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ENTERED ON DOCKET
DATE 2-10-98

FILED
FEB 9 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

THE FEDERAL DEPOSIT INSURANCE)
CORPORATION, as manager of the)
FSLIC Resolution Fund;)

Case No. 93cv123H ✓

Plaintiff;)

v.)

JOSEPH A. FRATES, THORN)
HUFFMAN, JOHN E. DEAS,)
DAVID L. FIST, C. MICHAEL)
BARKLEY and ROBERT WESTFIELD;)

Defendants.)

FILED
FEB 9 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATED JUDGMENT OF DISMISSAL

Plaintiff and Defendant Thorn C. Huffman having settled the disputes between them, and
having moved for entry of this judgment, it is hereby

/////
/////
/////

HERSHNER
HUNTER
ANDREWS
NEILL
&
SMITH, LLP
LAW OFFICES
180 East 11th Avenue
P.O. Box 1475
Eugene, Oregon 97440
(541) 686-8511

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ORDERED AND ADJUDGED that all claims and counterclaims between Plaintiff and Defendant Thorn C. Huffman are dismissed with prejudice, and without an award of costs, disbursements or attorney's fees to any party.

DATED this 6TH day of February, 1998.


Sven Holmes
United States District Judge

THE PARTIES HEREBY
STIPULATE TO, AND MOVE FOR,
ENTRY OF THIS JUDGMENT:

HERSHNER, HUNTER, ANDREWS,
NEILL & SMITH, LLP

By 
Andrew G. Lewis
Of Attorneys for Plaintiff


Thorn C. Huffman, pro se

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

JEWEL A. LAWRENCE,

Plaintiff,

vs.

COLUMBIA SPECIALTY HOSPITAL
OF TULSA,

Defendant.

ENTERED ON DOCKET

DATE 2-10-98

No. 96-C-573-H

FILED

FEB 9 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

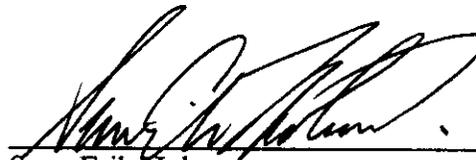
JUDGMENT

This matter came before the Court on a Motion for Summary Judgment by Defendant. The Court duly considered the issues and rendered a decision in accordance with the order filed on February 4, 1998.

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

IT IS SO ORDERED.

This 6TH day of February, 1998.



Sven Erik Holmes
United States District Judge

DATE 2-10-98

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

F I L E D

FEB - 9 1998 *M*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
)
 Plaintiff,)
)
)
 v.)
)
)
 ONE 1992 CHEVROLET 3500)
 4-DOOR DUALY PICKUP TRUCK,)
 VIN #1GCHK34F0NE194813; et. al.)
)
)
 Defendants.)

CIVIL ACTION NO. 97-CV-507-K (J)

PARTIAL JUDGMENT OF FORFEITURE

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"):

- a) One 1994 Chevrolet Silverado Suburban 1500, VIN 1GNEC16K4RJ426042;
- b) One 1990 Chevrolet C1500, Pickup Truck, VIN 1GCDC14K9LZ220862;
- c) One 1988 Chevrolet Silverado 1500 Pickup Truck, VIN 2GCFC29K4J1139085;
- d) One 1988 GMC Cab and Chassis Extended Cab Pickup Truck, VIN 1GTDC14K5JE534710;
- e) One 1996 Chevrolet Cab and Chassis Extended Cab Pickup Truck, VIN 1GCEC19R0VE101053;
- f) One White Z-71 Short Narrow Bed Pickup Truck Trailer, VIN Number Unknown;
- g) One Beckham Black Box Trailer, SN 1BTT2620XTAB12167;

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

The verified Complaint for Forfeiture In Rem was filed in this action on the 27th day of May, 1997, alleging that the default vehicles were subject to forfeiture pursuant to 18 U.S.C. § 981, because they are proceeds or constitute proceeds obtained directly or indirectly from a violation of 18 U.S.C. § 511 (altering or removing motor vehicle numbers); § 2321 (transporting stolen vehicles in interstate commerce); or § 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce).

Warrant of Arrest and Notice In Rem was issued on the 4th day of June 1997, by the Clerk of this Court to the United States Marshal for the Northern District of Oklahoma for the seizure and arrest of the defendant vehicles and/or parts, trailer, and crusher 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 defendant vehicles on August 26, 1996.

The following parties were determined to be the only individuals with possible standing to file a claim to the defendant vehicles and/or parts, trailer, and crusher, and, therefore the only individuals to be served with process in this action, and were served as follows:

- a) One 1994 Chevrolet Silverado Suburban 1500, VIN 1GNEC16K4RJ426042:
Marvin Hoover: Served June 20, 1997;
Sandy Hoover: Served June 20, 1997;
- b) One 1990 Chevrolet C1500, Pickup Truck, VIN 1GCDC14K9LZ220862:
Larry Epperson: Served June 20, 1997;

- c) One 1988 Chevrolet Silverado 1500 Pickup Truck, VIN 2GCFC29K4J1139085:
Otis Payne: Served June 19, 1997
- d) One 1988 GMC Cab and Chassis Extended Cab Pickup Truck, VIN 1GTDC14K5JE534710:
Freddie Payne: Served June 19, 1997;
- e) One 1996 Chevrolet Cab and Chassis Extended Cab Pickup Truck, VIN 1GCEC19R0VE101053:
Freddie Payne: Served June 19, 1997;
- f) One White Z-71 Short Narrow Bed Pickup Truck Trailer, VIN Number Unknown:
Freddie Payne: Served June 19, 1997;
- g) One Beckham Black Box Trailer, SN 1BTT2620XTAB12167:
Freddie Payne: Served June 19, 1997;

Freida Payne was determined to have a potential claim. The United States Marshal's Service Form 285 reflects that Otis Payne, the husband of Freida Payne, advised the Deputy United States Marshal that Freida Payne was deceased.

Plaintiff's Complaint for Forfeiture In Rem was filed in this Court on May 27, 1997.

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.

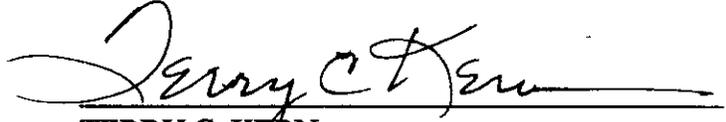
The United States Marshals Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce and Legal News, a newspaper of general circulation in the district in which this action is pending and in which the defendant vehicles and/or parts, trailer, and crusher was located, on October 30, November 6 and 13, 1997, and in the Miami News-Record, Miami, Oklahoma, the county where the defendant vehicles are located, on October 30, November 6 and 13, 1997. Proof of Publication was filed December 30, 1997.

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

- a) One 1994 Chevrolet Silverado Suburban 1500, VIN 1GNEC16K4RJ426042:
- b) One 1990 Chevrolet C1500, Pickup Truck, VIN 1GCDC14K9LZ220862:
- c) One 1988 Chevrolet Silverado 1500 Pickup Truck, VIN 2GCFC29K4J1139085:
- d) One 1988 GMC Cab and Chassis Extended Cab Pickup Truck, VIN 1GTDC14K5JE534710:
- e) One 1996 Chevrolet Cab and Chassis Extended Cab Pickup Truck, VIN 1GCEC19R0VE101053:
- f) One White Z-71 Short Narrow Bed Pickup Truck Trailer, VIN Number Unknown:
- g) One Beckham Black Box Trailer, SN 1BTT2620XTAB12167;

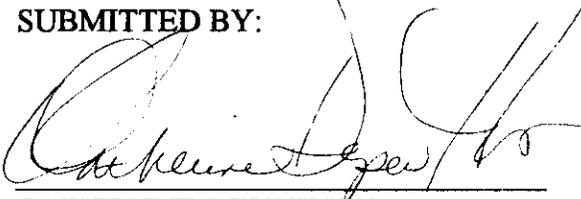
be, and it hereby is, forfeited to the United States of America for disposition according to law.

Entered this 6 day of ^{February}~~January~~, 1998.



TERRY C. KERN
Chief Judge of the United States District Court for the
Northern District of Oklahoma

SUBMITTED BY:



CATHERINE DEPEW HART
Assistant United States Attorney

NAUDDLPEADENFORFEITUBRISCOEJUDGMENT.DEF

ENTERED ON DOCKET

DATE 2-10-98

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

WILLIAM D. CARPENTER,)
)
Plaintiff,)
)
vs.)
)
STANLEY GLANZ, et al.,)
)
Defendants.)

No. 96-C-0057-K

FILED

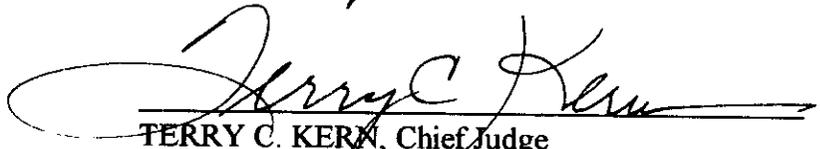
FEB - 9 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

In accord with this Court's Orders of October 29, 1996 and February 4, 1998, granting Defendants' motions for summary judgment, the Court hereby enters judgment in favor of Defendants Stanley Glanz, Ralph Duncan, Jack Putman and Melvin Sandy and against the Plaintiff, William Carpenter. Plaintiff shall take nothing on his Eighth and Fourteenth Amendment claims.

SO ORDERED THIS 6 day of February, 1998.



TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

165

ENTERED ON DOCKET

DATE 2-10-98

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

F I L E D

FEB - 9 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILLIAM D. CARPENTER,)
)
 Plaintiff,)
)
 v.)
)
 STANLEY GLANZ, et al.,)
)
 Defendants.)

Case No. 96-C-0057-K

ORDER

Before the Court in this § 1983 action are Plaintiff's appeal from the Magistrate's Order of March 4, 1997 (doc. #116), the Report and Recommendation (the "Report") of the U.S. Magistrate Judge filed on August 26, 1997 (doc. #151), and numerous motions submitted by Plaintiff since the filing of the Report including Plaintiff's Objection to the Magistrate's Report (doc. #152), Plaintiff's Second Motion to Reurge Summary Judgment (doc. #153), Motion for Summary Judgment in favor of Plaintiff pursuant to Rule 56(a) Fed. Rules of Civil Proc. on Medical Claim (doc. #154), Plaintiff's Fifth Motion to Compel Discovery (doc. #155), Motion for Summary Judgment in favor of Plaintiff based on Admissions of Defendant Ralph E. Duncan III (doc. #158), Motion for Order requiring Physical Examination of Plaintiff by Specialist (doc. #159), Plaintiff's Sixth Motion to Compel Discovery (doc. #162), and Plaintiff's Motion for Appointment of Counsel (doc. #163). In addition, since the filing of the Report, Defendants have filed objections to Plaintiff's various motions for summary judgment and motions to compel (doc. #s 156, 157, 160).

Before reviewing the Report, the Court will consider pending matters related to the Magistrate Judge's discovery order filed March 4, 1997, as amended by subsequent Orders (doc. #s

123 and 145). As to Plaintiff's "appeal" to this Court of the Magistrate Judge's March 4, 1997 Order (doc. #116), the Court finds that in light of Plaintiff's *pro se* status, the appeal should be liberally construed as an objection to the discovery order filed pursuant to Fed. R. Civ. P. 72(a). See Haines v. Kerner, 404 U.S. 519 (1972). Fed. R. Civ. P. 72(a) provides that when considering a party's objections to a nondispositive order entered by a magistrate judge, the district judge to whom the case is assigned "shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law." Plaintiff objects to the March 4, 1997 Order on the bases that (1) the Magistrate Judge erroneously denied his requested depositions of witnesses McKinley D. James and Juan W. Adams based on relevancy, (2) the Magistrate Judge misconstrued Plaintiff's invocation of jurisdiction pursuant to 18 U.S.C. § 242, and (3) the Magistrate Judge failed to rule on Plaintiff's pending Rule 56(a) motion for summary judgment. Having reviewed the March 4, 1997 discovery order (doc. #110), in light of Plaintiff's objections to the Order (doc. #116), the Court finds that the Order is not clearly erroneous or contrary to law and, therefore, declines to modify or set aside any portion of the order based on Plaintiff's objections. The relief requested by Plaintiff in his "appeal of U.S. Magistrate Judge John L. Wagner's Order of March 4, 1997, to the District Court" (doc. #116) should be denied.

As a result of the March 4, 1997 Order, Plaintiff was permitted to take depositions by written questions of inmate witness Andre Green, Defendants Glanz and Duncan, and Mr. Dick Bishop. The testimony of Andre Green, inmate #07555-062, upon written questions provided by Plaintiff, was recorded verbatim on June 17, 1997, and filed of record in this case on June 30, 1997, as certified by a Magistrate Clerk for the United States District Court for the Western District of Oklahoma (doc. #149). The testimony of Messrs. Bishop, Duncan and Glanz, upon written questions provided by

Plaintiff, was recorded verbatim on June 11, 1997, and filed of record in this case on June 30, 1997, as certified by a Courtroom Deputy for the United States District Court for the Northern District of Oklahoma (doc. #150). The tape recorded testimony has been transcribed by court personnel and the transcripts will be filed of record in this case. The Clerk of Court will be directed to send to Plaintiff copies of the transcripts and to notify Defendants that the transcripts have been filed. The Court finds that this action satisfies any obligation imposed on the Court Clerk by the March 4, 1997 Order concerning the depositions by written questions.¹

As to the Report and Recommendation, the Magistrate Judge found, after allowing Plaintiff to conduct limited discovery on the remaining issue to be resolved in this case, i.e., whether Defendants used excessive force against Plaintiff in the pepper gas incident on September 12, 1995, that an issue of fact remains as to the reason for the use of the pepper spray. Therefore, the Magistrate Judge recommends that Plaintiff's Motion for Summary Judgment Pursuant to Rule 56(a) Fed. R. Civ. Proc. (doc. #107), Defendant's Counter-Motion for Summary Judgment (doc. #114), Plaintiff's Motion for Order of Judgment Pursuant to Rule 54(c) of the Federal Rules of Civil Procedure (doc. #115), Plaintiff's Motion for Order of Judgment Pursuant to Rule 54(b) Fed. Rules of Civil Procedure (doc. #144), and Plaintiff's Motion to Reurge Motion for Summary Judgment Pursuant to Rule 56(a) Fed. R. Civ. Proc. (doc. #147) be denied.

Plaintiff objects to the Report on the bases that summary judgment was not granted in favor of Plaintiff, that the Report is contrary to the March 4, 1997 Order of the Court, that "the defendants and Judge Wagner are now acting 'in concert' to change the issues at bar from 'corporal punishment

¹Although the March 4, 1997 Order directed that "the Court Clerk shall cause the tape recording to be duplicated, and shall mail a copy of the tape to Plaintiff..." the Court finds that transmittal of the transcripts to Plaintiff by the Court Clerk will provide the information to Plaintiff in a useable form. As long as Plaintiff receives a copy of the transcribed testimony, there is no need to also provide a duplicate of the tape recording.

and complete lack of medical treatment thereafter' to Deminimus use of force necessary to quell a disturbance," that "U.S. Magistrate Judge Wagner has misconstrued the documentary evidence, admissions by defendant Ralph E. Duncan III," and that he "objects to any further interference in these proceedings by U.S. Magistrate Judge John Leo Wagner due to the advocacy he has demonstrated during these proceedings for the defendants." (doc. #152).

In accordance with Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C), the Court has reviewed de novo those portions of the Report to which Plaintiff has objected as well as the applicable law and concludes that for the reasons discussed infra, Plaintiff's objections should be overruled, the Report should also be overruled and summary judgment entered in favor of Defendants and against Plaintiff.

BACKGROUND

Plaintiff filed this civil rights action pursuant to 42 U.S.C. § 1983 on January 24, 1996. He requested and was granted leave to proceed *in forma pauperis*. In his complaint, Plaintiff alleged that Defendants, under the guise of legitimate penal authority, applied pepper spray in such an excessive manner as to constitute "cruel and unusual punishment" in violation of the Eighth and Fourteenth Amendments. Plaintiff also claimed that his § 1983 rights were violated by lack of immediate and adequate medical attention, by denial of access to the law library, by being placed in segregation and his telephone usage restricted without prior notification or hearing, by unsanitary and overcrowded prison conditions, by inadequate ventilation and unsanitary food handling, by the unavailability of hygiene supplies except through the jail commissary at inflated prices, and by denial of outside-of-cell exercise time.

On October 29, 1996, this Court filed its Order (doc. #55) whereby Plaintiff's claims of negligent medical treatment were dismissed for failure to state a claim upon which relief can be granted, Defendants' motion for summary judgment as to Plaintiff's claim for the improper and excessive use of pepper gas spray was denied, and Defendants' motion for summary judgment on all remaining Eighth/Fourteenth Amendment claims was granted. As a result of the October 29, 1996 Order, only Plaintiff's claim concerning the improper and excessive use of pepper gas spray lodged against Defendants Stanley Glanz, Sheriff of Tulsa County and Ralph Duncan, Detention Officer at Tulsa County Jail, remains to be resolved.

According to the Special Report (doc. #15), submitted pursuant to this Court's Order, the events giving rise to Plaintiff's remaining claim arose on or about September 12, 1995, at the Tulsa County Jail ("TCJ") where Plaintiff was being held for the United States government pending testimony before a federal grand jury (Form-41 Hold). At the time of the pepper gas incident, court was in session in the 7th Floor courtroom of The Hon. B. R. Beasley, Tulsa County District Court Judge. Plaintiff was housed on the 8th Floor of TCJ with inmates Andre Green and Ottie Webb, who were members of rival gangs. Inmate Green began kicking on the cell door, trying to obtain the attention of the officers and demanding other "housing." In an attempt to regain order in the jail and to prevent further disruption to the courtroom below, Officer Ralph Duncan ordered inmates Green, Webb and Carpenter to get on their beds, to stop the banging, and to quit asking for a change in housing placement. Officer Duncan released a burst of pepper spray (oleoresin capsicum or O.C. pepper gas) in the face of Plaintiff and inmate Green. After use of the pepper gas, order was restored. Officer Duncan immediately informed jail medical personnel that the inmates in cell B-2-8 had been sprayed with pepper gas.

Plaintiff alleges that Defendant Duncan used the pepper spray as a "punitive measure of control." (doc. #107, at 2). While Plaintiff admits that Defendant Duncan ordered Webb, Green and himself to "get on our beds and to stop asking the officers to change our 'housing arrangment [sic]," Plaintiff claims that "we all got on our beds as ordered," but Duncan nonetheless entered the cell and sprayed him directly in the face in contravention of a prison regulation which requires a distance of three feet, that the pepper spraying was "in no way necessary" as they had complied with Duncan's order, and that Defendant "never witnessed Plaintiff making the banging noises which were allegedly disrupting court." (doc. #1, at "Page One," and doc. #s 107, 115, 144, and 147).

In contrast, Defendants urge that jail officials used minimum force for justifiable ends and did not employ O.C. pepper gas for harassing or punitive purposes. (doc. #114, at 1). Defendants contend that in an attempt to restore order and prevent additional disruptions to the state jury trial being held immediately below the 8th floor where Plaintiff was housed, Duncan gave Plaintiff numerous direct orders to stop yelling and to retreat to his bunk. (doc. #s 15, 114). The inmates, including Plaintiff, were warned they would be "gassed" if the disturbance was not stopped. (doc. #15). Plaintiff refused to obey the orders. Duncan opened the cell door and again ordered the inmates, including Plaintiff, to get on their bunks. After the fourth order, Duncan entered the cell and sprayed both Carpenter and Webb in the face "for causing a disturbance and failing to comply with his order." (doc. #15, at 3-4). Defendants claim that the inmates retreated to their bunks and order was restored only after being sprayed with pepper gas. (doc. #15, at 3-4; doc. #114).

The issue to be resolved by the Court is whether the evidence submitted by the parties justifies adoption of the Magistrate Judge's recommendation that all motions for summary judgment should be denied due to the existence of an issue of material fact as to the reason for the use of pepper spray.

ANALYSIS

A. Summary Judgment Standard

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

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

477 U.S. at 322.

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

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

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

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v.

Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. [citation omitted]. If the evidence is merely colorable, [citation omitted], or is not significantly probative, summary judgment may be granted.").

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

B. Standard for Use of Pepper Spray by Jail Officials

In order for the use of pepper spray to rise to the level of an Eighth Amendment violation, Plaintiff must establish that Defendants "acted maliciously and sadistically for the very purpose of causing harm rather than in a good-faith effort to maintain or restore discipline." Mitchell v. Maynard, 80 F.3d 1433, 1440 (10th Cir. 1996) (citing Hudson v. McMillian, 503 U.S. 1, 6-7 (1992)). When determining whether Plaintiff has satisfied this burden, the Court must balance the need for force with the amount of force used. Hudson, 503 U.S. at 7. This standard "applies regardless of whether the corrections officers are quelling a prison disturbance or merely trying to maintain order." Northington v. Jackson, 973 F.2d 1518, 1523 (10th Cir. 1992). The absence of serious injury is a relevant, but not a dispositive, factor to be considered in the subjective analysis. Hudson, 503 U.S. at 7. However, the existence of de minimis injury can serve as conclusive evidence that de minimis force was used. Norman v. Taylor, 25 F.3d 1259, 1262-63 (4th Cir. 1994), cert. denied, 115 S.Ct.

909 (1995). The Eighth Amendment's prohibition of cruel and unusual punishment excludes from constitutional recognition de minimis uses of physical force, provided that the use of force is not of a sort "repugnant to the conscience of mankind." Hudson, 503 U.S. at 10-12.

Neither the Supreme Court nor a court of appeals has held, so far as this Court can determine, that it is "*per se* unconstitutional for guards to spray mace [or other chemical agents, such as pepper gas,] at prisoners confined in their cells." Williams v. Benjamin, 77 F.3d 756, 763 (4th Cir. 1996); see also Soto v. Dickey, 744 F.2d 1260, 1270 (7th Cir. 1984), cert. denied, 105 S.Ct. 1846 (1985); Bailey v. Turner, 736 F.2d 963 (4th Cir. 1984). However, "[i]t is generally recognized that 'it is a violation of the Eighth Amendment for prison officials to use mace, tear gas or other chemical agents in quantities greater than necessary or for the sole purpose of infliction of pain.'" Williams, 77 F.3d at 763 (4th Cir. 1996) (quoting Soto, 744 F.2d at 1270); see also Williams v. Landen, 920 F.2d 927 (4th Cir. 1990) (unpublished opinion) (reversing grant of qualified immunity to a guard who sprayed two cans of tear gas in prisoner's face for throwing water); Norris v. District of Columbia, 737 F.2d 1148 (D.C. Cir. 1984) (complaint alleged that correctional officers, without cause and for malicious purposes, maced, beat, and kicked inmate, causing substantial immediate pain as well as lingering ill effects; Battle v. Anderson, 376 F.Supp. 402 (E.D. Okla. 1974) ("the use of chemical agents such as mace or tear gas as a punitive measure rather than a control device results in the imposition of cruel and unusual punishment"), aff'd in part, rev'd in part, 993 F.2d 1551 (10th Cir. 1993).

