force case, because a plaintiff is not always replaced with another employee, a plaintiff may demonstrate the fourth element by producing "evidence, circumstantial or direct, from which a fact-finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." Jones v. Unisys Corp., 54 F.3d 624, 630 (10th Cir.1995) (quoting Branson v. Price River Coal Co., 853 F.2d 768, 771 (10th Cir.1988)).

Plaintiff's establishment of a prima facie case gives rise to a presumption that defendant unlawfully discriminated. See Greene, 98 F.3d at 558 (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993)). The burden then shifts to defendant to rebut the presumption of discrimination by "articulat[ing] a facially nondiscriminatory reason for the adverse employment decision." Marx v. Schnuck Mkts., Inc., 76 F.3d 324, 327 (10th Cir.1996) (citation omitted). If defendant succeeds in doing so, to avoid summary judgment, plaintiff must then "show that there is a genuine dispute of material fact as to whether the employer's proffered reason for the challenged action is pretextual--i.e.,

²Alternatively, an ADEA plaintiff may carry his burden directly "by presenting direct or circumstantial evidence that age was a determining factor in his discharge." Greene, 98 F.3d at 557 (quoting Lucas v. Dover, 857 F.2d 1397, 1400 (10th Cir.1988)).

unworthy of belief." Randle v. City of Aurora, 69 F.3d 441, 451 (10th Cir.1995), cert. denied, 116 S.Ct. 2552 (1996). For summary judgment purposes, a plaintiff makes an adequate showing of pretext by demonstrating "that a discriminatory reason more likely motivated the employer or . . . that the employer's proffered explanation is unworthy of credence." Marx, 76 F.3d at 327-28 (internal quotations omitted).

Defendant's brief moves directly to pretext, stating that "[a]ssuming that Plaintiff has established a prima facie case of age discrimination", plaintiff has not presented evidence establishing that defendant's action was pretextual. Defendant also apparently assumes that it has articulated a facially nondiscriminatory reason for its action. For purposes of the record, the Court adopts these assumptions, finding that plaintiff has established a prima facie case, and that the company-wide reduction in force satisfies defendant's burden at the second stage. Accordingly, pretext is the dispositive issue as to plaintiff's ADEA claim.

First, plaintiff argues that his greater seniority (31 years) to that of Kreps (15 years) creates an inference of pretext. However, defendant's written policy states that "[o]ther considerations being equal, length of service is the determining factor in making work force adjustments." (Defendant's Exhibit E at 2) (emphasis added). Here, the defendant has stated its reliance

upon Kreps' greater "tool crib"³ experience and greater clerical skills. This is a sufficient reason for the decision to have been made and defendant's business judgment not to be disturbed. While plaintiff seeks to characterize the tool crib function as "minor", both Deitz and Kreps termed the function "important". (Aff. of Deitz, ¶8, Defendant's Exhibit C; Kreps Depo., pg. 65, 11.10-12, Defendant's Exhibit K). Plaintiff's opinion is insufficient to raise a genuine issue of material fact as to pretext. Further, the evidence establishes that during recent company layoffs, employees with length of service comparable to plaintiff were laid off. (Jones Aff. ¶10, ¶13, Defendant's Exhibit D).

Next, plaintiff asserts generally that he was better qualified and made greater past contributions to the organization than Kreps. While plaintiff did have much experience over a wide range of jobs, the evidence establishes that Kreps was better qualified for the job at issue. While defendant does not dispute that plaintiff could have adequately functioned in the position, he would have required additional training, which Kreps did not. (Deitz Aff., ¶12, Defendant's Exhibit C). The Tenth Circuit has stated that "[t]his court will not second guess business decisions made by employers, in the absence of some evidence of impermissible motives." Lucas v. Dover Corp., 857 F.2d 1397, 1403-04 (10th Cir.1988). Plaintiff has presented no such evidence.

Plaintiff also asserts pretext on the basis that defendant did

³The "tool crib" is apparently where tools and materials used by maintenance shop employees were maintained and ordered.

not recall him or contact him regarding available work. There is no such requirement, unless the company's own policy sets it forth. Cf. Reynolds v. Land O'Lakes, Inc., 112 F.3d 358, 363-64 (8th Cir.1997). Defendant's policy did not so provide. (Defendant's Exhibit E at 9). Finally, plaintiff argues that the "company assigned multiple employees to do his duties" (Plaintiff's Brief at 10). However, the evidence establishes that Kreps was assigned the job duties of plaintiff in 1994. Even if multiple employees are performing the functional equivalent of plaintiff's job in 1997 and 1998, this does not raise a factual issue of pretext as to plaintiff's layoff in 1994. In sum, plaintiff's ADEA claim fails to survive the present motion.

Under the ADA, it is illegal for an employer to discriminate "against a qualified individual with a disability because of the disability of such individual in regard to . . . discharge of employees. . . and other terms, conditions, and privileges of employment." 42 U.S.C. §12112(a). The McDonnell Douglas analytical framework applies to cases brought under the ADA. See Morgan v. Hilti, 108 F.3d 1319, 1323 (10th Cir.1997). A plaintiff establishes a prima facie case by showing: (1) that he is a disabled person within the meaning of the ADA; (2) that he is qualified, that is, he is able to perform the essential functions of the job, with or without reasonable accommodation; and (3) that the employer discharged him under circumstances which give rise to an inference that the discharge was based on his disability. Id. If the prima facie case is established, the same burden shifting

relating to "legitimate nondiscriminatory reason" and "pretext" is applicable.