The appropriateness of the use of chemical agents depends on "the 'totality of the circumstances, including the provocation, the amount of gas used, and the purposes for which the gas is used.'" Williams, 77 F.3d at 763 (quoting Bailey, 736 F.2d at 969). Courts have recognized that guards can constitutionally use chemical agents in small quantities to prevent riots or escape or to

control an unruly or recalcitrant inmate, such as when an inmate refuses after adequate warning to relocate to another cell or when there is a reasonable possibility that slight force will be required. Spain v. Proconier, 600 F.2d 189, 195-96 (9th Cir. 1979); see also Smith v. Iron County, 692 F.2d 685 (10th Cir. 1982) (jailor's use of mace did not violate detainee's constitutional rights, where jailor used mace because he was by himself, there were two prisoners in the cell, jailor had heard banging noise coming from vicinity of detainee's cell and believed that detainee had heavy metal object which might have been used as weapon); Blair-El v. Tinsman, 666 F.Supp. 1218 (S.D. Ill. 1987) (spraying of chemical agent was reasonably necessary to restore order where disturbance throughout prison was caused in large part by shouting and chanting of plaintiff); Norris v. District of Columbia, 614 F.Supp. 294 (D.C. 1985) (mace was used in a proper manner when inmate refused to enter a cell when directed to do so), aff'd 787 F.2d 675 (1986).

Courts have also recognized that guards can use chemical agents to control an unruly inmate who disobeys an order or is disrespectful to a guard while locked in his cell. See Williams, 77 F.3d at 759 (inmate was maced for throwing water out of his cell's food service window and for failing to remove his arm from the food service window of his cell); Soto, 744 F.2d at 1264 (inmates were maced while in their cells or in the strip cage for disobeying orders or for disrespect to officers); Bailey, 736 F.2d at 974 (guard was entitled to qualified immunity for spraying mace on inmate, who was incarcerated in a one-person cell, for making profane remarks against prison guard); Williams v. Scott, 1995 WL 729314, *11 (N.D. Ind. Aug. 23, 1995) (unpublished opinion) (two-second burst of mace because inmate failed to obey officer's order to stop kicking his cell door did not amount to a constitutional violation). The use of chemical agents in small quantities to control unruly or disobedient inmates may be necessary because:

[w]hen an order is given to an inmate there are only so many choices available to the correctional officer. If it is an order that requires action by the institution, and the inmate cannot be persuaded to obey the order, some means must be used to compel compliance, such as a chemical agent or physical force. While experts [may] . . . suggest[] that rather than seek to enforce orders, it [is] possible to leave the inmate alone if he chooses not to obey a particular order, and wait him out, experience and common sense establish that a prison cannot be operated in such a way.

Soto, 744 F.2d 1260, 1267. Moreover, “responsible institutional personnel on the spot are in a better position to determine when its [chemical agent] use is necessary than the courts.” Id. at 1270. It is also well to remember that prison officials’ responsibility extends to the protection of the guard as well as that of the inmate. Hewitt v. Helms, 459 U.S. 460, 473-474 (1983). Therefore, courts should be extremely cautious before attempting to prohibit or limit the means by which prison guards may carry out this responsibility.

C. Plaintiff’s Evidence Fails to Demonstrate Constitutional Violation

In the instant case, as an initial matter, the Court notes that the record fails to indicate that Plaintiff sustained injury as a result of the pepper gas incident. Although the lack of serious injury is not determinative of an Eighth Amendment analysis, it is certainly relevant. See Hudson, 503 U.S. at 7. Each of the circuit courts of appeal which has considered the relevance of de minimis injury in conducting an excessive force inquiry has concluded that, absent the most extraordinary circumstances, more than a de minimis injury is needed for a plaintiff to prevail on an Eighth Amendment excessive force claim. Norman, 25 F.3d at 1262-64 (citing Cummings v. Malone, 995 F.2d 817, 822-23 (8th Cir. 1993); Rankin v. Klevenhagen, 5 F.3d 103, 108 (5th Cir. 1993); Jackson v. Culbertson, 984 F.2d 699, 700 (5th Cir. 1993)). The existence of de minimis injury can serve as conclusive evidence that de minimis force was used. Norman, at 1262-63. Coupled with the

Supreme Court's conclusion that more than de minimis force is required for a finding of an Eighth Amendment violation, a finding of de minimis injury should, except in extraordinary circumstances, preclude a finding of excessive force in violation of the Eighth Amendment. In this case, the Court's previous Order dismissing Plaintiff's claim of medical negligence (doc. #55) discussed the fact that no request for medical treatment of Plaintiff's eyes, or for any other injury or illness except a request for "cold pill," was documented until December 12, 1995, approximately three (3) months after the pepper gas incident, and even then, there was no mention that the problem arose from or was related to the pepper gas incident. (doc. #55, at 5 n.2). Thus, the Court finds that Plaintiff has failed to establish that he suffered more than a de minimis injury as a result of being sprayed with pepper gas. This finding supports Defendants' claim that only de minimis force was used during the September 12, 1995 incident.

However, according to the Supreme Court, an Eighth Amendment inquiry does not end with a finding of the absence of serious injury. Hudson, 503 U.S. at 7; see also Northington, 973 F.2d at 1523. The focus of the Court's inquiry must be whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. Hudson, 503 U.S. at 7. Significantly, the Supreme Court has explained that the "necessity of the guards' actions is not the proper focus of inquiry." Whitley, 475 U.S. at 319, 106 S.Ct. at 1084. Instead, the focus is whether the evidence supports the inference that defendants wantonly punished plaintiff. Id. at 322, 106 S.Ct. at 1085-86.

In this case, evidence demonstrating or allowing an inference of malicious or sadistic intent by Defendants is absent. It is uncontroverted that a jury trial was in progress on the floor immediately below the jail section in which Plaintiff was housed, that a disturbance was in fact in progress in the

jail, that Plaintiff and his cell mates were participants in the disturbance,² and that at least two orders, and possibly as many as four, had been given to Plaintiff and his cell mates to quell the noise. None of the unresolved issues of fact is material to the probative inquiry concerning whether Plaintiff has demonstrated that Defendants' use of pepper spray was malicious and sadistic for the purpose of inflicting punishment. Defendant Duncan's decision to use the pepper spray, in itself, does not support such an inference. When Defendant Duncan decided to use the pepper spray on the inmates in cell B-2-8, a disturbance had erupted in the jail, several minutes had elapsed since the disturbance had begun, the cell B-2-8 inmates were "cussing" and not complying with orders, and it was not obvious that the disturbance had ended. In view of these undisputed facts, the Court cannot conclude that the evidence indicates defendants used pepper spray wantonly to punish Plaintiff. Nor can the Court conclude that Defendant Duncan was unreasonable in his apparent belief that the use of pepper spray was necessary to restore "order and control." Thus, this case differs significantly from those cases where evidence indicated jail officials beat restrained inmates needlessly and as a result were found to have acted maliciously and sadistically. See Hudson, 503 U.S. at 4 (after arguing with prisoner, prison officials handcuffed and shackled prisoner, removed him from his cell where one prison official punched prisoner in the mouth, eyes, chest, and stomach while a second official held prisoner in place and kicked and punched him from behind and the supervisor watched the beating, telling the officers "not to have too much fun"); Mitchell 80 F.3d at 1440-41 (where there was no indication that prisoner, who was naked and shackled at the wrists, ankles and belly, had acted

²Defendants' assertion that Plaintiff was involved in creating the disturbance at the TCJ is corroborated by the testimony of Andre Green, one of the inmates housed in the cell with Plaintiff at the time of the incident. According to Mr. Green, "[w]e couldn't move around and we was knocking on the door asking to be removed, put in separate cells, and the officer just came back in and told us if we didn't get on our bunks he was going to spray us, and he sprayed us. That's all I have." (June 17, 1997 Trans., at 6, lines 14-18).

inappropriately or posed any type of a disciplinary problem or threat, but was nonetheless beaten by prison guards).

After reviewing the evidence submitted by the parties in a light most favorable to Plaintiff, the Court finds that the decision to use pepper gas as a deterrent to Plaintiff for continued disruptive and/or defiant behavior does not evidence a sadistic or malicious intent to punish Plaintiff. See Poindexter v. Woodson, 510 F.2d 464 (10th Cir.), cert. denied, 96 S.Ct. 85 (1975) (use of tear gas and fire hoses as control measures during periods of disruption at prison did not constitute cruel and unusual punishment, absent any malice on part of prison officials). The Court further finds that Defendant Duncan acted reasonably when he sprayed Plaintiff with pepper gas in a good faith effort to restore order and prison security and that the limited use of pepper gas to maintain order was "a reasonable response to the institution's legitimate security concern." Soto, 744 F.2d at 1271; see also Williams v. Scott, 1995 WL 729314, *11 (N.D. Ind. Aug. 23, 1995) (unpublished opinion) (two-second burst of mace because inmate failed to obey officer's order to stop kicking his cell door did not amount to a constitutional violation). Under the facts of this case, a reasonable jury could not conclude that Defendants' behavior falls into the category of malicious and sadistic rather than a good faith effort to maintain or restore discipline. Defendants should be granted judgment as a matter of law.

CONCLUSION

Plaintiff has failed to demonstrate an essential element of his claim, i.e., that Defendants "acted maliciously and sadistically for the very purpose of causing harm rather than in a good-faith effort to maintain or restore discipline." Mitchell v. Maynard, 80 F.3d 1433, 1440 (10th Cir. 1996) (citing Hudson v. McMillian, 503 U.S. 1, 6-7 (1992)). Because Plaintiff has failed to make a showing sufficient to establish the existence of an element essential to his case, Defendants are entitled to

judgment as a matter of law on the excessive use of force issue. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Pursuant to the Order of May 27, 1997 (doc. #145), the Clerk of Court is directed to file of record the transcribed testimony of Andre Green, and of Defendants Ralph Duncan, Stanley Glanz, and Dick Bishop; to send Plaintiff a copy of the transcribed testimony of each witness; and to notify Defendants that the transcripts have been filed.

2. Plaintiff's "appeal of U.S. Magistrate Judge John L. Wagner's Order of March 4, 1997, to the District Court" (doc. #116) is **denied**.

3. The Report and Recommendation of the United States Magistrate Judge (doc. #151) is **overruled**.

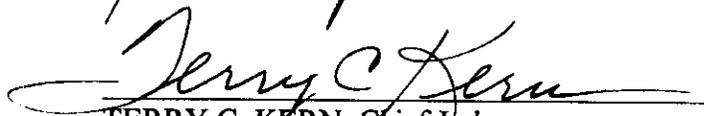
4. Plaintiff's Objection to the Magistrate's Report (doc. #152) is **overruled**.

5. Defendants' motion for summary judgment (doc. #114) is **granted**.

6. Plaintiff's motions for summary judgment (#107), for judgment pursuant to Fed. R. Civ. P. 54(c) (doc. #115), for order of judgment pursuant to Fed. R. Civ. P. 54(b) (doc. #144), and to reurge motion for summary judgment (#147) are **denied**.

7. Plaintiff's motions filed subsequent to the entry of the Magistrate Judge's Report and Recommendation (doc. #s 153, 154, 155, 158, 159, 162, and 163) are **denied as moot**.

SO ORDERED this 6 day of February, 1998.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

F I L E D

FEB - 9 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
OKLAHOMA NORTHERN DISTRICT

NATIONAL EXCHANGE CARRIER,
ASSOCIATION, INC.,

Plaintiff,

vs.

LONG DISTANCE SAVERS, INC.;
LONG DISTANCE SAVERS OF TULSA
LIMITED PARTNERSHIP;
LONG DISTANCE SAVERS OF OKLAHOMA
CITY, INC.,

Defendants.

CASE NO. 97-CV-754-B(W)

ENTERED ON DOCKET

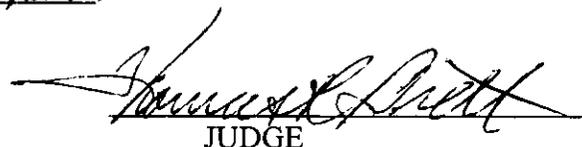
DATE FEB 10 1998

ORDER OF DISMISSAL

Considering the foregoing Joint Motion and Order for Dismissal:

IT IS ORDERED that all claims in this action for the period concluding October 20, 1997 be dismissed against LONG DISTANCE SAVERS, INC.; LONG DISTANCE SAVERS OF TULSA LIMITED PARTNERSHIP; and LONG DISTANCE SAVERS OF OKLAHOMA CITY, INC. with full prejudice and without costs.

Tulsa, Oklahoma, this 9 day of Feb., 1998


JUDGE

4

ENTERED ON DOCKET

DATE 2-10-98

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

FEB - 9 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 JENNIFER A. KOONCE,)
)
 Defendant.)

Civil No. 97CV729 K (J)

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of February 9, 1998 and the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendant, **Jennifer A. Koonce**, against whom judgment for affirmative relief is sought in this action has failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

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

Dated at Tulsa, Oklahoma, this 9th day of February, 1998.

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

By A. Shovelbe
Deputy Court Clerk for Phil Lombardi

ENTERED ON DOCKET

DATE 2-9-98

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

VERA LOUISE GOWERS,)
)
 Plaintiff,)
)
 vs.)
)
 MAYES COUNTY JAIL,)
 HAROLD BERRY, Sheriff,)
 KENNETH MARTIN, and)
 CHARLIE RICE,)
)
 Defendants.)

No. 97-CV-606-K

F I L E D

FEB - 9 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff has filed a civil rights complaint pursuant to 42 U.S.C. § 1983, but has not submitted either the proper \$150.00 filing fee or a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a), as amended by the Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996). In addition, Plaintiff has failed to provide the appropriate number of copies of the Complaint for service on the defendants as well as the requisite number of summons and Marshal forms. By order entered July 15, 1997, the Court informed Plaintiff of the deficiencies in her papers. The Clerk of Court attempted to mail Plaintiff the forms and information for preparing the documents ordered by the Court. That correspondence, however, was returned to the Court unopened on July 21, 1997, marked "refused, not here, attempted not known." As of the filing of this order, Plaintiff has failed to notify the Court of her current address.

Because Plaintiff has failed to pay the filing fee or seek leave to proceed in forma pauperis, the Court finds that this action may not proceed and should, therefore, be dismissed without prejudice

for failure to prosecute. It is well established that a plaintiff has the duty to keep the Court informed at all times of address changes.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's civil rights complaint is **dismissed without prejudice** for lack of prosecution.

SO ORDERED THIS 5 day of February, 1998.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE 2-9-98

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

WILLIAM ROBERT BROWN,)
)
 Plaintiff,)
)
 vs.)
)
 DONNA SHALALA, Secretary of the)
 Department of Health & Human Services,)
)
 Defendant.)

No. 97-C-497K ✓

F I L E D

FEB - 9 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the Motion to Dismiss of the Defendant, Donna Shalala, Secretary of the Department of Health and Human Services, appearing specially. Defendant claims that Plaintiff William Robert Brown has not properly served all parties pursuant to the Federal Rules of Civil Procedure. Specifically, Defendant claims that Plaintiff has not complied with Federal Rule of Civil Procedure 4(i) governing service upon the United States, its Agencies, Corporations, and Officers. Defendant further claims that Plaintiff has not complied with the required time limits for service set out in Federal Rule of Civil Procedure 4(m). Plaintiff, proceeding *pro se*, claims that he caused only Defendant Shalala to be served based upon information he received from the Court Clerk's office.

Plaintiff filed his complaint, alleging discrimination in employment in violation of Title VII, on May 23, 1997. On June 24, Plaintiff caused Defendant Shalala to be served at the Department of

Health and Human Services in Washington, D.C.. The Court granted Plaintiff's motion to proceed *in forma pauperis*, but denied Plaintiff's motion to receive appointed counsel. The Court has also denied Plaintiff's Motion for Default Judgment.

Federal Rule of Civil Procedure 4(i) mandates that service upon agencies and officers of the United States be made by delivering a copy of the summons and complaint to the United States Attorney for the district in which the action is brought and sending copies of the summons and complaint by registered or certified mail to the Attorney General and the agency or officer sued.

Here, Plaintiff served Secretary Shalala, but failed to send a copy of the summons and complaint to either the Attorney General or the United States Attorney for the Northern District of Oklahoma. *Pro se* litigants are subject to the same rules and procedures that govern other litigants. *See Dicesare v. Stuart*, 12 F.3d 973 (10th Cir. 1993). Dismissal for failure to comply with Federal Rule of Civil Procedure 4(i) is appropriate. *See e.g. Cleveland v. Williams*, 874 F. Supp. 270, 271 (E.D. Cal. 1994); 4A Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1106 (2d ed. Supp. 1997).

Federal Rule of Civil Procedure 4(m) mandates that service be effected within 120 days of filing the complaint. If service is not properly effected within the 120 day time limit, the Court, upon motion or on its own initiative, can dismiss the action after notice to the plaintiff. Proper service of the complaint and summons in this case is governed by Rule 4(i) because the action is against an officer of the United States. Plaintiff Brown filed the complaint on May 23, 1997. Plaintiff had not properly mailed or delivered copies of the complaint and summons to the United States Attorney for the Northern District of Oklahoma or the Attorney General as of January 1998, well beyond 120 day the time limit.

Plaintiff has responded to both grounds for dismissal by arguing that the government had actual notice of the action, that he is acting *pro se*, and that he relied on advice of the Court Clerk's office in effecting service.

The Plaintiff seeks to exempt himself from the Federal Rules of Civil Procedure by asserting his *pro se* status. “[P]*ro se* status does not excuse the obligation of any litigant to comply with the fundamental requirement of the Federal Rules of Civil and Appellate Procedure.” *Ogden v. San Juan County*, 32 F.3d 452, 445 (10th Cir. 1994). *Pro se* status also does not excuse a party from looking at the Federal Rules of Civil Procedure for themselves. Rule 4(i), governing service in suits against the United States and its agencies and officers, and Rule 4(m), governing time limits for service, are clear and do not require extensive interpretation.

Plaintiff cites *Gonzalez-Aller Balseyro v. GTE Lenkurt, Inc.*, 702 F.2d 857 (10th Cir. 1983) for the proposition that when a *pro se* party acts upon information from a court official, the court should not dismiss a complaint for improper service. *Balseyro*, however, is inapplicable here. *Balseyro* involved equitable tolling of the time period for suing under Title VII, along with the accompanying prerequisites of exhausting administrative remedies, not the basic procedures for effecting service. In this case, the issue is not the somewhat complex procedures required before filing a Title VII suit, but the straightforward procedure of delivering a copy of the complaint and summons to United States Attorney in the District in which suit has been filed and sending a copy of the same to the Attorney General. In *Balseyro*, Plaintiff also received a *letter* from the Court Clerk, which he retained, stating that time period for filing suit. Here, Plaintiff simply alleges that “someone” in the Court Clerk's office told him of the procedure for effecting service. Plaintiff does not, however, even provide the Court with the name of the person from the Court Clerk's office who

allegedly gave him this information. Plaintiff has not demonstrated good cause for the Court to grant him leave to effect proper service or not to dismiss this action.

Foregoing reasons, this action is DISMISSED without prejudice.

IT IS SO ORDERED THIS 6 DAY OF FEBRUARY, 1998.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

FILED

FEB 6 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

APRIL ALGER,)
)
 Plaintiff(s),)
)
 vs.)
)
 INTERNATIONAL TESTING SERVICES,)
 INC., et al,)
)
 Defendant(s).)

Case No. 97-C-522-B ✓

ENTERED ON DOCKET
DATE FEB 09 1998

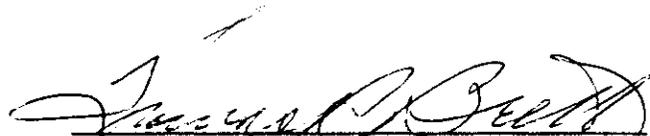
ORDER DISMISSING ACTION
BY REASON OF SETTLEMENT

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 6th day of February, 1998.


THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

FEB - 6 1998 *llw*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HERMAN EUGENE MACK,)
)
 Plaintiff.)
)
 vs.)
)
 CLIFF A. STARK,)
)
 Defendant.)

No. 97-CV-1023-B /

ENTERED ON DOCKET

DATE FEB 09 1998

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 December 11, 1997. Plaintiff has now paid the initial partial filing fee to commence this action and his custodial agency has been directed to collect payment of the filing fee.

Plaintiff states that Defendant, Cliff A. Stark, served as his court-appointed attorney during criminal proceedings in Tulsa County District Court and that Mr. Stark was appointed on May 9, 1997 "through a low-bid contract system." (doc. #1, at 3). Plaintiff alleges Defendant breached his contract agreement with Plaintiff, which breach resulted in a denial of due process and ineffective assistance of counsel. Plaintiff further states that he has submitted a grievance concerning Defendant's ineffectiveness to the Oklahoma Bar Association and to the state trial court judge. (doc. #1, at 7). He seeks compensatory and punitive damages, a jury trial and appointment of an attorney. (doc. #1, at 8).

ANALYSIS

Title 42 U.S.C. § 1983 provides individuals a federal remedy for deprivation of 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).

The Prison Litigation Reform Act of 1996 (the Act), Pub.L. No. 104-134, § 805, 110 Stat. 1321 (April 26, 1996), amended the in forma pauperis section to provide 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.

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 Defendant who provided legal representation to Plaintiff in his capacity as public defender or court-appointed attorney. "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). After reviewing Plaintiff's previous case filings, it has come to the Court's attention that this is the third dismissal of civil case flagged as a "prior occasion" under 28 U.S.C. § 1915(g). Therefore, in the future, Plaintiff shall not be allowed to bring a civil action or appeal a judgment in a civil action *in forma pauperis* unless he is in imminent danger of serious physical injury.

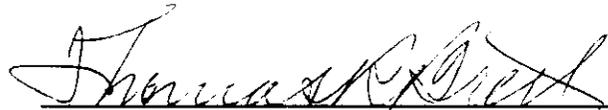
CONCLUSION

Plaintiff's § 1983 complaint, alleging that Defendant, his court-appointed counsel, breached his contract and 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 **"flag"** this as as Plaintiff's **third** 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 2nd day of Feb, 1998.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

FEB - 9 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,
on behalf of Farm Service Agency,
formerly Farmers Home Administration,

Plaintiff,

v.

THOMAS J. JACKSON
aka Thomas Joseph Jackson;
THERESA A. JACKSON
aka Theresa Ann Jackson aka Teresa A. Jackson;
STATE OF OKLAHOMA *ex rel.*
Oklahoma Tax Commission;
COUNTY TREASURER, Mayes County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Mayes County, Oklahoma,

Defendants.

ENTERED ON DOCKET

DATE FEB 09 1998

CIVIL ACTION NO. 96-CV-472-E

ORDER

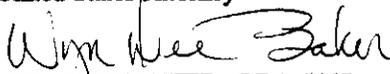
Upon the Motion of the United States of America, acting on behalf of Farm Service Agency, formerly Farmers Home Administration, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that the Judgment of Foreclosure entered on November 18, 1996 is vacated, set aside and held for naught and it is further **ORDERED** that this action is dismissed without prejudice.

Dated this 6th day of January, 1998.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney


WYN DEE BAKER, OBA #465

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

WDB:css

18

JAN 30 1998

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

F I L E D

FEB - 6 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HARTFORD FIRE INSURANCE COMPANY,)
a Connecticut corporation,)

Plaintiff,)

vs.)

R & M FLEET SERVICE, INC., an)
Oklahoma corporation; BERT EDWARD)
YOUNG, an individual; JUANITA M.)
HOWARD, by and through her)
natural guardian and next friend,)
Lester Howard; LESTER L. HOWARD,)
individually; and ROBERT McQUARY,)
an individual,)

Defendants.)

No. 97CV 681H (J) ✓

ENTERED ON DOCKET

DATE 2-9-98

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW Kent Fleming and D. Renée Skodak, attorneys for Plaintiff; Burton J. Johnson and Bradley K. Donnell, attorneys for Defendant, Bert Edward Young; Scott R. Savage and Terry M. Kollmorgen, attorneys for Juanita and Lester Howard; and M. Jean Holmes, attorney for Robert McQuary and R & M Fleet Service, Inc., and, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, do hereby stipulate to the dismissal of the above-styled and numbered matter with prejudice. Each party to bear their own costs and fees.

13

Contract
of
envelope

Dated this 4th day of February, 1998.

D. Renée Skodak

Kent Fleming (OBA 2976)
D. Renée Skodak (OBA 16241)
Huckaby, Fleming, Frailey, Chaffin,
Cordell, Greenwood & Perryman, L.L.P.
1215 Classen Drive
P.O. Box 60130
Oklahoma City, OK 73147
(405) 235-6648
(405) 235-1533 (fax)
ATTORNEYS FOR PLAINTIFF

Burton J. Johnson

Burton J. Johnson
Bradley K. Donnell
Looney, Nichols & Johnson
528 N.W. 12th Street
Oklahoma City, OK 73103
(405) 235-7641
ATTORNEYS FOR BERT EDWARD YOUNG

Scott R. Savage

Scott R. Savage
Terry M. Kollmorgen
Moyers, Martin, Santee, Imel &
Tetrick
320 S. Boston
Suite 920
Tulsa, OK 74103-3722
(918) 582-5281
ATTORNEYS FOR JUANITA M. HOWARD and
LESTER HOWARD

M. Jean Holmes

M. Jean Holmes
Winters, King & Associates, Inc.
2448 E. 81st Street
Suite 5900
Tulsa, OK 74137-4259
(918) 494-6868
ATTORNEY FOR R & M FLEET SERVICE,
INC. and ROBERT McQUARY

WBS

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

CHRYSTINE SCHMIDLY, Individually)
and as Trustee of the SCHMIDLY)
FAMILY REVOCABLE TRUST,)
)
Plaintiff,)
)
v.)
)
MERRILL LYNCH, PIERCE, FENNER &)
SMITH INCORPORATED d/b/a MERRILL)
LYNCH & CO., and KENNETH SIMPSON,)
)
Defendants.)

ENTERED ON DOCKET
DATE 2-9-98

Case No. 97 CV 622 H (M) ✓

FILED
FEB - 6 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

DISMISSAL WITH PREJUDICE

Plaintiff Chrystine Schmidly, Individually and as Trustee of the Schmidly Family
Revocable Trust, hereby dismiss their claims against Merrill Lynch, Pierce, Fenner & Smith
Incorporated d/b/a Merrill Lynch & Co., with prejudice.

Respectfully submitted,
Eric M. Daffern
Eric M. Daffern OBA #13419
MILLER DOLLARHIDE
321 South Boston, Suite 910
Tulsa, Oklahoma 74103-3102
(918) 587-8300
ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF MAILING

I certify that I mailed the foregoing instrument on ~~January~~ ^{February} 6, 1998, with proper postage
prepaid, to the following:

Heather E. Pollock
Hall, Estill, Hardwick, Gable, Golden & Nelson
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103-3708

Eric M. Daffern
Eric M. Daffern

4

OK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA ENTERED ON DOCKET

JOHN DOE 1 AND JOHN DOE 2,

Plaintiffs,

v.

RYAN WHITE IIIb PROGRAM;
DEBBIE STARNES, as Clinical and
Administrative Consultant;
MIDGE ELLIOTT, Clinical and
Administrative Consultant;
LISA RIGGS; DR. THOMAS STEES,

Defendants.

DATE 2-6-98

Case No. 97-CV-446-H

FILED

FEB 4 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court on a motion to dismiss the claim of John Doe 2 by Defendants Starnes and Elliott. The Court duly considered the issues and rendered a decision in accordance with the order filed on February 3, 1998.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered for Defendants and against Plaintiff John Doe 2.

IT IS SO ORDERED.

This 3RD day of February, 1998.


Sven Erik Holmes
United States District Judge

23

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

FILED

FEB 5 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JACK CHESBRO,)
)
Plaintiff,)
)
vs.)
)
GROUP HEALTH SERVICE OF OKLAHOMA)
INC.,)
)
Defendant.)

Case No. 96-C-561-B ✓

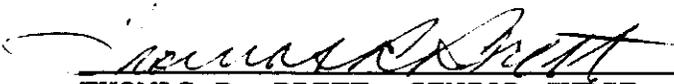
ENTERED ON DOCKET
DATE FEB 06 1998

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

IF, by 5-18-98, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 5 day of February, 1998.


THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

53

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

FEB - 5 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

INSURANCE COMPANY OF NORTH AMERICA,)

Plaintiff,)

v.)

SANJAYLYN COMPANY, a partnership;)
MEMOREX-TELEX, a Delaware corporation,)
and AMERICAN HOME ASSURANCE)
COMPANY, a New York corporation,)

Defendants.)

No. 95-C-1137-E ✓

ENTERED ON DOCKET

DATE FEB 06 1998

AMENDED 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 sixty (60) days of a final adjudication of the bankruptcy proceeding or lifting of the stay, the underlying action filed in United States District Court for the Northern District of Oklahoma, Case No. 91-C-955-B, is reopened for the purpose of obtaining a final determination therein, then this action can be reopened for an additional thirty (30) days after all parties receive actual notice that the underlying action (Case No. 91-C-955-B) has been reopened. If the underlying action (Case No. 91-C-955-B) is not reopened within sixty (60) days of a final adjudication of the bankruptcy proceedings or lifting of the stay, then this action is dismissed with prejudice.

ORDERED this' 5th day of February, 1998.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

27

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

FILED

FEB 3 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DENNIS DEAN WRIGHT,

Petitioner,

vs.

STEPHEN KAISER,

Respondent.

)
)
)
)
)
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)
)
)
)
)

No. 90-CV-855-B

ENTERED ON DOCKET

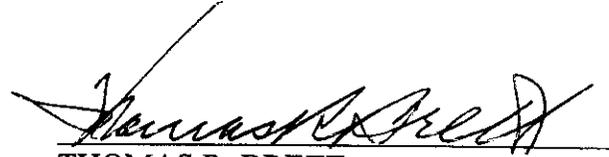
DATE FEB 06 1998

ORDER

By Order filed August 12, 1997, this Court conditionally granted Petitioner's request for writ of habeas corpus, the condition being that the State of Oklahoma commence retrial proceedings within 120 days of the entry of the Order. The State has filed a "notice to court" advising that retrial proceedings have commenced and that the new trial is scheduled for January 20, 1998. The Court advises that if the trial does not commence January 20, 1998 (aside from delay caused or consented to by Petitioner), Petitioner may file a motion to reopen this case, and the Court will consider granting the writ.

It is the Order of the Court that the petition for writ of habeas corpus is hereby DENIED without prejudice. The Court Clerk is directed to close this case administratively.

SO ORDERED THIS 3rd day of Feb. 1998.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

21

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

FILED

FEB - 5 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HARVEY CAPSTICK,

Plaintiff,

vs.

BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF CREEK,

Defendant.

Case No. 97 CV 766 BU(M)

ENTERED ON DOCKET

DATE FEB 06 1998

STIPULATION ^{OF} FOR DISMISSAL

COME NOW Plaintiff and Defendant and hereby stipulate that the above
entitled action be dismissed with prejudice and without payment of costs.

Scott Scroggs
Scott Scroggs
Attorney for Plaintiff
1401 South Cheyenne
Tulsa, OK 74119

John L. Harlan
John L. Harlan, OBA 3861
Attorney for Defendant
404 E. Dewey, Suite 106
P. O. Box 1326
Sapulpa, OK 74067
(918) 227-2590

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Cross

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

FILED

FEB -4 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PEGGY J. NEECE and BUEL H.)
NEECE,)

Plaintiffs,)

vs.)

No. 88-C-1320-E

INTERNAL REVENUE SERVICE OF)
THE UNITED STATES OF AMERICA,)
THE UNITED STATES OF AMERICA,)
and FIRST NATIONAL BANK OF)
TURLEY, N.A.,)

Defendants.)

ENTERED ON DOCKET
DATE FEB 05 1998

O R D E R

Now before the Court is Plaintiff's Motion to Alter or Amend Judgment (Docket #288) and the United States' Motion to Correct Clerical Error in Judgment (Docket #291).

This matter was last before this Court on remand by the Tenth Circuit with directions to determine the amount of attorney fees Plaintiffs reasonably incurred in litigating the jeopardy assessment abatement action together with the amount of attorney fees for "services performed on appeal" in connection with the issue on which Plaintiffs were successful. After holding a hearing, the court entered an Order Fixing Attorney Fees As Damages and a Judgment awarding plaintiffs \$25,657.92 to be paid by the First National Bank of Turley and \$76,973.76 to be paid by the Internal Revenue Service.

Plaintiffs then filed this Motion to Alter or Amend Judgment arguing, somewhat cryptically, that "the trial judge has no discretion to allow no attorney fees for \$73,877.80 in damages." Plaintiff's argument is, apparently that, in light of the

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\$73,877.80 actual damage award, they would be entitled, under the Right to Financial Privacy Act¹, the reasonable attorney fees incurred in proving those damages. Both defendants argue that the previous fee award of \$10,500 is adequate and has been affirmed by the Circuit. The fee award of \$10,500 was an attempt to take the attorney fees incurred to that point, and fashion a fee award in keeping with the damage award of \$1580. The actual damage award has since been increased by \$73,877.80, and time has gone into proving those damages. While the Court will not consider awarding fees for any time expended prior to the time the \$10,500 award was made, the Court agrees that, under the plain language of the Right to Financial Privacy Act, Plaintiffs are entitled to fees for the time spent in proving the additional damages.

The United States, in its Motion to Correct Clerical Error in Judgment, merely points out an error in the computed amount awarded. Plaintiffs do not object to the Motion. Therefore, the Judgment should be corrected to reflect an award of \$102,631.68

¹That act, at 12 U.S.C. §3417 provides:

(a) Any agency of department of the Untied States or financial institution obtaining or disclosing financial records or information contained therein in violation of this chapter is liable to the customer to whom such records relate in an amount equal to the sum of --

- (1) \$100 without regard to the volume of records involved;
- (2) any actual damages sustained by the customer as a result of the disclosure;
- (3) such punitive damages as the court may allow, where the violation is found to have been willful or intentional; and
- (4) in the case of any successful action to enforce liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

rather than \$105,026.68.

Plaintiff's Motion to Alter or Amend Judgment (Docket #288) is granted. The United States' Motion to Correct Clerical Error in Judgment (Docket #291) is granted. An amended and corrected judgment will be entered when the pending attorney fee issue is decided. Plaintiffs are directed to submit an application for attorney fees which sets forth the specific fees they are seeking along with itemized billing statements and any other documentation on or before February 19, 1998. Defendants are to respond with objections on or before March 5, 1998. A hearing on the Attorney fees will be held on March 18, 1998, at 10:30 A.M.

SO ORDERED THIS 4th DAY OF FEBRUARY, 1998.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED
FEB -4 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BERNARD OLCOTT,)
)
Plaintiff,)

vs.)

Case No. 83-C-179-E /

DELAWARE FLOOD COMPANY, a limited)
partnership under the laws of Oklahoma; LAYTON)
OIL COMPANY, a Kansas Corporation, WILLIAM)
DOUGLAS LAYTON, individually and as general)
partner of DELAWARE FLOOD COMPANY 1976)
DH, DELAWARE FLOOD COMPANY 1977 EH,)
DELAWARE FLOOD COMPANY 1978 FH,)
DELAWARE FLOOD COMPANY 1979 LTD.,)
limited partnerships under the laws of Oklahoma;)
and MICHAEL GALES,)
Defendants.)

ENTERED ON DOCKET
DATE FEB 05 1998

ORDER

Now before the Court is the Motion for Summary Judgment (Docket # 915) of the Defendants, Delaware Flood Company, an Oklahoma Limited Partnership, Delaware Flood Company 1976-DH, Delaware Flood Company 1977-EH, Delaware Flood Company 1978-FH, Delaware Flood company, 1979 Ltd and Michael Galesi and the Motion for Summary Judgment (Docket # 929) of the Defendants Layton Oil Company and William Douglas Layton.

Defendants request summary judgment on plaintiff's remaining state claims on three grounds: 1) Plaintiff, as a limited partner does not have standing to sue on behalf of the partnership; 2) the tort claims are barred on statute of limitations grounds; and 3) acceptance of the default judgment constitutes an election of remedy.

The Court rejects defendants' first argument. Plaintiff is not seeking damages on behalf of

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the partnership, or bringing "proceedings by a partnership," but rather seeks damages on his own behalf based on the investments he made in the limited partnerships. The Court finds that the authority cited by defendants for this proposition is not applicable to the specific facts of this case.

Next, in an apparent attempt to "whittle down" what will be tried in this case, and leave only the default judgment to defend, defendants attempt to defeat the state tort claims of plaintiff with statute of limitations and election of remedies arguments. With respect to the statute of limitations argument, Bernard Olcott filed this suit on July 7, 1982 regarding investments in the 1976, 1977, 1978, and 1979 programs. The suit was transferred to Oklahoma on February 18, 1983. With respect to torts, the statute of limitations under New Jersey law is 6 years, and under Oklahoma law is 2 years. Both parties agree that the transferee court must utilize the choice of law rules of the transferor court. Thus New Jersey law applies to determine which statute of limitations to use. Under New Jersey law, the "interest based" test is used in determining the applicable statute of limitations period. Computer Associates Intern Inc. V. Altri, Inc., 22 F.3d 32 (2d Cir. 1994).

Plaintiff argues that because both plaintiff and the "sole real party in interest" defendant are New Jersey Citizens, New Jersey's statute of limitations must be applied. In advancing this argument, plaintiff, relying on Pine v. Ely, Lilly and Co., 201 N.J. Super. 186 (App. Div. 1985) asserts that it is "the strong public policy of New Jersey to promote the interests of its domiciliaries, and to provide a forum through which they can be compensated." The Court notes that there are defendants in this lawsuit other than New Jersey resident Galesi. Moreover, in considering all of the factors that resulted in the transfer of this case to this forum, the Court concludes that the "interest based" test dictates that Oklahoma law should apply. The limited partnerships were formed under Oklahoma law, the acts of alleged mismanagement and negligence occurred in Oklahoma, and the oil properties

located are primarily in Oklahoma.

Thus, a two year statute of limitations runs from the time that the tortious or fraudulent acts were or could have been discovered. Based on the Court's previous ruling, that the statute of limitations began to run when plaintiff "knew he made a bad investment" in 1980, the statute of limitations bars the tort claims.

The primary issue raised by the motions for summary judgment is whether Plaintiff is entitled to pursue his state law claims and receive the benefit of the \$1.9 million dollar default judgment he has previously been awarded. Plaintiff has stated both at the preliminary pretrial conference and at previous status conferences, that he wishes to accept the \$1.9 million dollar default judgment, but that he wishes also to be able to put on the evidence for his fraud case as well. Plaintiff concedes that the damages are the same, but argues that proving the fraud case is necessary because he may incur problems proving his case if the default judgment is ultimately reversed. This is not sufficient reason to allow Plaintiff to put on evidence to prove a fraud claim, when plaintiff already has received a judgment in his favor entitling him to the same damages. In the interest of efficiency and judicial economy, the trial of this matter is limited to the issues encompassed by the default judgment previously awarded.

Defendants' motions for summary judgment (Docket #'s 915 and 929) are granted in part and denied in part.

IT IS SO ORDERED THIS 3rd ^{February} DAY OF ~~JANUARY~~, 1998.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
FEB -4 1998

JAMES E. ORR, Individually and doing)
business as ED ORR & ASSOCIATES,)
)
Plaintiff,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 92-CV-688-E /

ENTERED ON DOCKET

DATE FEB 05 1998

J U D G M E N T

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, United States of America and against the Plaintiff, James E. Orr, individually and doing business as Ed Orr & Associates on both plaintiff's claim and Defendant's counterclaim. Plaintiff shall take nothing of its claim and Judgment shall be awarded Defendant on its counterclaim in the amount of \$326,197.46 plus statutory additions.

Dated this 3rd Day of February, 1998.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

58

IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB -4 1998

JAMES E. ORR, Individually and doing)
business as ED ORR & ASSOCIATES,)
)
Plaintiff,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 92-CV-688-E

ENTERED ON DOCKET

DATE FEB 05 1998

ORDER

Now before the Court is the Motion for Summary Judgment (Docket #36) of Defendant and counter-claimant United States.

This matter was brought by James E. Orr d/b/a Ed Orr & Associates for a refund of overpaid taxes in the amount of \$218.75, and a declaration that he is not responsible for unpaid employment taxes assessed against him for the years 1984, 1985, 1986, and 1987. The United States filed an answer and counterclaim denying that Orr had over-paid taxes and seeking judgment in the amount of \$326,197.46, plus statutory additions. The only factual issue is whether certain workers for plaintiff were "employees" such that plaintiff would be required to pay employment taxes on these workers. The United States has filed a motion for summary judgment on this issue, arguing that, under the undisputed facts, the workers in question were employees, and plaintiff was responsible for employment taxes for these workers. Plaintiff has failed to respond to the motion for summary judgment, and therefore, under Local Rule 56.1 the following facts are deemed admitted:

1. At all relevant times, James E. Orr was the owner of Ed Orr & Associates.

-51

2. The plaintiff was in the business of checking real property titles and acquiring oil and gas leases from the property owners for client oil companies and individuals.

3. The plaintiff hired individuals to check titles and acquire oil and gas leaseholds for his clients. These individuals are commonly referred to as "landmen."

4. No formal training or special license is required in the State of Oklahoma to perform landmen services.

5. The landmen's duties required no special skills. They consisted mainly of checking courthouse or public records.

6. The plaintiff did not enter into any written agreement with the landmen which defined their responsibilities and duties, the duration of their services, or the particular service that was to be rendered by them.

7. The plaintiff paid each landman a fixed daily wage. The total payment was based upon the number of days spent on a particular project.

8. The daily wage that was paid to each landman was determined by the plaintiff, and was paid to each landman independent of the client of the prospect that the landman had worked on.

9. A landman would be paid his daily rate no matter how many prospects or clients he worked on during a given day.

10. Each landman reported the time that was spent on a particular project.

11. The landmen were reimbursed for their expenses, including

automobile mileage, meals and lodging.

12. The landmen were required to prepare and submit to the plaintiff various reports, including ownership reports and billing statements.

13. Ownership reports show the legal description of the property, the owners of the surface and mineral rights, and whether there is an oil and gas lease already in effect on the property.

14. The landmen's ownership reports were reviewed by someone in the plaintiff's office.

15. The plaintiff has the right to make changes to the ownership reports and to require each landman to comply with the changes made to the report.

16. Completing ownership reports was the primary job of the landmen.

17. The plaintiff retained the right to discharge the landmen at any time and the landmen retained the right to terminate their relationship with the plaintiff at any time.

18. The services performed by the landmen were continuous in nature and were of indefinite duration. The services were primarily full-time jobs.

19. It was understood that the work hours were 8:00 a.m. to 5:00 p.m.

20. The landmen were required to give status updates on their work to the plaintiff if requested.

21. As a general rule, a landman could not hire an assistant to negotiate a lease on his own behalf. A landman could not hire

someone else to perform the work that the plaintiff assigned him to do.

22. The plaintiff retained the right to direct the landmen to a specific project or to a more urgent prospect when the need arose.

23. The plaintiff monitored the number of landmen on a prospect, and would pair a new landman with a more experienced landman in order to provide supervision, training and experience.

24. Some of the workers hired by the plaintiff has no experience as landmen and needed to be trained.

25. One of the landmen, David Smith, had check signing authority on the plaintiff's checking account and balanced the monthly statement. Smith had a part in the hiring of other landmen. He would interview them and sometimes hire them on behalf of the plaintiff.

26. Smith was a supervisor for the plaintiff. He oversaw and the reviewed the other landmen's work.

27. According to Smith, one-half of the newly hired persons has limited or no experience as landmen and would become more proficient by working with the plaintiff's more experienced hands.

28. When one of the plaintiff's landmen was assigned to supervise or train a less experienced worker, both landmen were paid the normal daily wage.

29. The plaintiff provided the necessary forms and office and desk space, along with telephones, for the landmen to complete their assigned tasks. Secretarial help was also furnished.

30. Every landman was furnished a key to the plaintiff's premises which allowed them unlimited access to the plaintiff's facilities in order for them to complete the assigned work.

31. The landmen did not advertise their services or solicit their services to the general public.

32. Generally, the landmen would represent themselves as working for the plaintiff.

33. Newspaper advertisements were used by the plaintiff to recruit new workers. These advertisements were prepared by landman David Smith.

34. One advertisement states that the plaintiff is seeking a person to be a "Petroleum Land Man Trainee" who has a "willingness to learn."

35. Many of the workers became associated with the plaintiff by responding to the newspaper advertisements.

36. The Internal Revenue Service made assessments of February 4, 1991, against the plaintiff for his failure to withhold and pay over various employment and unemployment taxes associated with the landmen for each of the periods from 1984 through 1988.

37. The plaintiff is challenging the assessments in this law suit and is claiming that the taxes are not owed because the landmen were not employees of the plaintiff.

Analysis

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Widon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

"The 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."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

Because plaintiff filed to dispute the facts set out by defendant, the question for this court is whether these facts compel a conclusion that the workers were in fact common law employees. Plaintiff's workers are employees for federal employment tax purposes if they have the status of employee under common law rules determining the employer-employee relationship. Marvel v. United States. 719 F.2d 1507, 1514 (10th Cir. 1983).

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to direct and control the method and manner in which the work shall be done and the result to be accomplished, while an independent contractor is one who engages to perform services for another according to his own method and manner, free from direction and control of the employer in all matters relating to the performance of the work, except as to the result or the product of his work.

Id. Other factors to be considered include:

1. Whether the person rendering the service has a substantial investment in his own tools and equipment;
2. Whether the alleged employee has incurred any costs in rendering the service, as in employing his own laborers;
3. Whether the person rendering the service has the ability to profit from his own "management skill";
4. Whether the person rendering the service is using a specialized skill;
5. Whether the relationship between the parties is permanent;
6. Whether the person rendering the service works in the course of the alleged employer's business or in an ancillary capacity.