The ADA defines a disability, as relevant here, as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. §12102(2). Although the ADA does not define major life activities, the Court is guided by EEOC regulations issued to implement the statute. Bolton v. Scrivner, Inc., 36 F.3d 939, 942 (10th Cir.1994), cert. denied, 115 S.Ct. 1104 (1995). The regulations state that "[m]ajor life activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. §1630.2(i).

An individual's impairment constitutes a "disability" under the ADA, however, only if it "substantially limits" a major life activity. An impairment is substantially limiting if it significantly restricts the "condition, manner or duration under which an individual can perform a particular major life activity as compared to . . . the average person in the general population." 29 C.F.R. §1630.2(j)(1)(ii). Three factors must be considered in determining whether a substantial limitation is present: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; (3) the expected permanence or long term impact. Bolton, 36 F.3d at 943, citing 29 C.F.R. §1630.2(j)(2).

Defendant argues that plaintiff cannot establish that he has a covered disability. Plaintiff relies upon his heart attack,

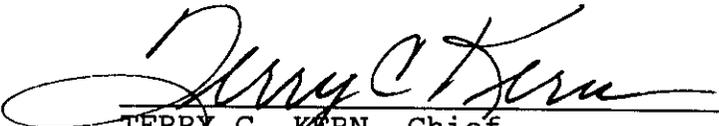
which took place in May, 1993. Plaintiff admitted in his deposition that after the heart attack he was able to return to work, and neither his heart attack nor the 20-pound lifting restriction which the doctor imposed had any effect upon plaintiff's ability to perform his job duties or his job performance. (Plaintiff's depo., pg.55, ll.6-12; p.63, ll.7-18). However, plaintiff argues that he was disabled because his employer "regarded" him as such. A situation of this type may be actionable under the ADA. See 42 U.S.C. §12102(2)(C). However, plaintiff must demonstrate that he was treated as having an impairment which substantially limited a major life activity. See 29 C.F.R. §1630.2(1).

The evidence upon which plaintiff relies is his testimony that once every month or every two or three months, Deitz inquired as to how plaintiff was feeling. Plaintiff also testified that Deitz noted after plaintiff returned to work that plaintiff's life was more important than his job. One district court has held that "the existence of mere inquiries as to [plaintiff's] health by members of the management does not prove that they believed that she was disabled or treated her as such." Pater v. Deringer Manuf. Co., 1995 WL 530655 (N.D.Ill.1995). This Court agrees. Plaintiff was not terminated in three layoffs in his department after his heart attack. He was not ultimately laid off until a year and a half after his heart attack. The Deitz comments appear to be nothing more than concern about another human being, who also happens to be an employee. Without evidence supporting an inference that

defendant "regarded" the plaintiff as disabled, plaintiff's ADA claim fails.

It is the Order of the Court that the motion of the defendant for summary judgment (#24) is hereby GRANTED.

ORDERED THIS 16 DAY OF JANUARY, 1998


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

DERYL WAYNE COOK,)
)
Petitioner,)
)
vs.)
)
RON CHAMPION, et al.,)
)
Respondents.)

No. 96-CV-757-K (J)

FILED

JAN 20 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

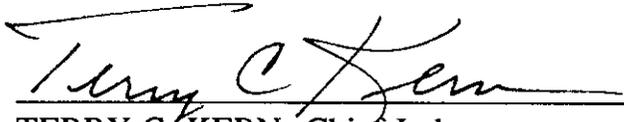
ORDER

The Court has for consideration the Report and Recommendation (the "Report") of the U.S. Magistrate Judge filed on December 2, 1997, in this habeas corpus action brought pursuant to 28 U.S.C. § 2254. The Magistrate Judge recommends that Petitioner's petition for writ of habeas corpus be denied. None of the parties has filed an objection to the Report.

Having reviewed the Report and the facts of this case, pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court concludes that the Report should be adopted and affirmed.

IT IS THEREFORE ORDERED that the Report and Recommendation of the Magistrate Judge (Docket #9) is **adopted and affirmed**. Petitioner's petition for a writ of habeas corpus is **denied**.

SO ORDERED THIS 16 day of January, 1998.



TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

FILE 1

JAN 20 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PAIGE MARSH, an individual,)
)
Plaintiff,)
)
vs.)
)
FARMERS INSURANCE COMPANY,)
INC.,)
)
Defendant.)

Case No. CIV-98-0017BU(J) ✓

JAN 21 1998

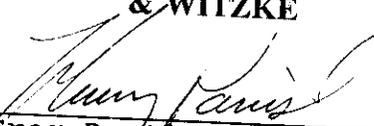
NOTICE OF DISMISSAL

COMES NOW the Defendant, Farmers Insurance Company, Inc., and dismisses the above captioned cause for the reason said case was erroneously removed from the District Court of Kay County, State of Oklahoma, to the United States District Court for the Northern District of Oklahoma.

Defendant states this case has now been properly removed to the United States District Court for the Western District of Oklahoma by filing the appropriate documents with the Court. (A copy of said documents are attached hereto).

**EDMONDS, COLE, HARGRAVE, GIVENS
& WITZKE**

BY:



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ATTORNEYS FOR DEFENDANT

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mail
1/21/98

CERTIFICATE OF SERVICE

The undersigned certifies a true and correct copy of the above and foregoing document was mailed, postage prepaid, this 15 day of January 1998, to:

Mr. Kenneth Jean
Boettcher Law Firm, Inc.
P.O. Drawer 1588
Ponca City, OK 74602