Id., (citing Avis Rent A Car System, Inc. v. United States, 503 F.2d 423, 429 (2d Cir. 1974)).

In examining each of these factors, and applying them to the undisputed facts, the court must conclude that the workers in question were under the ultimate direction and control of plaintiff and were, therefore, employees.

Defendant's motion for summary judgment (Docket #36) is granted.

DATED this 31st day of February, 1998.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

52
1/16/98

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 2-5-98

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

VIRGIL ALEN BLACKSHEAR)
aka V. Alen Blackshear;)
CYNTHIA M. BLACKSHEAR;)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)

Defendants.)

F I L E D

FEB 6 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 96-C-312-K

DEFICIENCY JUDGMENT

This matter comes on for consideration this 3 day of February, 1998, upon the Motion of the Plaintiff, United States of America, on behalf of the Secretary of Housing and Urban Development, for leave to enter a Deficiency Judgment. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Virgil Alen Blackshear aka V. Alen Blackshear, appears neither in person nor by counsel.

The Court being fully advised and having examined the court file finds that copies of Plaintiff's Motion and Declaration were mailed by first-class mail to Raymond S. Allred, Attorney for Defendant, Virgil Alen Blackshear aka V. Alen Blackshear, 717 South Houston, Suite 400, Tulsa, Oklahoma 74127, and by first-class mail to all answering parties and/or counsel of record.

The Court further finds that the amount of the Judgment rendered on February 3, 1997, in favor of the Plaintiff United States of America, and against Virgil Alen Blackshear, with interest and costs to date of sale is \$134,276.70.

The Court further finds that the appraised value of the real property at the time of sale was \$80,000.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered February 3, 1997, for the sum of \$68,000.00 which is less than the market value.

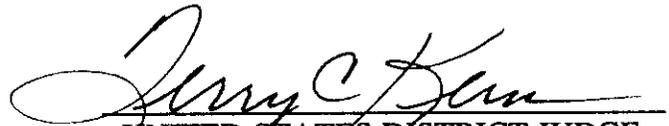
The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on the 15th day of January, 1998.

The Court further finds that the Plaintiff, United States of America on behalf of the Secretary of Housing and Urban Development, is accordingly entitled to a deficiency judgment against the Defendant, Virgil Alen Blackshear aka V. Alen Blackshear, as follows:

Principal Balance	\$ 73,963.09
Pre-Judgment Interest & Penalties	55,008.94
Interest From Date of Judgment to Sale	4,882.56
Publication Fees of Notice of Sale	197.11
Court Appraisers' Fees	<u>225.00</u>
TOTAL	\$134,276.70
Less Credit of Appraised Value	<u>80,000.00</u>
DEFICIENCY	\$54,276.70

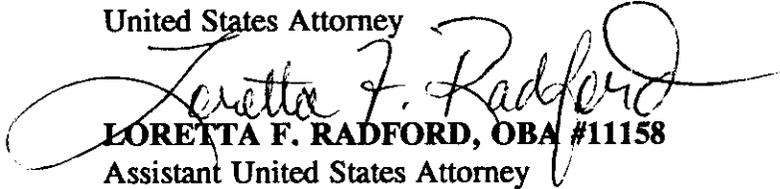
plus interest on said deficiency judgment at the legal rate of 5.23 percent per annum from date of deficiency judgment until paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Housing and Urban Development have and recover from Defendant, Virgil Alen Blackshear aka V. Alen Blackshear, a deficiency judgment in the amount of \$54,276.70, plus interest at the legal rate of 5.23 percent per annum on said deficiency judgment from date of judgment until paid.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney


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

Deficiency Judgment
Case No. 96-C-312-K (Blackshear)

IFR:cas

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

FILED

FEB - 4 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICHARD A. HOFFMAN,)
)
 Plaintiff,)
)
 vs.)
)
 GARY WINNICK, DAVID LEE,)
 RICHARD SANDIFER, ED CARPENTER,)
 MICHAEL E. TENNENBAUM,)
 individually and doing business)
 as PACIFIC ASSET GROUP and)
 BEAR STEARNS AND COMPANY, INC.,)
 STEPHEN E. GRIFFITH,)
 individually and as Trustee of)
 the Benjamin E. Griffith Trust,)
 and UNKNOWN JOINT VENTURERS in)
 PACIFIC ASSET GROUP,)
)
 Defendants.)

Case No. 95-C-1090-H

STIPULATION OF DISMISSAL

COME NOW the Plaintiff, Richard A. Hoffman, and Defendant, Benjamin E. Griffith Trust ("Griffith"), by and through the undersigned attorneys, and pursuant to Rule 41 (a) (1) (ii) of the Federal Rules of Civil Procedure stipulate the following:

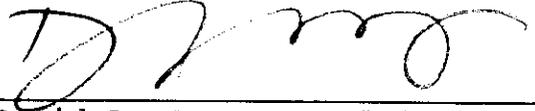
1. The parties and each of them have settled all matters in controversy or subject to the controversy encompassed by the above styled matter.
2. By this stipulation the parties and each of them intend that the controversy that is the subject of this action as plead or as may have been plead shall be forever barred.
3. Plaintiff moves for an order dismissing the above titled action against Defendant Griffith, with prejudice.
4. Defendant Griffith filed an answer to the Amended Complaint on April 23, 1997, and will not suffer prejudice by this dismissal. It did not file a counterclaim.
5. The Parties herein acknowledge that Plaintiff has settled with other parties Defendant by separate agreement and stipulation.

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6. Pursuant to the settlement between these parties, each shall bear his own costs of this action, including attorneys' fees.

Submitted by



David A. Tracy, OBA# 10501
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Approved as to form
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Attorney for A. Benjamin
Griffith Trust and Stephen
E. Griffith individually

Entered

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

FILED

FEB 03 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THE F&M BANK & TRUST COMPANY,)
)
Plaintiff,)

vs.)

Case No. 96-CV-1079-BU

EUGENE A. LUDWIG, THE)
)
COMPTROLLER OF THE CURRENCY)
)
OF THE UNITED STATES OF AMERICA)
)
and BOATMEN'S NATIONAL BANK)
)
OF OKLAHOMA formerly BOATMEN'S)
)
FIRST NATIONAL BANK OF)
)
OKLAHOMA,)

ENTERED ON DOCKET

DATE FEB 04 1998

Defendants.)

JUDGMENT

This matter came before the Court upon various motions of the parties, and the issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Plaintiff, The F&M Bank & Trust Company, and against Defendants, Eugene A. Ludwig, The Comptroller of the Currency of the United States of America and Boatmen's National Bank of Oklahoma, formerly Boatmen's First National Bank of Oklahoma and that Plaintiff is entitled to recover of Defendants its costs of action.

Dated at Tulsa, Oklahoma this 3rd day of February, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

FEB 03 1998

THE F&M BANK & TRUST COMPANY,)
)
Plaintiff,)
)
vs.)
)
EUGENE A. LUDWIG, THE)
COMPTROLLER OF THE CURRENCY)
OF THE UNITED STATES OF AMERICA)
and BOATMEN'S NATIONAL BANK OF)
OKLAHOMA formerly BOATMEN'S)
FIRST NATIONAL BANK OF)
OKLAHOMA,)
)
Defendants.)

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

Case No. 96-C-1079-BU

ORDER

This matter comes before the Court upon Defendant, The Comptroller of the Currency's Motion to Dismiss, or, in the Alternative, for Summary Judgment; Defendant, The Comptroller of the Currency's Supplementary Motion to Dismiss for Lack of Standing; Plaintiff, The F&M Bank & Trust Company's Motion for Summary Judgment; Defendant, Boatmen's National Bank of Oklahoma's Motion for Summary Judgment and Defendants' Unopposed Request for Oral Argument. Upon due consideration of the parties' submissions, the Court makes its determination.

In this action, Plaintiff, The F&M Bank & Trust Company ("F&M"), challenges the decision of Defendant, The Comptroller of the Currency ("Comptroller"), approving, pursuant to 12 U.S.C. § 36(c), an application of Defendant, Boatmen's National Bank of

Oklahoma, formerly Boatmen's First National Bank of Oklahoma, to relocate a branch bank from 2424 East 21st Street to 2100 South Utica in Tulsa, Oklahoma. F&M contends that the Comptroller's decision should be set aside because it is arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.

Background

The material facts relevant to the parties' motions are undisputed. On May 21, 1993, Boatmen's First National Bank of Oklahoma ("Boatmen's First National") acquired a branch bank from the Resolution Trust Corporation in its purchase of certain assets and assumption of certain liabilities of the failed Cimarron Federal Savings Association, Muskogee, Oklahoma. On January 17, 1995, Boatmen's First National received authorization from the Comptroller to change the location of the branch bank from 6630 South Lewis to 2424 East 21st in Tulsa, Oklahoma.

On June 7, 1996, Boatmen's First National filed an application seeking approval from the Comptroller to relocate its branch bank at 2424 East 21st to 2100 South Utica, a location six blocks away.

F&M operates a branch at 1924 South Utica and a drive-in facility at 21st and Utica. F&M's branch and drive-in facility are within 330 feet of Boatmen's First National's proposed branch bank relocation.

On July 2, 1996, F&M submitted an objection and comment to the Comptroller regarding Boatmen's First National's application. F&M

objected to the proposed relocation branch because the branch would be within 330 feet of F&M's branch and drive-in. F&M claimed that according to Oklahoma banking law, in counties with a population in excess of 500,000, a branch of another bank was prohibited from relocating within 330 feet of an existing bank or branch. Although the 1996 amendment to Okla. Stat. tit. 6, § 501.1(A)(2) imposed the 330-foot proximity restriction only to counties having 500,000 or more in population according to the "1980 Federal Decennial Census" and Tulsa County as of the 1980 federal census had a population less than 500,000, F&M argued that the 1996 amendment constituted special legislation and was thus unconstitutional. F&M argued that the unconstitutional special legislation had to be stricken and the 1995 version of the statute, which imposed the 330-foot proximity restriction to counties with 500,000 or more in population according to the "latest Federal Decennial Census" had to be applied. According to the 1990 federal census or the "latest Federal Decennial Census," Tulsa County had a population in excess of 500,000. F&M therefore argued that the 330-foot proximity restriction of section 501.1(A)(2) applied and precluded the proposed relocation of Boatmen's First National's branch to 2100 South Utica.

F&M requested a hearing on the issues raised in its objection and comment. The Comptroller denied F&M's request for a hearing but granted F&M 14 days to submit additional written comments and

data. By letter dated August 7, 1996, F&M submitted additional comments and raised a factual question concerning the continuous operation of the 2424 East 21st branch. On information and belief, F&M represented that Boatmen's First National had only recently staffed the 2424 East 21st location as a branch bank; the branch was not listed in the local phone book; the signs on the building and office door referred to "Boatmen's Trust Company"; the door of the location was locked during normal business hours and the lights were off during at least part of the normal business hours; and a note on the door said to push button or ring bell for service if the door was locked during normal business hours. F&M stated that the Comptroller should require Boatmen's First National to present affirmative and conclusive proof that its branch had been continuously opened since its approved relocation from 6630 South Lewis on January 17, 1995. F&M claimed that if the branch bank had not been continuously open, it was a de facto closed branch and could not be relocated.

On August 14, 1996, Boatmen's First National submitted to the Comptroller a response to F&M's objection and comment, representing that it had been continuously open and thus, was eligible to be relocated.

On September 13, 1996, Boatmen's First National Bank of Oklahoma merged into Bank IV Oklahoma, N.A., under the charter of the latter and with the title Boatmen's National Bank of Oklahoma

("Boatmen's").

On September 20, 1996, in response to the Comptroller's request, Boatmen's submitted the affidavit of Carolyn Dunn, former manager of the 2424 East 21st branch, attesting to the prior representations of Boatmen's First National that it had been and continued to be open to the public for a range of banking activities.

On November 12, 1996, the Comptroller approved Boatmen's application to relocate its branch bank from 2424 East 21st to 2100 South Utica. The Comptroller found that the bank branch relocation was authorized by the McFadden Act, 12 U.S.C. § 36(c), and the applicable provisions of state law. The Comptroller declined to inquire into the constitutionality of Oklahoma's branching law, reasoning that only a court could declare a state statute unconstitutional. The Comptroller found that the 330-foot proximity restriction was inapplicable in Tulsa County because Tulsa County had a population less than 500,000 as of the "1980 Federal Decennial Census." The Comptroller further found that the 2424 East 21st branch was a functioning branch office and could be relocated.

Discussion

At the outset, the Court declines to grant the request of the Comptroller and Boatmen's for oral argument. The Court opines that the parties' submissions are sufficient and oral argument would not

be of material assistance in the resolution of the parties' motions.

Standing

In their motions, the Comptroller and Boatmen's argue that F&M lacks standing to challenge the Comptroller's decision approving Boatmen's application to relocate its branch bank. The Comptroller and Boatmen's assert that F&M has failed to show specific and concrete injury in fact. In support of their argument, the Comptroller and Boatmen's rely upon the testimony of F&M's Vice-President and Director of Marketing, Anthony B. Davis, given during the December 19, 1996 hearing on F&M's motion to stay. According to the Comptroller and Boatmen's, Mr. Davis testified that F&M's claim was not based upon competitive injury, but was merely related to a national bank being permitted to do something a state bank could not do. Because F&M's claims no specific and concrete injury to itself and is not permitted by law to prosecute a generalized grievance, specifically, "the integrity of the dual banking system," the Comptroller and Boatmen's contend that F&M cannot pursue this action.

Article III of the Constitution restricts the "judicial power" of the United States to the resolution of "cases" and "controversies." See, Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471, 102 S.Ct. 752, 757-758, 70 L.Ed.2d 700 (1982). Subsumed within

this restriction is the requirement that "a litigant have 'standing' to challenge the action sought to be adjudicated in the lawsuit." Id.; U.S.C.A. Const. Art. 3, § 1 et seq. Standing has constitutional and prudential components, both of which must be satisfied before a litigant may seek redress in federal courts. Valley Forge Christian College, 454 U.S. at 471, 102 S.Ct. 757-758.

At a minimum, the constitutional dimension of standing requires: (1) that the plaintiff "suffered an 'injury in fact'--an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent, not 'conjectural' or 'hypothetical;'" (2) that the injury is "'fairly . . . trace [able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court;'" and (3) that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992).

In addition to the constitutional components, the Supreme Court has developed prudential standing considerations "that are part of judicial self-government." Id. These prudential standing considerations require: (1) a litigant "assert [its] own legal interests rather than those of third parties"; (2) a court "refrain from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances;'" and (3) a litigant

demonstrate that [its] interests are arguably within the "zone of interests" intended to be protected by the statute, rule or constitutional provision on which the claim is based. Valley Forge Christian College, 454 U.S. at 474-475, 102 S.Ct. at 757-760.

When the plaintiff challenges agency action under the Administrative Procedure Act ("APA"), like in the instant case, the plaintiff must also satisfy special standing requirements applicable to administrative claims. 5 U.S.C. § 702. In order to have standing under the APA, the plaintiff must identify some final agency action that has injured it, and that the injury complained of is within the "zone of interests" to be protected by the statute at issue. Lujan v. National Wildlife Federation, 497 U.S. 871, 882-883, 110 S.Ct. 3177, 3185-3186, 111 L.Ed.2d 695 (1990); Western Shoshone Business Council for and on Behalf of Western Shoshone Tribe of Duck Valley Reservation v. Babbitt, 1 F.3d 1052, 1055 (10th Cir. 1993).

The party invoking federal jurisdiction bears the burden of establishing standing. Defenders of Wildlife, 504 U.S. at 561, 112 S.Ct. at 2136. In response to a summary judgment motion, the plaintiff, "can no longer rest on [the] 'mere allegations' [contained in its complaint], but must 'set forth' by affidavit or other evidence 'specific facts,' Fed. Rule Civ. Proc. 56(e), which for purposes of summary judgment will be taken to be true." Id.

In this case, the Court finds that F&M satisfies the

constitutional standing requirements. First, F&M, a competitor of Boatmen's, has established through the affidavit of Mr. Davis that it has made a substantial investment in improving the facilities of its branch and drive-in and that the relocation of Boatmen's branch will diminish the value of F&M's investment because of the increase in competition and confusion to the public. The Court concludes that F&M has sufficiently shown a personal stake in the outcome of the proceedings. The Court concludes that F&M's "imminent" and "particularized" loss in its investment meets the "injury in fact" component. Second, the requisite "casual connection" between F&M's injury and the Comptroller's decision is clear. With the relocation of the 2424 East 21st branch bank, F&M will no longer be the only bank at the corner of 21st and Utica. F&M's investment will diminish in value with the increase in competition and confusion to the public. Furthermore, the Court finds that a decision favorable to F&M will undoubtedly redress its injuries. If the Court sets aside the Comptroller's decision, Boatmen's will not be permitted to relocate its branch to 2100 South Utica and F&M's investment in its bank branch and drive-in facility will remain intact.

As to prudential requirements, the Court finds that F&M has identified a final agency action, i.e., the Comptroller's decision, from which it claims injury. The Court also finds that F&M is asserting its own legal rights and is not seeking to adjudicate

"generalized grievances." Although F&M, during the motion to stay hearing, expressed an interest in maintaining "the integrity of the dual banking system," the Court opines that F&M has not commenced this action to vindicate the interest of others or to adjudicate abstract questions of wide public significance. F&M is the only bank within 330 feet of Boatmen's proposed branch relocation. In the Court's view, F&M's action is brought to protect its own interest and investment in the 21st and Utica location.

In regard to the "zone of interests" requirement, the Court finds that F&M's interest is within the "zone of interests" to be protected by the McFadden Act. As stated by the Supreme Court in Clarke v. Securities Industry Ass'n, 479 U.S. 388, 403, 107 S.Ct. 750, 759, 93 L.Ed.2d 757 (1987), "competitors who allege an injury that implicates the policies of the National Bank Act are very reasonable candidates to seek review of the Comptroller's rulings." In the instant case, F&M is a competitor of Boatmen's. It has also claimed an injury which implicates the policies of the McFadden Act. With the McFadden Act, Congress intended to place federal and state banks on a basis of "competitive equality" insofar as branch banking was concerned. First National Bank in Plant City, Florida v. Dickinson, 396 U.S. 122, 131-133, 90 S.Ct. 337, 342-343, 24 L.Ed.2d 312 (1969); First National Bank of Logan, Utah v. Walker Bank & Trust Co., 385 U.S. 252, 261, 87 S.Ct. 492, 497, 17 L.Ed.2d 343 (1966). To implement the policy of "competitive equality,"

Congress incorporated into the McFadden Act the limitations which state law places on branch banking activities by state banks. Dickinson, 396 U.S. at 131; 90 S.Ct. at 342. F&M maintains that the Comptroller has permitted Boatmen's to relocate to a location where a state bank, under the same circumstances, would not be permitted to relocate under state law and it will suffer injury as a result of that action. The Court concludes that F&M's interest falls within the zone of interests to be protected by the McFadden Act. Therefore, F&M is the proper party to challenge the Comptroller's decision.

Standard of Review

The standards a court must apply when reviewing an agency's action are embodied in the APA, specifically, 5 U.S.C. § 706. The APA distinguishes between review of law and review of fact and sets different standards for each. The final word on interpretation of law and its applicability resides with the courts. 6, Stein, Mitchell, Mezines, ADMINISTRATIVE LAW, Chapter 51.01(1) (1998). In other words, the review of an agency's determination of constitutional or statutory provisions is de novo. Hill v. NTSB, 886 F.2d 1275, 1278 (10th Cir. 1989); Seattle Trust & Savings Bank v. Bank of California, N.A., 492 F.2d 48, 50 (9th Cir. 1974). A reasonable interpretation of a regulatory statute adopted by the federal agency charged with enforcement of that statute is entitled to judicial deference. Chevron, U.S.A. Inc. v. NRDC, 467 U.S.

837, 842-845, 104 S.Ct. 2778, 2781-2783, 81 L.Ed.2d 694 (1984). This administrative law doctrine is usually applied to acts of Congress administered by a federal agency, such as the federal banking laws administered by the Comptroller. Clarke, 479 U.S. at 403-404, 107 S.Ct. at 759. However, in certain circumstances, the doctrine has been applied to a federal agency's interpretation of a state statute that serves as the agency's rule of decision. Montgomery National Bank v. Clarke, 882 F.2d 87, 92 (3d Cir. 1989). Nonetheless, a federal agency does not have the authority to address the constitutionality of a statute upon which it is called to administer. Gilbert v. NTSB, 80 F.3d 364, 366-67 (9th Cir. 1996); Buckeye Industries, Inc. v. Secretary of Labor, Occupational Safety & Health Review Commission, 587 F.2d 231, 235 (5th Cir. 1979).

The APA provides three criteria by which to review an agency's determination of fact. 6, Stein, Mitchell, Mezines, ADMINISTRATIVE LAW, Chapter 51.01(1)(1998). One of those criteria is the arbitrary, capricious or an abuse of discretion standard. To make a finding as to whether an agency acted arbitrarily and capriciously, the court must consider whether the agency decision was based upon a consideration of relevant factors and whether there has been a clear error of judgment. Id. at Chapter 51.03; Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971). The court is not

empowered to substitute its judgment for that of the agency. Id. Judicial review is limited to examination of the agency record. Camp v. Pitts, 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973). The second criteria, de novo review, allows the court to make independent findings of fact. However, this review is permitted in very limited situations. 6, Stein, Mitchell, Mezines, ADMINISTRATIVE LAW, Chapter 51.04. A court may conduct a de novo review "when the action is adjudicatory in nature and the agency factfinding procedures are inadequate." Id.; Citizens to Preserve Overton Park, Inc., 401 U.S. at 415.¹

In the instant case, the Comptroller and Boatmen's urge the Court to uphold the Comptroller's decision unless he acted arbitrarily, capriciously or abused his discretion in construing the applicable banking statutes. The Court, however, concludes that the issue of the Comptroller's interpretation of Okla. Stat. tit. 6, § 501.1(A)(2) is an issue of law, which requires a de novo determination. Because the Comptroller does not have the expertise to evaluate constitutional problems, see, Williams v. Babbitt, 115 F.3d 657, 662 (9th Cir. 1997), and in fact, declined to address the constitutional question in this case, the Court concludes that it need not accord deference to Comptroller's construction of section

¹ The third criteria, which is not applicable to this case, is the substantial evidence standard. This factfinding review is used for judicial findings made on a hearing record. Camp, 411 U.S. at 140, 93 S.Ct. at 1243.

501.1(A)(2).

In this action, F&M has also challenged the inadequacy of the factfinding procedures of the Comptroller in determining whether the 2424 East 21st location was a functioning branch. F&M requests that the Court to either remand this action to the Comptroller to permit F&M to rebut Boatmen's evidence concerning the continuous operation of the 2424 East 21st branch or to conduct a de novo review of the matter itself. The Court, however, finds it unnecessary to decide this issue. As discussed below, the Court finds the construction and application of Okla. Stat. tit. 6, § 501.1 (A)(2) dispositive of this action.

McFadden Act

The McFadden Act, 12 U.S.C. § 36, governs national bank branching. It provides in pertinent part:

(c) A national banking association may, with the approval of the Comptroller of Currency, establish and operate new branches: (1) Within the limits of the city, town, or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location, imposed by the law of the State on State banks
.....

12 U.S.C. § 36(c).

The Act also provides in pertinent part that:

(i) No branch of any national banking association shall be established or moved from one location to another without first obtaining the consent of the Comptroller of the Currency.

12 U.S.C. § 36(i).

At the time pertinent to Boatmen's application, a regulation, which had been promulgated by the Comptroller to implement 12 U.S.C. § 36(i), provided in pertinent part:

(e) Branch Relocation. A national bank desiring to relocate a branch shall file an application. An application to relocate a branch is evaluated in essentially the same manner as an application to establish a branch.

12 C.F.R. § 5.40(e) (1996).

The Comptroller's authority to permit the relocation of branches is subject to applicable state law restrictions. Mutschler v. Peoples Nat'l Bank of Washington, 607 F.2d 274 (9th Cir. 1979). A branch may be established or relocated "when, where and how state law would authorize a state bank to establish and operate such a branch." Dickinson, 396 U.S. at 130, 90 S.Ct. at 341.

Okla. Stat. tit. 6, § 501.1(A)(2)

Okla. Stat. tit. 6, § 501.1(A) authorizes Oklahoma banks to open two branch banks, subject to the limitations of that statute. Section 501.1(A)(2) imposes a 330-foot proximity restriction on the establishment of branches in counties having a population in excess of 500,000. Section 501.1(A)(2) states:

Neither the Board nor the Comptroller of the Currency

shall grant a certificate for any branch unless it is more than three hundred thirty (330) feet from any main bank or branch bank in counties with a population of five hundred thousand (500,000) or more according to the 1980 Federal Decennial Census unless the branch is established with the irrevocable consent of such other bank. This distance limitation shall be determined by measuring along a straight line drawn between the nearest exterior wall of the appropriate main bank building or branch building and the nearest exterior wall of the branch bank or facility.

Okla. Stat. tit. 6, § 501.1(A)(2) (Emphasis added).

In 1983, the Oklahoma Legislature enacted section 501.1(A)(2), which was then numbered 501(B). Okla. Stat. tit. 6, § 501(B)(West. Supp. 1983). At that time, the statute included the same language as above-underlined. During the 1995 legislative session, the Oklahoma Legislature amended section 501.1(B) (which had been renumbered in 1988) and substituted "latest" for "1980" in describing the applicable Federal Decennial Census. 1995 Okla. Sess. Laws Ch. 36, § 12; Okla. Stat. tit. 6, § 501.1(B)(2)(West. Supp. 1995). The Oklahoma Legislature, during the 1996 legislative session, again amended section 501.1(B)(2). It renumbered the section as 501.1(A)(2) and substituted "1980" for "latest." 1996 Okla. Sess. Laws Ch. 92, § 6; Okla. Stat. tit. 6, § 501.1(A)(2).

F&M contends that the 1996 amendment is unconstitutional because it is a special law proscribed by Art. 5, § 59 of the Oklahoma Constitution. The Comptroller declined to address this issue in deciding Boatmen's application, reasoning that only a court may declare a state statute unconstitutional.

Art. 5, § 59 of the Oklahoma Constitution provides
in pertinent part:

Laws of a general nature shall have a uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted.

Okla. Const. Art. 5, § 59.

Section 59 generally allows the Oklahoma Legislature to pass special laws when a general law is not applicable. Reynolds v. Porter, 760 P.2d 816, 822 (Okla. 1988). Under section 59, a three-pronged inquiry is required to determine whether a statute is constitutional: (1) "Is the statute a special or general law? (2) If the statute is special law, is a general law applicable? and (3). If a general law is not applicable, is the statute a permissible special law?" Ross v. Peters, 846 P.2d 1107, 1119 (Okla. 1993); Reynolds, 760 P.2d at 822.

Under the first prong, the court must identify the class. A statute relating to all persons or things of a class is a general law while one relating to particular persons or things is a special law. Reynolds, 760 P.2d at 822. Special laws are those which single out less than an entire class of similarly affected persons or things for different treatment. Id.

Upon review, the Court concludes that section 501.1(A)(2) constitutes a special law. Section 501.1(A)(2) relates to the establishment of branch banks in counties with populations of 500,000 or more as of the 1980 federal census. Specifically, it

operates and applies to branch banks in only one county: Oklahoma County. The Court opines that section 501.1(A)(2) singles out less than the entire class for different treatment.

The second prong requires the court to determine if the subject of the legislation is reasonably susceptible of general treatment or if, on the other hand, there is a special situation possessing characteristics impossible of treatment by general law. Ross, 846 P.2d at 1119; Reynolds, 760 P.2d at 822. In assessing whether a general law can be made applicable, the court must consider both the nature and objective of the legislation as well as the conditions and circumstances under which the statute was enacted. Reynolds, 760 P.2d at 822.

In the instant action, the parties have not provided evidence as to the nature and purpose of section 501.1(A)(2) or the conditions and circumstances under which it was enacted. The Court concludes that the purpose of section 501.1(A)(2) was to restrict the location of branches in counties with high populations. Counties with high populations would obviously attract more branches. The Court believes that the legislature was within its province in enacting a statute to restrict branches in highly populated counties. In the Court's view, special circumstances exist which could not be addressed by a general law.

Under the third and final prong, the court must determine if the special legislation is reasonably and substantially related to

a valid legislative objective. If it is, the Oklahoma Constitution permits the Oklahoma Legislature to pass the special law to promote its objective. Reynolds, 760 P.2d at 822. "A classification is not infirm if the special class has some reasonable distinction from other subjects of like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation." Black v. Ball Janitorial Serv. Inc., 730 P.2d 510, 514 (Okla. 1986).

In Tulsa Exposition and Fair Corporation v. Board of County Commissioners of Tulsa County, 468 P.2d 501 (Okla. 1970), the Oklahoma Supreme Court stated:

. . . where a statute operates upon a class, the classification must not be capricious or arbitrary and must be reasonable and pertain to some peculiarity in the subject matter calling for the legislation. As between the persons and places included within the operation of the law and those omitted, there must be some distinctive characteristic upon which a different treatment may be reasonably founded and that furnished a practical and real basis for discrimination.

Id. at 505, quoting Haas v. Holloman, 327 P.2d 655 (Okla. 1958).

Additionally, in Hamilton v. Oklahoma City, 527 P.2d 14 (Okla. 1974), the Oklahoma Supreme Court stated:

The Legislature may classify the counties and cities of the state on the basis of population for legislative purposes when the classification is not arbitrary and capricious, but is founded upon real and substantial distinctions and the questions of population bears some reasonable, rational relation to the subject matter.

Id. at 16.

The classification in the 1996 amendment is counties with a

population in excess of 500,000 as of the "1980 Federal Decennial Census." As stated, Oklahoma County is the only county which falls within this classification. Because of the reference to "the 1980 Federal Decennial Census," section 501.1(A)(2) cannot apply to any other county. Therefore, the inquiry is whether there are some real and substantial distinctions warranting different treatment for Oklahoma County.

As previously stated, it is the Court's view that the legislative objective in section 501.1(A)(2) was to restrict the location of branches in highly populated counties. However, as of the 1990 federal census, Tulsa County also had a population count in excess of 500,000. In its briefing, Boatmen's has not offered any reason why the 330-foot proximity restriction should apply only Oklahoma County. The Court perceives no real and substantial distinctions exist between Oklahoma County and Tulsa County so as to warrant a different treatment for Oklahoma County.² The Court concludes that the population classification in the 1996 amendment is an arbitrary and capricious classification and does not bear any reasonable relation to the legislative objective. The Court therefore concludes that the 1996 amendment is void and must be stricken.

² The Court notes that a parallel provision for savings banks and associations exists which imposes the identical 330-foot proximity restriction on the location of branches in counties with a population of 500,000 or more "according to the last Federal Decennial Census." Okla. Stat. tit. 18, § 381.24(a).

F&M contends that the remedy for the unconstitutional special legislation is for the Court to apply the 1995 version of section 501.1(A)(2), which provided for the "latest Federal Decennial Census." Citing to Ethics Commission v. Cullison, 850 P.2d 1069 (Okla. 1993), F&M asserts that when a court declares an amendment to a statute unconstitutional, the court leaves the law as it stood prior to the amendment's enactment. F&M contends that the 1996 amendment to section 501.1(A)(2) amended the statute and the declaration of its unconstitutionality leaves the 1995 version of section 501.1(A)(2) in place.

Boatmen's argues that the 1996 amendment did not simply repeal the 1995 version of section 501.1(A)(2) but rather amended the statute, which involved both repealing and replacing the statutory language. Citing to One Chicago Coin's Play Boy Marble Board, No. 19771 v. State ex rel. Adams, 212 P.2d 129 (Okla. 1949), Boatmen's contends that the Oklahoma Supreme Court has recognized that an amendment, such as the 1996 amendment, is equivalent to repealing a statute in its entirety and then replacing it with a new enactment containing the substance of the amended section. According to Boatmen's, the 1996 amendment involved two elements: (1) the repeal of the proximity restriction applying to both Tulsa County and Oklahoma County, and (2) the enactment of a new proximity restriction which only applies to Oklahoma County. Boatmen's contends that even if the second step is special

legislation and void, the first step to repeal the extension of the proximity restriction to Tulsa County would remain valid.

Additionally, Boatmen's contends that the unconstitutional population classification of the 1996 amendment is not severable from the remaining provisions in section 501.1(A)(2). Boatmen's asserts that the Oklahoma Legislature does not want the proximity restriction to apply to any county other than Oklahoma County. It asserts that the population classification was an integral part of the 1996 statute and there is no basis to change the classification so as to apply the proximity restriction in a manner the Oklahoma Legislature rejected. Consequently, because the unconstitutional population classification may not be severed, Boatmen's argues that section 501.1(A)(2) is void in its entirety.

Furthermore, Boatmen's asserts that if the Court chooses to strike the 1996 amendment as unconstitutional and to reinstate the 1995 version of section 501.1(A)(2), the Court should apply its ruling prospectively. Boatmen's asserts that the Oklahoma Supreme Court recognized in Cullison that a court may give prospective application to a ruling declaring a statute unconstitutional when public officials have relied upon the statute in performing their duties. Boatmen's contends that prospective application is warranted in this case.

Upon review, the Court concurs with F&M that with the declaration of the 1996 amendment as unconstitutional, the 1995

version of section 501.1(A)(2) applies. In Cullison, the Oklahoma Supreme Court stated:

When an unconstitutional statute repeals a former statute the earlier statute is deemed unaffected by the void repealing enactment. 'If an express repealing clause is contained in a statute which is unconstitutional, it seems the repealing clause will not take effect.' T. Sedgwick, A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law, 110 n. (J. Pomeroy 2d ed. 1874 & photo. reprint 1980). In line with this authority, this Court observed that 'if a statute which purports to repeal a prior one is itself void, said prior statute is in no wise (sic) affected by the attempted repealing enactment.' Porter v. Commissioners of Kingfisher County, 6 Okl. 550, 51 P. 741, 743 (1898). Our Court of Criminal Appeals has followed the rule in State ex el. Burns v. Steely, 600 P.2d 367, 368-369 (Okla.Cr.App. 1979). One court has explained this rule as the result of the principle that a (sic) invalid statute is a nullity:

It is the rule in this state that an invalidly enacted statute is a nullity. It is as inoperative as if it had never been passed. State ex rel. Evans v. Brotherhood of Friends, 41 Wash.2d 133, 247 P.2d 787 (1952). The natural effect of this rule as countenanced by the [State v.] Tieman [32 Wash. 294, 73 P. 375 (1903)] holding, is that once the invalidly enacted statute has been declared a nullity, it leaves the law as it stood prior to the enactment. Boeing Co. v. State, 74 Wash.2d 82, 442 P.2d 970 (1968); 82 C.J.S. Statutes § 75, at 132 (1953); 16 Am.Jur.2d Constitutional Law § 177, at 402 (1964).

Id. at 1078-1079.

The unconstitutional 1995 amendment to section 501.1(A)(2) is a nullity. Based upon the above-quoted language in Cullison, the 1995 version of section 501.1(A)(2) was unaffected by the 1996 amendment and is in effect. The Court rejects Boatmen's argument

that the 1995 statute may not be reinstated because the 1996 amendment not only repealed the proximity restriction in 1995 statute and but also enacted a new proximity restriction. Cullison makes clear that that "the earlier statute is deemed unaffected by the void repealing enactment . . . the repealing clause [does] not take effect." Cullison, 850 P.2d at 1078. The repeal of the 1995 version of the statute does not, as argued by Boatmen's, remain valid. It never took effect.

The Court recognizes that Cullison discusses an unconstitutional statute "repealing" a former statute rather than an unconstitutional statute "amending" a former statute. The same rule, however, applies to either circumstance. The Court of Criminal Appeals case, State ex rel. Burns v. Steely, 600 P.2d 367 (Okla.Cr.App.1979), cited in Cullison as following the rule, concerned an unconstitutional amendment to a statute. The primary case relied upon by the Court of Criminal Appeals in adopting the rule, Johnkol, Inc. v. License Appeal Commission of City of Chicago, 42 Ill.2d 377, 247 N.E.2d 901 (1969), also involved an unconstitutional amendment to a statute.

The Court rejects Boatmen's argument that the 1996 amendment is not severable. In Cullison, the Oklahoma Supreme Court recognized the presumption of severability of an unconstitutional amendment with two limited exceptions: (1) the constitutional provisions are so dependent on the unconstitutional provision that

it cannot be presumed that the legislature would have enacted the former without the latter, and (2) the constitutional provisions if severed are not capable of standing alone. Cullison, 850 P.2d at 1077. The Court finds that neither exception applies. The constitutional provisions of section 501.1 (A)(2) are not so dependent on the unconstitutional amendment "1980 Federal Decennial Census" as the prior 1995 version of section 501.1 (A)(2) used "latest" and the constitutional provisions are capable of standing alone.

The Court further rejects Boatmen's argument that the Court's ruling in regard to the unconstitutionality of section 501.1(A)(2) should be given prospective application. In Cullison, the Court gave prospective application to a decision that the statute was unconstitutional because it involved an invalid statute imposing statutory duties of conduct for public officials. It analyzed the decision as an ex post facto law. Section 501.1(A)(2) does not impose civil or criminal penalties for improper acts. It is regulatory in nature. The Court finds no reason to apply its ruling prospectively.

Finally, Boatmen's argues if the 1996 amendment is invalid as impermissible special legislation because it only applies to Oklahoma County then the 1995 version of section 501.1(A)(2) is also invalid since it only applies to Oklahoma County and Tulsa County. This Court disagrees. Oklahoma courts have recognized the

validity of high-end classifications, such as in the 1995 version of section 501.1(A)(2), based upon a rationally-based legislative goal. Hamilton v. Oklahoma City, 527 P.2d 14 (Okla. 1974); Issacs v. Oklahoma City, 437 P.2d 229 (Okla. 1966); Morrison v. Fry, 208 Okla. 239, 255 P.2d 270 (1953); Lowden v. Oklahoma County Excise Board, 186 Okla. 706, 100 P.2d 448 (1940). Size may be an important factor in any particular classification scheme based on population. Hamilton, 527 P.2d at 16. Indeed, it has long been recognized that counties having larger populations may have problems much different from more sparsely populated counties, insofar as many topics of legislation are concerned. Tulsa Exposition and Fair Corporation, 468 P.2d at 507. The Court concludes that a rational basis exists for having a proximity restriction in counties with high populations, particularly in excess of 500,000, since such high populations provide a need for more bank branches. The Court therefore concludes that the population classification in the 1995 version of section 501.1(A)(2) does not violate section 59. Therefore, the 330-foot proximity restriction in section 501.1(A)(2) applies to both Tulsa County and Oklahoma County.

Okla. Stat. tit. 6, § 501.1(E)(A)

Even if the 330-foot proximity restriction applies to Tulsa County, Boatmen's contends that section 501.1(A)(2) does not preclude the relocation of its branch. Boatmen's asserts that

section 501.1(A)(2) applies only to the initial establishment of a de novo branch. Boatmen's argues that section 501.1 separately addresses the establishment of a de novo branch and the relocation of a branch. Boatmen's contends that the plain language of section 501.1 makes clear that the 330-foot proximity restriction applies only to the establishment of de novo branches. According to Boatmen's, subsection H of section 501.1, which addresses branch relocations, only specifies two conditions for relocation of an acquired branch: (1) the branch must be on property owned or leased by the bank, and (2) the bank must be located in the city where the acquired branch is located, or within twenty-five miles of the acquired branch if in a city or town not served by a state or national bank. As there is no dispute that the proposed branch relocation satisfies the two conditions, Boatmen's contends that the Comptroller's decision must be upheld.³

Okla. Stat. tit. 6, § 501.1(H)(2) provides in pertinent part:

H. Branch relocations. It is the policy of the Legislature of Oklahoma that branches, whether de novo or by acquisition, or main offices of banks state or national, not be permitted to be relocated in such a manner which would result in one or more branches in locations which could not have been lawfully established there to begin with, except as specifically permitted herein. A branch may be relocated:

* * * *

³ Because the Comptroller presumed the constitutionality of section 501.1(A)(2), he did not address whether the 330-foot proximity restriction would apply to the relocation of a branch under section 501.1(H).

2. By acquisition. A branch which resulted from the acquisition of a branch from another bank or savings and loan or of a main office or branch thereof, which was converted to a branch, hereafter referred to as the "acquired branch." Application may be made to relocate the acquired branch to a location on property owned or leased by the bank:

- a. within the corporate city limits where the acquired branch is located, or
- b. to a location within twenty-five miles of the acquired branch if the relocation is to be in a city or town in which no state or national bank is located. However, if an application for a bank charter has been filed, the Board or the Office of the Comptroller of the Currency shall give priority to the charter application if filed prior to the branch application.

Okla. Stat. tit. 6, § 501.1(F)(2).

F&M contends that the 330-foot proximity restriction applies to Boatmen's relocation of its acquired branch. F&M specifically relies upon the above-underlined portion of subsection H. F&M contends that the above-underlined language of subsection H is a clear statement of legislative intent that branches are to be relocated only where they could be established "to begin with." F&M thus contends that subsection H incorporates all of the restrictions in subsection A.

Boatmen's argues that the requirements in subsection H must be read as plenary. According to Boatmen's, such reading gives meaning to the express declaration that the legislative policy of proximity be followed "except as specifically permitted herein." In contrast, Boatmen's contends that F&M's reading of subsection H

does violence to the language and structure of section 501.1. Specifically, Boatmen's contends that the language of subsection A, which bars the Comptroller from "grant[ing] a certificate" for a branch, makes no sense as applied to relocation of a branch for which no certificate is required. Also, the requirements in subsection H for relocating a de novo or acquired branch are a subset of the requirements for establishing a new branch under subsection A. Boatmen's contends that if relocation of a de novo or acquired branch must meet all the requirements of subsection A, including the proximity restriction, then the requirements for branch relocation would be identical to the requirements for establishment of branches and subsection H would be redundant. Boatmen's additionally contends that the legislature expressly indicated that its policy in subsection H was "except as specifically permitted herein." Furthermore, Boatmen's asserts that section 501.1(C), which discusses acquired branches does not include a proximity restriction.

Upon review, the Court finds that the 330-foot proximity restriction applies to the relocation of branch banks. It is clear from the introductory sentence of section 501.1(H) that the Oklahoma Legislature intended branch banks to be relocated under the same restrictions applied to branch banks established de novo. One of those restrictions is the 330-foot proximity restriction. The Court rejects Boatmen's argument that application of subsection

A to subsection H makes no sense since the Comptroller does not "grant a certificate" for relocating a branch bank. Whether or not the Comptroller grants a certificate or not for a branch relocation is irrelevant.⁴ Subsection H states that it is the intent of the Oklahoma Legislature that branches not be relocated "in such a manner which would result in one or more branches in locations which could not have been lawfully established there to begin with." Under subsection A, a de novo branch cannot be established within 330 feet of another bank or branch. Therefore, pursuant to the legislative policy statement in subsection H which incorporates subsection A, a branch cannot be relocated within 330 feet of another bank or branch.

The Court rejects Boatmen's argument that F&M's reading of 501.1(H) does violence to the Oklahoma Legislature's intent that the policy statement apply "except as specifically permitted herein." The Court concludes that the restrictions in paragraph 2 of subsection H are not "exceptions" to the policy statement. They simply restate in part the restrictions for relocating branches. As the restrictions are similar to the restrictions in paragraph 1 of subsection A, the Court concludes that the restrictions are more akin to provisos or examples and not exceptions. Becknell v. State

⁴ The Court notes that the Oklahoma Legislature in subsection I of section 501.1 refers to a certificate to relocate a branch. Subsection I states in part that "[t]he Board may by rule establish a procedure whereby the Commissioner may grant approval and issue the certificate to establish and operate or relocate a branch. . . ." Okla. Stat. tit. 6, § 501.1(I).

Industrial Ct., 512 P.2d 1180 (Okla. 1973); Beemer v. Solar Oil Co. v. Sussex, 232 A.2d 447 (N.J. 1967); Town of Port Acres v. City of Port Arthur, 340 S.W.2d 325 (Tex. Civ. App. 1960); Florida Gulf Coast Building & Const. Trades Council v. NLRB, 796 F.2d 1328, 1341 (4th Cir. 1986) (an "exception exists only to exempt something which would otherwise be covered").

The Court additionally finds that Boatmen's interpretation of the restrictions in paragraph 2 of subsection H as "exceptions" destroys the general principle of the introductory sentence and renders it a nullity. Under Boatmen's interpretation, there was no need for the introductory sentence. Courts have held that an "exception" should never overrule or destroy the general principle of a statute. Beemer, supra.; Town of Port Acres v. City of Port Arthur, supra. Therefore, even if the restrictions in paragraph 2 of subsection H are "exceptions," the Court concludes that they should not be interpreted so as to destroy the general principle of the introductory sentence.

The primary goal of statutory construction is to ascertain and follow the intention of the legislature. City of Hugo v. State ex rel. Public Employees Relations Board, 886 P.2d 485, 492 (Okla. 1994). Legislative intent controls judicial statutory construction. Id. Legislative intent may not be ascertained by words alone, but all provisions of a statute are to be taken as a whole, so each provision will harmonize with every other, and

remedial purposes of the law preserved. Becknell, 512 P.2d at 1183. A statute should be construed reasonably and sensibly in preference to a construction which renders all, or a portion thereof, useless and deleterious, or permits absurd consequences. Id.

In the Court's view, Boatmen's construction of section 501.1(H) not only ignores the legislative policy statement in subsection H, but also creates absurd consequences. For example, a bank under subsection A could not establish a de novo branch within 330 feet of another bank or branch. However, under Boatmen's interpretation, the bank could establish a branch at a location under subsection A and then the next day make application under subsection H to relocate the branch within 330 feet of another bank or branch. Although the decision may not be financially sound, it still could result under Boatmen's interpretation of subsection H. The Court concludes that it was not the intention of the Oklahoma Legislature to allow such result. The Court concludes that the legislature's intent as explicitly expressed in the introductory sentence of subsection H must control.

Furthermore, the Court rejects Boatmen's argument that its interpretation of section 501.1(H) is contextually supported by section 501.1(C). Although a branch under subsection C may be acquired without proximity restrictions, the Court concludes that

this has no bearing on the relocation of acquired branches. The Oklahoma Legislature has explicitly stated that acquired branches are to be relocated in the same manner in which branches are established "to begin with." Moreover, the Court concludes that the absence of a proximity restriction for acquiring branches is not without justification. When a bank acquires the assets of a failed bank, it does not choose the location of the failed main bank or its branches. In order to encourage banks to acquire the failed bank's assets, it is necessary to allow the acquired branches to be free of the 330-foot proximity restriction. However, when a bank seeks to relocate an acquired branch, it is in the same position of a bank seeking to establish a new branch. Thus, subsection C does not, as argued by Boatmen's, support permitting the relocation of an acquired branch without the 330-foot proximity restriction.

In sum, the Court concludes that the 330-foot proximity restriction applies to the relocation of branch banks. In so concluding, the Court has read section 501.1 as a whole and has harmonized the language of section 501.1(H) with the explicitly stated objective of the Oklahoma Legislature that relocated branches are to be situated in locations where the branches could have been located "to begin with." The Court concludes that its interpretation of section 501.1(H) gives effect to the legislature's intention.

Comptroller's FactFinding Procedures

F&M asserts that the Comptroller's factfinding procedures in regard to the factual issue of Boatmen's continuous operation of the 2424 East 21st branch violated due process requirements. F&M requests the Court to either remand this action to the Comptroller to permit F&M to rebut Boatmen's evidence or to conduct a de novo review itself on the issue of Boatmen's continuous operation of the 2424 East 21st branch. In light of the Court's rulings as to Okla. Stat. tit. 6, § 501.1(A)(2) and § 501.1(H), the Court declines to address this issue.

Conclusion

Based upon the foregoing, the Court finds that the Comptroller's decision

1. Defendant, The Comptroller of the Currency's Motion for Summary Judgment (Docket Entries #13 and 14) is **DENIED**. Defendant, The Comptroller of the Currency's Motion to Dismiss (Docket Entries #13 and 14) is **MOOT**. Defendant Comptroller of the Currency's Supplementary Motion to Dismiss for Lack of Standing (Docket Entry #25) is also **DENIED**.

2. Plaintiff, The F & M Bank & Trust Company's Motion for Summary Judgment (Docket Entry #20) is **GRANTED**.

3. Defendant, Boatmen's National Bank of Oklahoma's Motion for Summary Judgment (Docket Entry #22) is **DENIED**.

4. Defendants' Unopposed Request for Oral Argument (Docket

Entry #38) is DENIED.

ENTERED this 3rd day of February, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

MARY and DAVID YERKEY,)
individually and as husband and wife,)

Plaintiffs,)

v.)

RONALD H. SMITH, LEO BUFORD)
and HARTFORD UNDERWRITERS)
INSURANCE COMPANY, a foreign)
corporation, doing business in the State)
of Oklahoma,)

Defendants.)

Case No. 97 CV646 E (M)

FILED

FEB - 3 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

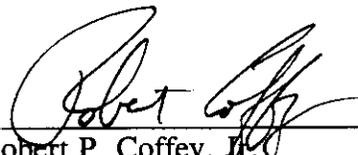
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DATE FEB 04 1998

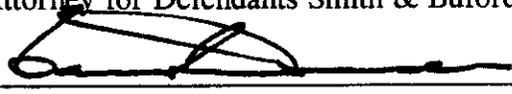
STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Come now the Plaintiffs, Mary & David Yerkey, and Defendants Ronald Smith and Hartford Underwriters Insurance Company, and pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby stipulate and agree to the dismissal of the above-caption cause of action against Defendant Leo Buford, without prejudice.

DATED this 3rd day of February, 1998.


Fred E. Stoops, Sr.
Attorney for Plaintiff


Robert P. Coffey, Jr.
Attorney for Defendants Smith & Buford


Earl Donaldson
Attorney for Defendant Hartford

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

FILED

FEB - 2 1998 *rw*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THOMAS R. GLOVER,)
)
Plaintiff,)

v.)

Case No. 96CV 886B /

GARY ALRED, JIM ALRED, MIKAEL)
ALRED, PAWNEE LIVESTOCK SALES,)
INC., GARY STRAHAN, as Personal)
Representative of the Estate of J. B. SMITH,)
deceased, JOE SODERSTROM, SARAH)
SODERSTROM, OSAGE ANIMAL)
CLINIC, INC., SAM STRAHM, D.V.M.,)
and JOHN DOES I THROUGH XX,)

ENTERED ON DOCKET

DATE FEB 04 1998

Defendants.)

and)

JOE SODERSTROM and SARAH)
SODERSTROM,)

Defendants and Third-Party)
Plaintiffs,)

v.)

MID-ARK CATTLE COMPANY, INC.;)
BARRETT-CROFOOT, INC.;)
BARRETT-CROFOOT CATTLE, INC.;)
and JAMES F. LOWDER,)

Third-Party Defendants.)

ORDER GRANTING DISMISSAL WITH PREJUDICE
OF PLAINTIFF'S CLAIMS AGAINST PAWNEE LIVESTOCK SALES, INC.

Came on before the Court on this the 2nd day of Feb, 1998, Plaintiff's

unopposed Stipulation of Dismissal With Prejudice as to Defendant Pawnee Livestock Sales, Inc. Upon
considering the stipulation and the agreement of all parties in this matter, THE COURT FINDS that, pursuant

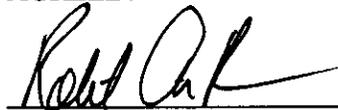
87

to Fed. R. Civ. P. 41(a), Plaintiff's claims as to Pawnee Livestock Sales, Inc. should be dismissed with prejudice with each party bearing its own costs, accordingly, it is

ORDERED, ADJUDGED AND DECREED that all of Plaintiff's claims as to Pawnee Livestock Sales, Inc. are hereby dismissed with prejudice to the refiling of same, with each of those parties bearing their respective costs as to each other, and that this constitutes a final Order with respect to the claims between the Plaintiff, Thomas R. Glover, and the Defendant, Pawnee Livestock Sales, Inc.

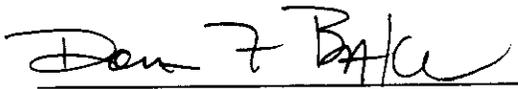

JUDGE

AGREED:



Richard W. Lowry, O.B.A. #5552
Robert Alan Rush, O.B.A. #13342
Michael S. Linscott, O.B.A. #17266
Logan & Lowry, LLP
P. O. Box 558
Vinita, OK 74301
(918) 256-7511
(Attorneys for Plaintiff Thomas R. Glover)

AGREED:

A handwritten signature in cursive script, appearing to read "Donn F. Baker", written over a horizontal line.

Donn F. Baker, O.B.A. #443

Baker & Baker

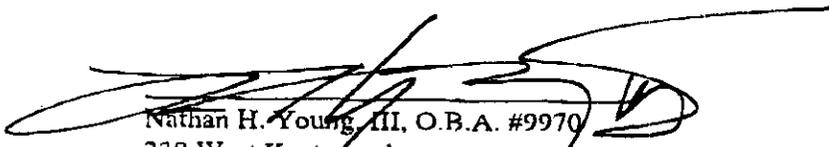
303 West Keetoowah

Tahlequah, OK 74464

(918) 456-0618

(Attorney for Defendants Gary Alred and Mikael Alred)

AGREED:



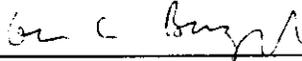
Nathan H. Young, III, O.B.A. #9970
239 West Keetoowah
Tahlequah, OK 74464
(918) 456-8900 (fax: 918-456-3648)
(Attorney for Defendant Jim Alred)

AGREED:



David L. Bryant, O.B.A. #1262
406 South Boulder Avenue, Suite 417
Tulsa, OK 74103
(918) 587-4200
(Attorney for Defendants Joe Soderstrom and
Sarah Jane Soderstrom)

AGREED:



Patrick O. Waddel, O.B.A. #9254

Gene G. Buzzard, O.B.A. #1396

Gable, Gotwals, Mock, Schwabe, Kihle & Gaberino

2000 Boatmen's Center

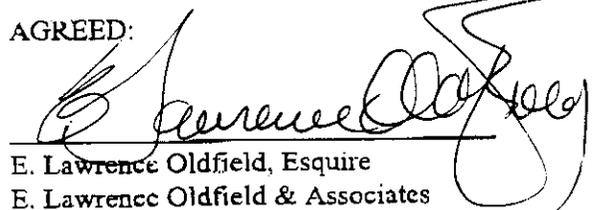
15 West Sixth Street

Tulsa, OK 74119-5447

(918) 582-9201

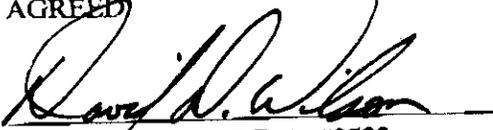
(Attorneys for Defendant Gary Strahan, as Personal
Representative of the Estate of J. B. Smith, deceased)

AGREED:

A handwritten signature in black ink, appearing to read "E. Lawrence Oldfield", is written over a horizontal line. The signature is stylized and cursive.

E. Lawrence Oldfield, Esquire
E. Lawrence Oldfield & Associates
2021 Midwest Road, Suite 201
Oak Brook, IL 60523
(Attorneys for Defendant Pawnee Livestock Sales, Inc.)

AGREED



David D. Wilson, O.B.A. #9722
Bruce A. Robertson, O.B.A. #13113
Wilson, Cain & Acquaviva
300 N.W. 13th Street, Suite 100
Oklahoma City, OK 73103
(Attorneys for Defendants Sam Straham, D.V.M.
and Osage Animal Clinic, Inc.)

FILED

FEB 3 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

**RELIASTAR LIFE INSURANCE COMPANY,
a Minnesota Corporation,**

Plaintiff,

v.

**JIMMY L. WEST and GLORIA SANCHEZ,
individuals,**

Defendants.

Case No. 97 CV 673B (M)

ENTERED ON DOCKET
DATE FEB 04 1998

ORDER

Upon review of Plaintiff's Motion to Dismiss Reliastar with Prejudice and Award Reliastar attorney fees and costs, the Court finds that all parties agree and that Plaintiff's motion should be granted.

IT IS HEREBY ORDERED that this Court will permit this interpleader action to go forward and enter judgment that Reliastar is discharged from all liability.

IT IS FURTHER ORDERED that Plaintiff Reliastar is dismissed, with prejudice, from this interpleader action.

IT IS FURTHER ORDERED that counsel presenting this order serve a copy thereof on the Court Clerk or the Chief Deputy Court Clerk personally. Absent this service the Clerk is hereby relieved of any personal liability relative to compliance with this order.

IT IS FURTHER ORDERED that the Clerk shall accept the deposit of \$41,461.66 into an interest bearing account pending the outcome of this litigation and further order of the Court and issue a check to Bridger-Riley & Associates, P.C. in the amount of \$600.00 as agreed-to attorney fees:

8

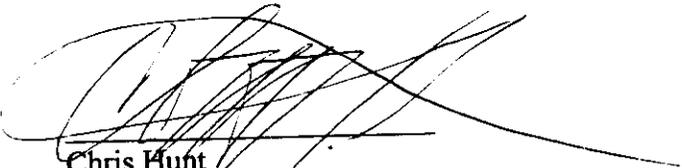
C255m12

Ordered this 30th day of January, 199~~8~~⁸


JUDGE OF THE DISTRICT COURT
for Thomas R. Brett, Judge

Approved by:

- see attached -
George Underwood
Attorney for Defendant Jimmy West


Chris Hunt
Attorney for Defendant Gloria Sanchez


N. Kay Bridger-Riley
Attorney for Plaintiff

Ordered this _____ day of _____, 1997.

JUDGE OF THE DISTRICT COURT

Approved by:

George Underwood

George Underwood
Attorney for Defendant Jimmy West

Chris Hunt

Attorney for Defendant Gloria Sanchez

N. Kay Bridger-Riley

Attorney for Plaintiff

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

F I L E D

FEB - 2 1998

JEFFERY JACOBS,

Plaintiff,

vs.

RON CHAMPION; et al.,

Defendants.

)
)
)
)
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)
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)
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No. 97-CV-493-B ✓

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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DATE FEB 04 1998

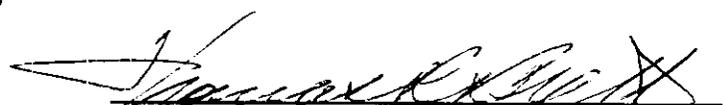
ORDER

On May 22, 1997, Plaintiff filed a civil rights complaint pursuant to 42 U.S.C. § 1983, and subsequently filed a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a), as amended by The Prison Litigation Reform Act, Pub.L.No. 104-134, 110 Stat. 1321 (1996). On July 9, 1997, the Court granted leave to proceed in forma pauperis and the Plaintiff was directed to pay an initial partial filing fee of \$5.63, or show cause in writing for his failure to do so, on or before July 28, 1997. Plaintiff was specifically advised that his case could be dismissed if he failed to comply with the Order.

Upon review of the record, the Court finds that as of this date Plaintiff has neither paid the initial partial filing fee nor shown cause in writing for his failure to do so as directed in the July 9, 1997 Order. 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 2nd day of Feb, 1998.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

4

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

FILED

FEB - 2 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BEVERLY A. HENDERSON)

Plaintiff,)

vs.)

PUBLIC SERVICE COMPANY OF)
OKLAHOMA,)

Defendants.)

No. 96-CV-1057-C ✓

ENTERED ON DOCKET

DATE FEB 04 1998

JUDGMENT

This matter came before the Court for consideration on the motion for summary judgment filed by defendant, Public Service Company of Oklahoma, on plaintiff Beverly A. Henderson's cause of action for employment discrimination, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Plaintiff being in default for having failed to respond to said motion in a timely manner, the Court has entered an Order in favor of defendant Public Service Company of Oklahoma,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment is entered for the defendant Public Service Company of Oklahoma and against plaintiff Beverly A. Henderson.

IT IS SO ORDERED this 2 day of ~~January~~ ^{Feb}, 1998.



H. DALE COOK
Senior U.S. District Judge

37

The Court being fully advised and having examined the court file finds that the Defendant, John H. Gambling, executed a Waiver of Service of Summons on April 29, 1997; that the Defendant, Anita K. Gambling, executed a Waiver of Service of Summons on April 29, 1997; that the Defendant, Raul Sandoval, was served with Summons and Complaint by a United States Deputy Marshal on June 5, 1997; that the Defendant, Barbara Sandoval, was served with Summons and Complaint by a United States Deputy Marshal on June 5, 1997; that the Defendant, Budget Bail Bonds, executed a Waiver of Service of Summons on April 21, 1997; that the Defendant, William Mack Kelly dba Mack Kelly Bail Bonding, executed a Waiver of Service of Summons on or before August 28, 1997.

It appears that the Defendants, John H. Gambling and Anita K. Gambling, filed their Answer on May 13, 1997; that the Defendant, Budget Bail Bonds, filed its Disclaimer on April 22, 1997; that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on May 2, 1997; and that the Defendants, Raul Sandoval, Barbara Sandoval, and William Mack Kelly dba Mack Kelly Bail Bonding, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot Sixteen (16), Block Twelve (12) AMENDED PLAT OF
VAN ACRES ADDITION A Subdivision to the City of Tulsa,
Tulsa County, State of Oklahoma, according to the recorded
Plat thereof.

The Court further finds that on June 12, 1987, the Defendants, John H. Gambling and Anita K. Gambling, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of \$43,250.00, payable in monthly installments, with interest thereon at the rate of 9.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, John H. Gambling and Anita K. Gambling, husband and wife, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a real estate mortgage dated June 12, 1987, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on June 12, 1987, in Book 5030, Page 806, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, John H. Gambling and Anita K. Gambling, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the note and mortgage, after full credit for all payments made, the principal sum of \$39,539.58, plus administrative charges in the amount of \$471.00, plus penalty charges in the amount of \$84.60, plus accrued interest in the amount of \$1,862.35 as of January 31, 1997, plus interest accruing thereafter at the rate of 9.5 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendants, John H. Gambling and Anita K. Gambling, claim no right, title or interest in or to the subject real property.

The Court further finds that the Defendant, Budget Bail Bonds, disclaims any right, title or interest in or to the subject real property.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of \$430.00, plus penalties and interest, for the year 1997. Said lien is superior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendants, Raul Sandoval, Barbara Sandoval, and William Mack Kelly dba Mack Kelly Bail Bonding, are in default and therefore have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment **in rem** against Defendants, John H. Gambling and Anita K. Gambling, in the principal sum of \$39,539.58, plus administrative charges in the amount of \$471.00, plus penalty charges in the amount of \$84.60, plus accrued interest in the amount of \$1,862.35 as of January 31, 1997, plus interest accruing thereafter at the rate of 9.5 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, plus the costs of this action in the amount of \$8.00 (fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property, plus any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$430.00, plus penalties and interest, for ad valorem taxes for the year 1997, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, John H. Gambling; Anita K. Gambling; Raul Sandoval; Barbara Sandoval; Budget Bail Bonds; Board of County Commissioners, Tulsa County, Oklahoma; and William Mack Kelly dba Mack Kelly Bail Bonding, have no right, title, or interest in the subject real property.

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

First:

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

Second:

In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Tulsa County, Oklahoma;

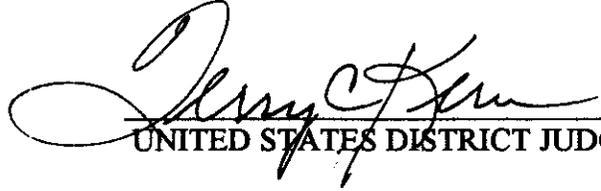
Third:

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

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

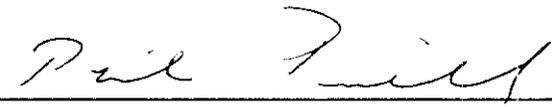
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of

the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.


UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


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


JANELLE H. STELTZLEN, OBA #8601
1150 East 61st Street
Tulsa, Oklahoma 74136
(918) 749-5526
Attorney for Defendants,
John H. Gambling and Anita K. Gambling

Judgment of Foreclosure
Case No. 97-CV-349-K (M) (Gambling)



DICK A. BLAKELEY, OBA #0852

Assistant District Attorney

406 Tulsa County Courthouse

Tulsa, Oklahoma 74103

(918) 596-4841

Attorney for Defendants,

County Treasurer and

Board of County Commissioners,

Tulsa County, Oklahoma

Judgment of Foreclosure

Case No. 97-CV-349-K (M) (Gambling)

CDM:css

DATE 2-4-98

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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

Plaintiff,)
v.)

PATRICIA WISE aka Patricia Cain;)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)

Defendants.)

F I L E D

FEB 03 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 97-CV-635-K (W) ✓

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 2nd day of February, 1998.

The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendant, Patricia Wise aka Patricia Cain, appears not, but makes default.

The Court being fully advised and having examined the court file finds that the Defendant, Patricia Wise aka Patricia Cain, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on October 20, 1997.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on July 16, 1997; that the Defendant, Patricia Wise aka Patricia Cain, has failed to answer and her default has therefore been entered by the Clerk of this Court.

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

Lot Thirteen (13), Block Fifty-one (51), Valley View Acres
Third Addition to the City of Tulsa, County of Tulsa, State of
Oklahoma, according to the recorded plat thereof.

The Court further finds that on August 7, 1970, Michael A. Wise and Patricia Wise executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of \$11,450.00, payable in monthly installments, with interest thereon at the rate of 8.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, Michael A. Wise and Patricia Wise executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a real estate mortgage dated August 7, 1970, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on August 11, 1970, in Book 3934, Page 1915, in the records of Tulsa County, Oklahoma.

The Court further finds that Patricia Wise currently holds the fee simple title to the property via the Decree of Divorce, Case No. JFD-77-127, filed on April 13, 1977, in the District Court, Tulsa County, State of Oklahoma, and recorded on September 23, 1977, in Book 4285, Page 529 in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, Patricia Wise aka Patricia Cain, made default under the terms of the aforesaid note and mortgage by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the

Defendant, Patricia Wise aka Patricia Cain, is indebted to the Plaintiff in the principal sum of \$1,299.76, plus administrative charges in the amount of \$785.20, plus penalty charges in the amount of \$15.72, plus accrued interest in the amount of \$421.80 as of February 21, 1997, plus interest accruing thereafter at the rate of 8.5 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$158.00 (\$150.00 abstracting fee; \$8.00 fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, Patricia Wise aka Patricia Cain, is in default and therefore has no right, title or interest in the subject real property.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment in rem against the Defendant, Patricia Wise aka Patricia Cain, in the principal sum of \$1,299.76, plus administrative charges in the amount of \$785.20, plus penalty charges in the amount of \$15.72, plus accrued interest in the amount of \$421.80 as of February 21, 1997, plus interest accruing thereafter at the rate of 8.5 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.23 percent per annum until paid, plus the costs of this action in the amount of \$158.00 (\$150.00 abstracting fee; \$8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property and any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Patricia Wise aka Patricia Cain and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, Patricia Wise aka Patricia Cain, to satisfy the *in rem* judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

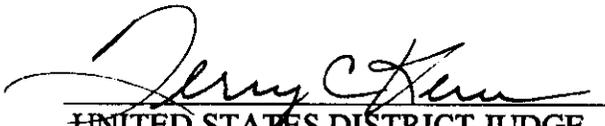
In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

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

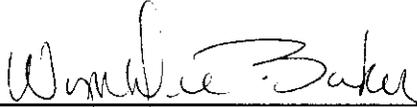
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

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


UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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



DICK A. BLAKELEY, OBA #0852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 586-4841
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Case No. 97-CV-635-K (W) (Wise)

WDB:css

DATE 2-4-98

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

MICHAEL WILLIAMS,

Plaintiff,

vs.

WHIRLPOOL CORPORATION,

Defendant.

No. 97-C-16-K ✓

FILED

FEB 03 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the motion of the defendant for summary judgment. Plaintiff brings this action for alleged violation of Title VII of the Civil Rights Act of 1964. Plaintiff, a black male, commenced employment with defendant on April 26, 1996. He was terminated on September 10, 1996 following an investigation by the company into allegations of sexual harassment made by several of plaintiff's coworkers against plaintiff. Plaintiff brings this action pro se.

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). A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers. Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir.1991).

A Title VII 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 belongs to a protected class; (2) he was qualified and satisfactorily performing his job; and (3) he was terminated under circumstances giving rise to an inference of discrimination. Martin v. Nannie & the Newborns, 3 F.3d 1410, 1417 (10th Cir.1993).

Plaintiff's establishment of a prima facie case gives rise to a presumption that defendant unlawfully discriminated. See Greene v. Safeway Stores, Inc., 98 F.3d 554, 558 (10th Cir.1996) (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., 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 does not contest the first phase, stating that "[a]ssuming that Plaintiff has established a prima facie case of discriminatory discharge," (Defendant's Brief at 7), defendant has articulated a facially nondiscriminatory reason for its action and plaintiff has not presented evidence establishing that defendant's action was pretextual. For purposes of the record, the Court finds that plaintiff has established a prima facie case.

The record establishes that during the first two weeks of employment, Whirlpool employees receive training regarding Whirlpool's policies against harassment and discrimination in the workplace and the consequences of not observing those policies. Plaintiff signed an Acknowledgment of Receipt on April 30, 1996, acknowledging his receipt of the Human Resources Guide, which sets forth Whirlpool's nondiscrimination and nonharassment policies.

On or about July 10, 1996, William K. Pierce (plaintiff's immediate supervisor) arranged a meeting between plaintiff and a female co-worker, Laura Perry. Both employees had told Pierce they were not getting along. During the meeting, Perry stated she was uncomfortable with sexual remarks and language used by plaintiff in her presence. Plaintiff stated that Perry was prejudiced and that her assertions stemmed from this prejudice. Pierce reminded both employees of Whirlpool's policies against sexual harassment and

discrimination. Both employees were advised that they could make a formal complaint, but neither wished to do so. In order to resolve the conflict, it was agreed that Perry would move to a different work area. Both employees stated that they were satisfied with the action taken.

In September, 1996, several other female employees made allegations of sexual harassment against plaintiff. Whirlpool conducted an investigation and interviewed at least four female employees who reported inappropriate conduct and remarks by plaintiff. Two of those employees, Denise Morgan and DeAnn Cooks, are black. In addition, Chris Marler, a male employee formerly assigned to plaintiff's work area, reported that he had heard the plaintiff make inappropriate remarks to female employees. Supervisors met with plaintiff to discuss the allegations. Plaintiff denied the allegations. Plaintiff theorized that the women were conspiring to get rid of him because he was the only male on the work team.

After the investigation, it was determined by company officials that plaintiff had violated the company's policy prohibiting sexual harassment and that his behavior was inappropriate in the workplace. The officials found the female employees to be credible and determined that there were no facts to suggest that the female employees were conspiring against plaintiff because of his race or gender. The decision was made to terminate plaintiff because there were multiple incidents of reported misconduct with several female employees. The conduct was viewed

as serious in light of the training plaintiff had received regarding the company nonharassment policy, and the reiteration of that policy he had received at the time of the Perry incident. Upon review of the record presented, the Court concludes that defendant has articulated a facially nondiscriminatory reason for discharge. The dispositive issue, therefore, is whether plaintiff has demonstrated a factual issue as to pretext.

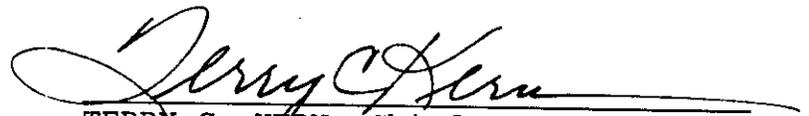
In his response (styled "Plaintiff's reply in support of motion to not dismiss"), plaintiff states "I'm not a lawyer, and I can find all kind of holes in the so-called investigation that Whirlpool did, so I can't see how Whirlpool could have found grounds for termination." The basis for this conclusion put forth by plaintiff is largely an objection to other employees' credibility, but he has not shown that Whirlpool was unjustified in relying on statements by those employees.

In an unpublished decision, the Tenth Circuit stated that the "relevant inquiry" in a case of this type is not the truth of the allegations. Instead, it is whether the person responsible for the ultimate decision "reasonably believed the harassment and/or discrimination allegations . . . and acted on [them in] good faith" or whether that person did not actually believe the allegations but instead used them as a pretext for an otherwise discriminatory dismissal. Sloan v. Boeing Co., 105 F.3d 669, 1997 WL 8868 (10th Cir.). In support of this principle, the court cited Waggoner v. City of Garland, 987 F.2d 1160, 1165 (5th Cir.1993) and Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir.1991).

In further support of his assertion of pretext, plaintiff contends that a white employee, Kendall Roberts, had sexually harassed a female employee but was not discharged. After a female employee complained about Roberts, he was moved to a different area. Defendant explains the differing treatment by quoting the language Roberts reportedly used: he told a female employee that "he sure wished that she would go out with him and that he would show her a good time." Defendant contends the incident involving Roberts was isolated and the language used was not vulgar or sexually explicit.¹ Construing the record in the light most favorable to plaintiff, even under the standard for pro se litigants, the Court concludes plaintiff has failed to raise a genuine issue of material fact regarding pretext.

It is the Order of the Court that the motion of the defendant for summary judgment (#15) is hereby GRANTED.

ORDERED THIS 2 DAY OF FEBRUARY, 1998


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

¹Among the remarks attributed to plaintiff by female coworkers were comments about "jacking off" and "have you ever been with a black man". It was also reported to defendant by Denise Morgan that plaintiff rubbed his body against hers.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
FEB - 2 1998

UNITED STATES OF AMERICA,
Plaintiff,
v.
ROYCE SPLAWN, SR.,
Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Action No. 97CV1032C

ENTERED ON DOCKET

DATE 2-4-98

DEFAULT JUDGMENT

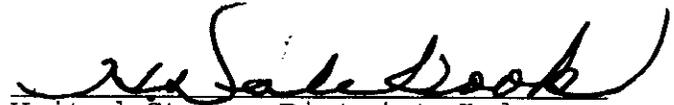
This matter comes on for consideration this 2nd day of Feb., 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Royce Splawn, Sr., appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Royce Splawn, Sr., acknowledged receipt of Complaint on November 1, 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.

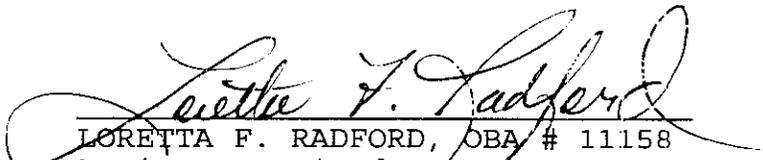
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Royce Splawn, Sr., for the principal amount of \$759.00, plus accrued interest of \$574.21, plus administrative charges in the amount of \$69.49, plus interest thereafter at the rate of 7 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 5.232 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

5AC

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

BORG COMPRESSED STEEL CORP.,)
)
Plaintiff,)
)
v.)
)
RICHARD S. NEUFELD, A.M.)
BRADLEY, BRADLEY E. RONCO,)
O. BUTCHEE, LAWRENCE M.)
LIEBMAN, RONALD T. ROWE,)
WILLIAM MARKLE & MICHAEL G.)
SERTICH,)
)
Defendants.)

ENTERED ON DOCKET

DATE 2-4-98

Case No. 97 CV 967 H (M)

FILED
FEB - 3 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

NOTICE OF DISMISSAL

Comes now the Plaintiff, Borg Compressed Steel Corporation, and would advise the Court of its Notice of Dismissal with prejudice as to refiling as to Defendants Richard S. Neufeld, Bradley E. Ronco, Lawrence M. Liebman, Ronald T. Rowe, William Markle and Michael G. Sertich only, pursuant to FRCP 41 (a)(1).

Respectfully Submitted,



Richard J. Borg OBA #10621
Attorney for Plaintiff
5514 South Lewis, Suite 101
Tulsa, Oklahoma 74105
(918) 744-0666

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c/5

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was mailed, postage prepaid on the 5 day of February, 1998 to:

Thomas A. Creekmore,
Hall, Estill, Hardwick, Gable, Golden and Nelson
320 South Boston, Suite 400
Tulsa, Oklahoma 74103


Richard J. Borg

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

FILED
FEB - 2 1998

JOE ESLICK, an Individual,)
)
 Plaintiff,)
)
 vs.)
)
 TULSA RIG IRON, INC.)
 an Oklahoma Corporation,)
)
 Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-973 B (W)

ENTERED ON DOCKET

DATE 2-3-98

ORDER

Before the Court for consideration is Plaintiff Joe Dean Eslick's ("Eslick") Motion To Remand (Docket # 4). Eslick also asks the Court to grant him attorney fees for the costs incurred in preparing the motion to remand and brief. Based on a careful review of the record and applicable legal authorities, the Court hereby grants Plaintiff's Motion To Remand and his request for attorney fees in the amount of \$350.00.

I.

On September 17, 1997, Eslick filed this action against Defendant Tulsa Rig Iron, Inc., ("Tulsa Rig Iron") in the District Court of Creek County, Oklahoma. Therein, Eslick stated that Tulsa Rig Iron employed him from approximately March of 1995 until his termination on or around November 20, 1995. Eslick alleged Tulsa Rig Iron's decision to terminate him was significantly influenced by proceedings he had instituted against the company under the Worker's Compensation Laws of Oklahoma, Okla. Stat. tit. 85, §§ 5-7, in violation of same. He also alleged that Tulsa Rig Iron was further influenced in its decision to terminate him by a perceived disability/handicap in violation of Oklahoma's Anti-Discrimination Statute, Okla. Stat. tit. 25, § 1901 et. seq. Tulsa Rig

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Iron removed the case to this court based on federal question jurisdiction and diversity of citizenship jurisdiction. Specifically, Tulsa Rig Iron alleged federal question jurisdiction as grounds for removal based on its allegation that Eslick's petition alleged sufficient facts to allow Eslick to maintain a claim against Tulsa Rig Iron under the Americans with Disabilities Act, 42 U.S.C. § 12101 et. seq. ("ADA"); and that the ADA preempts Oklahoma's Anti-Discrimination Statute. Tulsa Rig Iron additionally alleged diversity jurisdiction as a grounds for removal based on the fact that Eslick is a resident of the State of Texas and that Tulsa Rig Iron is an Oklahoma corporation with its principal place of business in Creek County, State of Oklahoma.

II.

Eslick rightly objects to Tulsa Rig Iron's Notice Of Removal. He contends the action is not removable to federal court pursuant to 28 U.S.C. § 1445(b), which states:

A civil action in any State court arising under the workman's compensation laws of such State may not be removed to any district court of the United States.

It is important to a determination of this issue to establish whether Eslick's retaliatory discharge claim emanating from Oklahoma's Worker's Compensation Laws, Okla. Stat. tit. 85, §§ 5-7, "arises under" the worker's compensation laws of Oklahoma. The Tenth Circuit has held that such a claim in Oklahoma does indeed arise under the state's worker's compensation laws. In *Suder v. Blue Circle, Inc.*, 116 F.3d 1351 (10th Cir. 1997), the court stated: "As long ago as 1977, the federal district court in Oklahoma had held that claims brought pursuant to this statute [Okla. Stat. Tit. 85, § 5] arise under the workers' compensation laws of Oklahoma. See *Kemp v. Dayton Tire & Rubber Co.*, 435 F. Supp. 1062, 1063 (W.D. Okla. 1977). We find no basis upon which to disturb that conclusion." *Id.* at 1352.

III

Furthermore, Tulsa Rig Iron's assertion that the ADA preempts Oklahoma Anti-Discrimination Statute is wrong. Tulsa Rig Iron supports its contention by citing to § 12201(b) of the ADA, which provides that:

Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter.

The purpose of such language is to guard *against* federal preemption of equivalent state law, not to effectuate such preemption. In *Wood v. Alameda*, 875 F. Supp. 659 (N.D. Calif. 1995), the court pointed out that “[v]iewed within the context of the ADA as a whole, § 12201(b) clearly reflects Congress’ intent to ensure that plaintiffs are not denied the benefits of compatible state statutes on the ground that a federal statute precludes any cause of action under the state law.” *Id.* at 663. Tulsa Rig Iron asserted that the Oklahoma Anti-Discrimination Statute falls below the floor of protection established by the ADA because it does not provide for punitive damages for those wrongly discriminated against by their employers. However, this difference in the available remedies does not mean that the Oklahoma Anti-Discrimination Statute does not provide the same minimum *protections* guaranteed the disabled under the ADA. The Oklahoma Anti-Discrimination Statute is not preempted by the ADA.

IV.

Tulsa Rig Iron's removal was thus improper. Title 28, § 1445(c) of the United States Code unequivocally excludes, from any district court of the United States, any civil action arising out of a State's workers' compensation laws. In addition, even if Eslick were to allege a cause of action under the Americans with Disabilities Act against Tulsa Rig Iron, state courts have concurrent jurisdiction with federal courts over ADA claims.¹ As both claims arise out of the same facts, the intent of judicial economy is protected by remand. Furthermore, there is no federal diversity jurisdiction over this case. Even if Tulsa Rig Iron could allege the requisite jurisdictional amount of \$75,000,² it is precluded from removing the action to federal court by title 28, § 1441(b) of the United States Code, which provides that any action founded in diversity "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." Thus, since Tulsa Rig Iron, the defendant in this case, is a citizen of Oklahoma, the state in which the action was originally brought, the case is not removable on the basis of diversity jurisdiction.

"The burden of establishing federal jurisdiction is on the party seeking removal." *Hecklemann v. Piping Companies*, 904 F. Supp. 1257, 1260 (N.D. Okla. 1995), citing *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 42 S.Ct. 35, 66 L.Ed. 144 (1921). Just the presence of a federal issue in

¹*Jones v. Illinois Cent. R. Co.*, 859 F. Supp. 1144 (N.D. Ill. 1994). See also *Fox v. Maulding*, 112 F.3d 453 (10th Cir. 1997): "Courts 'considering the propriety of state-court jurisdiction over any particular claim ... begin[] with the presumption that state courts enjoy concurrent jurisdiction.'" quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981).

²See 28 U.S.C. § 1332(a): "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000 ... and is between (1) citizens of different States ..."

a state cause of action does not thereby confer federal-question jurisdiction. *Id.* (citation omitted.)

Eslick, as the plaintiff in this case, was free to “avoid federal jurisdiction by exclusive reliance on state law.” *Id.*, citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 2429 (1987).

Thus, since Eslick chose to bring a suit for relief under a state statute rather than a federal one, this Court finds that there is no federal question jurisdiction over any aspect of this case.

Because the removal of this action was improper *ab initio*, the Court grants Eslick attorney fees in the amount of \$350.00³ under 28 U.S.C. § 1447(c), which states in pertinent part that: “An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.”⁴

IV.

For the above reasons, Plaintiff’s Motion To Remand (Docket # 4) and request for \$350.00 in attorney fees is granted. Accordingly, the case management conference set for 2/27/98 is therefore stricken.

³Tulsa Rig Iron makes no objection to the reasonableness of the fees. See *Suder v. Blue Circle, Inc.*, 116 F.3d 1351 (10th Cir. 1997) which arose from facts similar to those of the present case. The Tenth Circuit in that case rejected the corporation-appellant’s argument that the individual-appellee should not have been awarded attorneys’ fees because there had been a “colorable’ basis for the removal.” *Id.* at 1352-3. The court upheld the district court’s discretionary award of attorneys’ fees based upon its proper finding that the removal to federal court had not been legitimate. *Id.*

⁴The 1988 Revision to Section 1447 amended part c to authorize the court to award attorney fees at its discretion if it finds the defendant improperly removed the case. David D. Siegel, *Commentary on 1988 Revision of Section 1447*. Tulsa Rig Iron relied on a case decided before the 1988 Revision to argue against the award of attorney fees: *Howard v. Group Hospital Service*, 618 F. Supp. 38 (W.D. Okla. 1984).

IT IS SO ORDERED this 7th day of ~~January~~ Feb, 1998.



THOMAS R. BRET
UNITED STATES DISTRICT JUDGE

SAC

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

CHRYSITINE SCHMIDL Y, Individually)
and as Trustee of the SCHMIDL Y)
FAMILY REVOCABLE TRUST,)
)
Plaintiff,)
)
v.)
)
MERRILL LYNCH, PIERCE, FENNER &)
SMITH INCORPORATED d/b/a MERRILL)
LYNCH & CO., and KENNETH SIMPSON,)
)
Defendants.)

FILED

FEB - 2 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97 CV 622 H (M)

ENTERED ON DOCKET

DATE FEB 03 1998

DISMISSAL WITH PREJUDICE

Plaintiff Chrystine Schmidly, Individually and as Trustee of the Schmidly Family
Revocable Trust, hereby dismiss their claims against Kenneth Simpson, with prejudice.

Respectfully submitted,

Eric M. Daffern
Eric M. Daffern OBA #13419
MILLER DOLLARHIDE
321 South Boston, Suite 910
Tulsa, Oklahoma 74103-3102
(918) 587-8300
ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF MAILING

I certify that I mailed the foregoing instrument on ~~January~~ ^{Feb. 2}, 1998, with proper postage
prepaid, to the following:

Heather E. Pollock
Hall, Estill, Hardwick, Gable, Golden & Nelson
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103-3708

Eric M. Daffern
Eric M. Daffern

3

ckj

SR

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

ENTERED ON DOCKET

DATE FEB 03 1998

SUSAN GIRARD,)
)
Plaintiff,)
)
vs.)
)
UNIFIRST CORPORATION,)
)
Defendant.)

Case No. 97 CV 440 H (J)

FILED

FEB - 2 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41 (a)(1)(ii), the Plaintiff, Susan Girard, and Defendant, UniFirst Corporation, hereby stipulate that the above-styled cause is dismissed with prejudice, and Plaintiff agrees that all rights, causes of action, claims or other proceedings which she may have, known and unknown, asserted or unasserted, against UniFirst Corporation are dismissed with prejudice. The Plaintiff stipulates that all claims or causes of action which she may have against UniFirst Corporation, as well as against any and all supervisors, employees, or agents of UniFirst Corporation, are released and dismissed with prejudice.

Respectfully submitted,

Stanley D. Monroe, OBA # 6305
Park Centre Building
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Tulsa, OK 74103-4509
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John R. Woodard, OBA # 9853 Paula J. Quillin, OBA # 7368
FELDMAN, FRANZEN, WOODARD

& FARRIS

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ATTORNEYS FOR DEFENDANT

20

C/J

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

FOSTER WHEELER USA CORP., a)
Delaware corporation,)
)
Plaintiff,)
v.)
)
VBF, INC. (f/k/a ELECTRICAL)
POWER SYSTEMS, INC.,)
an Oklahoma corporation;)
EPSI ACQUISITION, INC. (d/b/a)
ELECTRICAL POWER SYSTEMS, INC.,)
a Missouri corporation; VERNON)
LAWSON; ADDISON FREDERICK SMITH;)
and WILLIAM C. CODAY,)
)
Defendants,)
v.)
)
BRAND EXPORT PACKAGING OF)
OKLAHOMA, INC., ROBERT AND PENNY)
DOWNING; AMERICAN PRESIDENT)
LINES, INC.; ROBBINS-FLEISIG)
FORWARDING, INC.; AND JOSE)
ESCOBAR,)
)
Third Party Defendants.)

Case No. 96-C-390-H ✓

FILED

FEB 2 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE FEB 03 1998

**STIPULATION FOR DISMISSAL
OF DEFENDANT EPSI ACQUISITION, INC.
D/B/A ELECTRICAL POWER SYSTEMS, INC.**

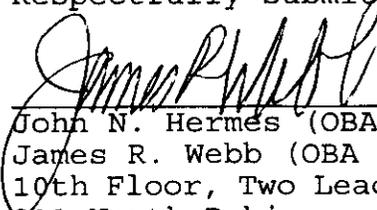
Plaintiff, Foster Wheeler USA Corp., pursuant to Rule 41 (a) (1) of the Federal Rules of Civil Procedure, hereby stipulates that defendant, EPSI Acquisition, Inc. d/b/a Electrical Power Systems, Inc., a Missouri corporation, be dismissed without prejudice from this action, each party to bear their own attorneys' fees, costs and expenses.

Dated this 30TH day of January, 1998.

82

Handwritten notes and signatures in the bottom right corner.

Respectfully submitted,


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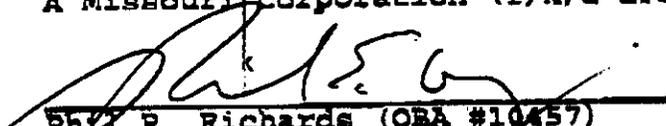
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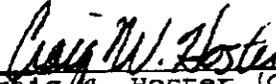
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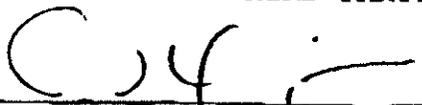
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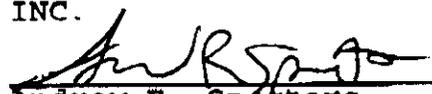
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INC.

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

FILED

FEB - 2 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LANA J. MASSA, et al.,)
)
Plaintiffs,)
)
v.)
)
COMMERCIAL FINANCIAL)
SERVICES, INC., an Oklahoma)
corporation, et al.,)
)
Defendants.)

Case No. 97-CV-611-BU (J)

ENTERED ON DOCKET

DATE FEB 03 1998

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW Plaintiffs Massa, Barnett and Champion and Defendants CFS, Bartmann, Learned, and Welsh and stipulate to the dismissal of the above styled and numbered cause with prejudice to any future action, pursuant to Federal Rule of Civil Procedure 41 (a) (1), each party to bear his own cost.

Respectfully submitted,

FRASIER, FRASIER & HICKMAN

By:



Steven R. Hickman, OBA#4172
1700 Southwest Blvd.
P.O. Box 799
Tulsa, OK 74101-0799
918/584-4724

and

5

43

DOERNER, SAUNDERS, DANIEL &
ANDERSON

By: *Kristen L. Brightmire*
Kristen L. Brightmire
320 S. Boston, Suite 500
Tulsa, OK 74103
918/582-1211

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

MACK FREEMAN and
DEANNA FREEMAN

Plaintiffs,

vs.

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

Defendants.

ENTERED ON DOCKET

DATE FEB 03 1998

Case No.: 97 CV 865 BU(J)

FILED

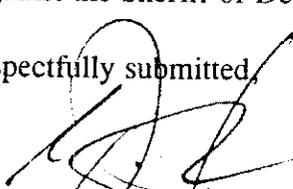
FEB - 2 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

**STIPULATION OF DISMISSAL OF STATE TORT CLAIMS
AGAINST THE SHERIFF OF DELAWARE COUNTY**

Pursuant to Rule 41 (a)(1)(ii), Plaintiffs, Mack Freeman and Deanna Freeman, and the Defendant, the Sheriff of Delaware County, Oklahoma hereby stipulate that to the extent that Plaintiffs' Complaint filed September 22, 1997, can be construed to allege state tort claims for relief against the Sheriff of Delaware County, Oklahoma they are hereby dismissed. Plaintiffs expressly reserve their federal claims against the Sheriff of Delaware County, Oklahoma.

Respectfully submitted,



R. Jack Freeman, OBA No. 3128
FELDMAN, FRANDEN, WOODARD & FARRIS
1000 Park Centre
525 South Main
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Tel: (918) 583-7129
Fax: (918) 584-3814

ATTORNEYS FOR MACK AND DEANNA FREEMAN

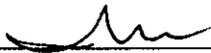
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Freeman vs. Allstate Insurance Company, et al.
Northern District of Oklahoma, Case No.: 97 CV- 865-BU(J)
Stipulation of Dismissal of State Tort Claims Against Sheriff of Delaware County

~~January~~, 1998
FEBRUARY 2, 1998

Respectfully submitted,



Jason Wagner, Esq.

Chris Collins, Esq.

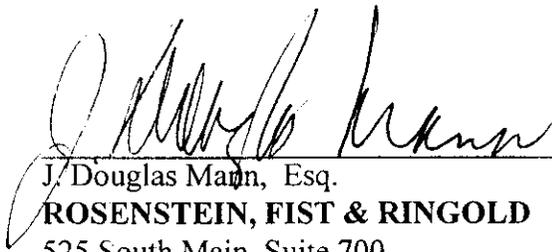
COLLINS, ZORN, JONES & WAGNER

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Second Floor

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ATTORNEYS FOR SHERIFF OF DELAWARE COUNTY



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ROSENSTEIN, FIST & RINGOLD

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ATTORNEYS FOR CITY OF GROVE, OKLAHOMA



James K. Secrest, II, Esq.

SECRET, HILL & FOLLUO

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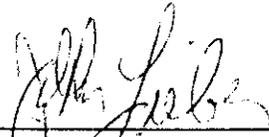
ATTORNEYS FOR ALLSTATE INSURANCE COMPANY

Freeman vs. Allstate Insurance Company, et al.
Northern District of Oklahoma, Case No.: 97 CV- 865-BU(J)
Stipulation of Dismissal of State Tort Claims Against Sheriff of Delaware County

~~January~~, 1998

FEBRUARY 2, 1998

Respectfully submitted,



John Lieber, Esq.
ELLER and DETRICH
2727 East 21st Street
Suite 200, Midway Building
Tulsa, Oklahoma 74114
ATTORNEYS FOR CITY OF COMMERCE, OKLAHOMA

CERTIFICATE OF SERVICE

I CERTIFY that on the 2nd day of FEBRUARY, 1998, a true and correct copy of the foregoing Stipulation of Dismissal of State Tort Claims Against Sheriff of Delaware County was:

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

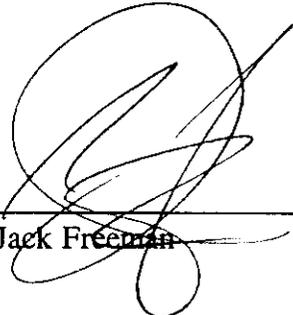
to:

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R. Jack Freeman

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

JOE LEFLORE,

Plaintiff,

vs.

FLINT INDUSTRIES, INC.,
a Delaware corporation,

Defendants.

No. 97-C-189-H /

ENTERED ON DOCKET

2-2-98

FILED

FEB 2 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court on a Motion for Summary Judgment by Defendant. The Court duly considered the issues and rendered a decision in accordance with the order filed on January 29, 1998.

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

IT IS SO ORDERED.

This 30TH 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

FRANK A. TAUCHER,
Plaintiff,

v.

COMMODITY FUTURES TRADING
COMMISSION,
Defendant.

ENTERED ON DOCKET

DATE 2-2-98

Case No. 97-C-928-H

FILED

FEB 2 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on consideration of Plaintiff's notice of withdrawal of complaint (Docket # 9) filed on December 5, 1997, and Plaintiff's motion to dismiss (Docket # 9) his complaint without prejudice filed on December 5, 1997. Plaintiff's motion to dismiss without prejudice is hereby granted.

IT IS SO ORDERED.

This 2ND day of February, 1998



Sven Erik Holmes
United States District Judge

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

FRANK A. TAUCHER,

Plaintiff,

v.

COMMODITY FUTURES TRADING
COMMISSION,

Defendant.

ENTERED ON DOCKET

DATE 2-2-98

Case No. 97-C-927-H

FILED

FEB 2 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on consideration of Plaintiff's notice of withdrawal of complaint (Docket # 7) filed on December 5, 1997, and Plaintiff's motion to dismiss (Docket # 7) his complaint without prejudice filed on December 5, 1997. Plaintiff's motion to dismiss without prejudice is hereby granted.

IT IS SO ORDERED.

This 2nd day of February, 1998.



Sven Erik Holmes
United States District Judge

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

FRANK A. TAUCHER,

Plaintiff,

v.

COMMODITY FUTURES TRADING
COMMISSION,

Defendant.

ENTERED ON DOCKET

DATE 2-2-98

Case No. 97-C-926-H

FILED

FEB 2 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on consideration of Plaintiff's notice of withdrawal of complaint (Docket # 9) filed on December 5, 1997, and Plaintiff's motion to dismiss (Docket # 9) his complaint without prejudice filed on December 5, 1997. Plaintiff's motion to dismiss without prejudice is hereby granted.

IT IS SO ORDERED.

This 2ND day of February, 1998.


Sven Erik Holmes
United States District Judge

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

FRANK A. TAUCHER,

Plaintiff,

v.

COMMODITY FUTURES TRADING
COMMISSION,

Defendant.

ENTERED ON DOCKET
DOCKET

DATE

2-2-98

Case No. 97-C-925-H

FILED

FEB 2 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on consideration of Plaintiff's notice of withdrawal of complaint (Docket # 10) filed on December 5, 1997, and Plaintiff's motion to dismiss (Docket # 10) his complaint without prejudice filed on December 5, 1997. Plaintiff's motion to dismiss without prejudice is hereby granted.

IT IS SO ORDERED.

This 2nd day of February, 1998



Sven Erik Holmes
United States District Judge

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

THOMAS R. GLOVER,)
)
Plaintiff,)

v.)

Case No. 96CV 886B ✓

GARY ALRED, JIM ALRED, MIKAEL)
ALRED, PAWNEE LIVESTOCK SALES,)
INC., GARY STRAHAN, as Personal)
Representative of the Estate of J. B. SMITH,)
deceased, JOE SODERSTROM, SARAH)
SODERSTROM, OSAGE ANIMAL)
CLINIC, INC., SAM STRAHM, D.V.M.,)
and JOHN DOES I THROUGH XX,)

Defendants.)

and)

JOE SODERSTROM and SARAH)
SODERSTROM,)

Defendants and Third-Party)
Plaintiffs,)

v.)

MID-ARK CATTLE COMPANY, INC.;)
BARRETT-CROFOOT, INC.; BARRETT-)
CROFOOT CATTLE, INC.; and JAMES F.)
LOWDER,)

Third-Party Defendants.)

FILED
JAN 31 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE FEB 02 1998

PLAINTIFF'S STIPULATION OF DISMISSAL
AS TO DEFENDANT PAWNEE LIVESTOCK SALES, INC.

The Plaintiff, Thomas R. Glover, hereby files this, his Stipulation of Dismissal as to Defendant Pawnee Livestock Sales, Inc. ("Pawnee Livestock"), pursuant to Fed. R. Civ. P. 41(a), and states as follows:

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1. The Plaintiff and Pawnee Livestock reached a settlement with respect to Plaintiff's claims against Pawnee Livestock.

2. As a part of that settlement, Plaintiff's claims as to Pawnee Livestock are to be dismissed with prejudice.

3. All parties to this action do not oppose this dismissal with prejudice.

4. Pawnee Livestock has not asserted a counterclaim or any other claim in this matter.

5. Dismissal with prejudice of Plaintiff's claims against Pawnee Livestock will finally resolve all disputes and claims between the two parties.

6. Pawnee Livestock and Plaintiff have agreed that each party is to bear its own costs in this matter.

WHEREFORE, premises considered, Plaintiff respectfully requests that this Court recognize this stipulation of dismissal and Order that all of Plaintiff's claims against Pawnee Livestock Sales, Inc. be dismissed with prejudice to refileing of same and that each of those parties are to bear their own respective costs as to each other.

Dated this 29th day of January, 1998.

LOGAN & LOWRY, LLP
P. O. Box 558
Vinita, OK 74301-0558
(918) 256-7511

Attorneys for Plaintiff Thomas R. Glover

By:



Richard W. Lowry, O.B.A. #5552
Robert Alan Rush, O.B.A. #13342
Michael S. Linscott, O.B.A. #17266

CERTIFICATE OF MAILING

I, Michael S. Linscott, do hereby certify that on this 29/1 day of January, 1998, I mailed a true and correct copy of the above and foregoing "Plaintiff's Stipulation of Dismissal as to Defendant Pawnee Livestock Sales, Inc." to:

Donn F. Baker, Esquire
Baker & Baker
303 West Keetoowah
Tahlequah, OK 74464
(Attorney for Defendants Gary Alred and Mikael Alred)

Nathan H. Young, III, Esquire
239 West Keetoowah
Tahlequah, OK 74464
(Attorney for Defendant Jim Alred)

David D. Wilson, Esquire
Bruce A. Robertson, Esquire
Wilson, Cain & Acquaviva
300 N.W. 13th Street, Suite 100
Oklahoma City, OK 73103
(Attorneys for Defendants Sam Straham, D.V.M.
and Osage Animal Clinic, Inc.)

Steven A. Heath, Esquire
Mysock & Chevaillier
2021 South Lewis, Suite 700
Tulsa, OK 74104
(Attorneys for Defendants Sam Straham, D.V.M.
and Osage Animal Clinic, Inc.)

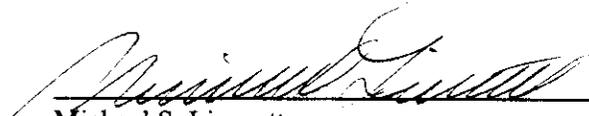
David L. Bryant, Esquire
406 South Boulder Avenue, Suite 417
Tulsa, OK 74103
(Attorney for Defendants Joe Soderstrom and Sarah Jane Soderstrom)

Patrick O. Waddel, Esquire
Gene G. Buzzard, Esquire
Gable, Gotwals, Mock, Schwabe, Kihle & Gaberino
2000 Boatmen's Center
15 West Sixth Street
Tulsa, OK 74119-5447
(Attorneys for Defendant Gary Strahan, as Personal
Representative of the Estate of J. B. Smith, deceased)

Paul T. Boudreaux, Esquire
Jeffrey L. Wilson, Esquire
Atkinson, Haskins, Nellis, Boudreaux,
Holeman, Phipps & Brittingham
1500 ParkCentre
525 South Main
Tulsa, OK 74103-4524
(Attorneys for Defendant Pawnee Livestock Sales, Inc.)

E. Lawrence Oldfield, Esquire
E. Lawrence Oldfield & Associates
2021 Midwest Road, Suite 201
Oak Brook, IL 60523
(Attorneys for Defendant Pawnee Livestock Sales, Inc.)

with proper postage thereon fully prepaid.



Michael S. Linscott

CERTIFICATE OF CONFERENCE

Counsel for Plaintiff has contacted counsel for each of the Defendants to this action and informed them of the contents of this Stipulation of Dismissal With Prejudice. Such counsel confirmed that they have no opposition to this Dismissal With Prejudice, therefore, it is submitted for the Court's signature and entry upon the record in this case.



Michael S. Linscott

Logan & Lowry, LLP

LAW OFFICES

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P. O. BOX 452469

GROVE, OK 74345-2469

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FAX (918) 786-5687

J. DUKE LOGAN
RICHARD W. LOWRY
O. B. JOHNSTON, III
THOMAS J. MCGEADY
MARK W. CURNUTTE
LEONARD M. LOGAN, IV
DONNA L. SMITH
ROBERT ALAN RUSH
DAVID E. JONES
MICHAEL S. LINSKOTT
TAMARA E. JAHNKE
ERIC O. JOHNSTON

OF COUNSEL
CHARLES E. WEST

January 29, 1998

RECEIVED

JAN 30 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Phil Lombardi, Court Clerk
United States District Court
Northern District of Oklahoma
4411 U.S. Courtroom
333 West Fourth Street
Tulsa, OK 74103

Re: *Thomas R. Glover v. Gary Alred and John Does I Through XX*; Case No.
96CV 886B

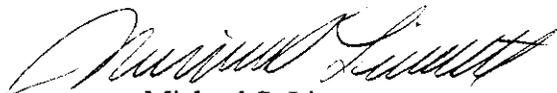
Dear Mr. Lombardi:

Enclosed please find an original and two (2) copies of Plaintiff's Stipulation of Dismissal as to Defendant Pawnee Livestock Sales, Inc. for filing in the above-entitled and numbered case. Please return one copy, with your file-stamp affixed thereto, in the envelope provided.

Also enclosed is an original and two (2) copies of "Order Granting Dismissal With Prejudice of Plaintiff's Claims Against Pawnee Livestock Sales, Inc.", which we would request that you submit to the Judge for his review and approval. After the Judge has approved the Order, we would also request that a file-stamped copy of the Order be returned to us in the envelope provided.

Thank you for your courtesies.

Very truly yours,



Michael S. Linscott
For the Firm

MSL/sh
Enclosures

cc: Donn F. Baker, Esquire
Baker & Baker
303 West Keetoowah
Tahlequah, OK 74464

Nathan H. Young, III, Esquire
239 West Keetoowah
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2021 Midwest Road, Suite 201
Oak Brook, IL 60523

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

DOREEN EDENS,)

Plaintiff,)

v.)

SAIED MUSIC COMPANY, INC.,)

Defendant.)

Case No. 97-CV-257 E

ENTERED ON DOCKET

DATE FEB 02 1998

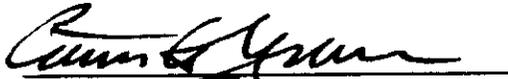
FILED

JAN 30 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

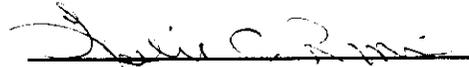
JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

The Plaintiff, Doreen Edens, and the Defendant, Saied Music Company, Inc., hereby stipulate to the dismissal of this case with prejudice, each party to bear her or its own costs, expenses and attorneys' fees.



Steven A. Novick, OBA # 6723
1717 So. Cheyenne Avenue
Tulsa, Oklahoma 74119
(918) 582-4441

COUNSEL FOR PLAINTIFF



J. Patrick Cremin, OBA # 2013
Leslie C. Rinn, OBA # 12160
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
320 South Boston, Suite 400
Tulsa, Oklahoma 74103
(918) 594-0400

COUNSEL FOR DEFENDANT

12

217

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

FILED

JAN 30 1998

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

TERRY L. BENNETT,
SSN: 444-64-3351,

Plaintiff,

v.

CASE NO. 96-CV-1063-M

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

Defendant.

ENTERED ON DOCKET

DATE FEB 02 1998

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 30th day of JAN, 1998.

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

(15)

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

FILED

JAN 30 1998

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

TERRY L. BENNETT

444-64-3351

Plaintiff,

vs.

Case No. 96-CV-1063-M

KENNETH S. APFEL,¹

Commissioner,
Social Security Administration,

Defendant.

ENTERED ON DOCKET

DATE FEB 02 1998

ORDER

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

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

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

² Plaintiff's June 13, 1994, application for disability benefits was denied initially and on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held June 15, 1995. By decision dated August 30, 1995, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on September 13, 1996. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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F.3d 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 would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health and Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born April 12, 1959, and was 36 years old at the time of the hearing. He has a 12 grade education with vocational training as a welder. In the past he has worked as a diesel mechanic helper, cement worker, and a mobile assistance driver for an automobile club. He claims to be unable to work as a result of sever lower back pain. The ALJ found that although Plaintiff could not return to his former work, documented physical findings do not demonstrate a functional loss that would preclude performance of a limited range of light work. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) improperly evaluated his subjective complaints; (2) improperly evaluated and developed the medical evidence; and (3) failed to apply the correct legal standard in evaluating Plaintiff's residual functional capacity ("RFC").

Plaintiff alleges that he became unable to work on April 10, 1993, as the result of an automobile accident. Following the accident, Plaintiff was treated at Hillcrest Medical Center for cervical spine strain and was released. Cervical x-rays performed at Hillcrest revealed no acute injury or significant abnormality. [R. 266]. The discharge instruction sheet contained a release from work for 2 days. [R. 268]. On April 29, 1993, Plaintiff presented to orthopedic surgeon, Emil Milo, M.D., complaining of low back pain. Dr. Milo found muscle spasm in the lumbosacral area, limited and painful range of motion, normal muscle strength, normal reflexes, and bilateral positive straight leg raises, 30 degrees on the left side. [R. 270]. An MRI of the lumbar spine performed April 29, 1993, showed mild narrowing of the spinal canal at L4-5 and no disc herniation. [R. 139, 270]. On May 19, 1993, a lumbar myelogram performed by Dr. Milo was normal. [R. 274].

Plaintiff was examined by orthopedic surgeon, Sami R. Framjee, M.D. on May 28, 1993 and June 3, 1993. On May 28, Dr. Framjee's examination of the lumbar spine revealed minimal tenderness on deep pressure. Range of motion was reduced but straight leg raising was negative bilaterally with no hamstring tightness. He found no neurological deficits and observed no dystrophy or atrophy. [R. 280-81]. On June

3, 1993, Dr. Framjee noted that Plaintiff was relatively asymptomatic, complaining of nonspecific soreness in the lumbar spine. He found no radicular symptoms in the right or left lower extremity. Dr. Framjee expressed the opinion that Plaintiff could return to his normal occupational duties with no restrictions. He was unable to find any evidence of permanent impairment of the cervical spine, lumbar spine, arms or legs related to the accident of April 10, 1993. [R. 278-79].

From June 9, 1993 through August 6, 1993, Plaintiff received chiropractic care from Ivan J. Bebermeyer, D.C. Dr. Bebermeyer's records record spinal pain, tenderness, and muscle spasm. [R. 191-206]. He expressed the opinion that Plaintiff was totally temporarily disabled throughout the time he was involved in his treatment. [R. 191].

From September 21, 1993 to December 16, 1993, Plaintiff was under the care of Don L. Hawkins, M.D. of Central States Orthopaedic and Sports Medicine Center. Dr. Hawkins noted some spinal tenderness, not localized to one specific area, straight leg raising produced some discomfort in the legs, there was moderate restriction in Plaintiff's range of motion. [R. 294]. After reviewing Plaintiff's MRI, which Dr. Hawkins interpreted as showing a mild bulge in the disc at L4-5, he was scheduled for a lumbar discogram, and CT scan. [R. 292]. After performing these tests, Dr. Hawkins stated:

This patient does not have enough pathology, in my opinion, to warrant any physical intervention. He has minor degenerative changes in the lower disk. I have discussed this with him. The patient states his pain is bad and he is concerned that he may have to have surgery, but

in my opinion, this pain is not substantiated by any abnormalities which I have been able to find.

[R. 291]. On December 16, 1993, Dr. Hawkins summarized the diagnostic studies and his findings, as follows:

No specific abnormalities were found on [myelogram and metrizimide enhanced CT scan]. He has since undergone more extensive diagnostic testing, being placed through a formal rehab therapy program. The MRI scan was performed of the lumbar spine which showed possibly mildly narrowed osseous neural foramen at L4-5 of questionable significance. The patient has since undergone more extensive testing including discograms at L3-4, L4-5 and L5-S1. Basically, the results of the discogram were fairly normal. In fact, I believe L3-4 and L4-5 were essentially normal. L5-S1 did show some mild degenerative changes only in the internal annular fibers with the outer half of the annular fibers totally intact which would not be expected to produce any significant symptoms. The disco CT scan confirms essentially normal findings with minor degenerative change only. The bone scan also has been performed and does not show any abnormalities.

[R. 291, 289]. Dr. Hawkins stated that examination of Plaintiff on a clinical basis did not show any reproducible clinical abnormalities. Although Dr. Hawkins stated that Plaintiff does have some pain and limitation of motion in his back, he was unable to find any significant abnormality to explain the pain. Dr. Hawkins was of the opinion that no additional treatment was indicated or necessary and released Plaintiff to return back to full employment, effective January 1994. [R. 289].

On December 21, 1993, Plaintiff was examined by family practice physician, Jim Martin, M.D. He found muscle spasm and tenderness over the mid-thoracic to lower lumbar musculature, with point tenderness over the sacroiliac joints. He

measured range of motion at: flexion 30 degrees, extension 0 degrees; lateral flexion 10 degrees bilaterally, positive straight leg raising on the right at 30 degrees, 40 degrees on the left. [R. 223]. These range of motion findings contrast with Dr. Hawkins findings made just 5 days earlier: flexion 55 degrees, extension 32 degrees; left lateral flexion 21 degrees, right lateral flexion 23 degrees. [R. 289]. Based on his single examination and review of Plaintiff's medical records and history, Dr. Martin concluded that Plaintiff was in need of further treatment and that he was 100% temporarily totally disabled, and would be for an indefinite period of time. [R. 223].

A consultative examination was performed by Merle Jennings, D.O., on July 8, 1994, at the behest of the Social Security Administration. Dr. Jennings noted Plaintiff could perform normal heel and toe walking without pain. Flexion of the lumbosacral spine was measured at 45 degrees, difficulty was observed straightening up after having flexed. Lateral bending was 10 degrees bilaterally, extension was 8 degrees. He found straightening of the lumbar curve and evidence of pain on percussion in the lumbar area. However, the lower extremities had full range of motion. He observed no sensory loss or loss of strength. Dr. Jennings concluded that Plaintiff has a discogenic disorder in the lumbar area and that neurological examination was indicated to rule out such a diagnosis. [R. 227]. Dr. Jennings' report does not indicate that he was provided Plaintiff's numerous diagnostic studies to review.

Subsequent to the ALJ's decision, Plaintiff submitted an additional report generated by Dr. Jennings. On September 7, 1995, Dr. Jennings saw Plaintiff, for

consultation. He reported that Plaintiff was walking in a flexed position complaining of pain in his lumbar area. Dr. Jennings referred to the October 5, 1993, discogram report and expressed the opinion that Plaintiff was in need of further diagnostic evaluation. [R. 13]. On September 26, 1995, he added an addendum to his report, expressing the opinion that Plaintiff was temporarily totally disabled and unable to work. [R. 14].

The Court finds that the ALJ's conclusion that Plaintiff has a residual functional capacity for light work, limited by no more than occasional stooping and crouching is supported by substantial evidence. The Court rejects Plaintiff's contention that the ALJ failed to properly evaluate and develop the record. According to Plaintiff, the ALJ erred in relying upon medical records generated in 1993 to support his decision rendered in 1995. The ALJ is required to develop a complete medical record by obtaining medical evidence for at least the twelve months prior to the date the claimant filed the application for benefits. See 42 U.S.C. § 423(d)(5)(B); 20 C.F.R. §§ 404.1512(d) & 416.912(d). Social Security rulings do not require the ALJ to update medical records to the time of the hearing. See *Luna v. Shalala*, 22 F.3d 687, 693 (7th Cir. 1994) cited with approval by the Tenth Circuit in the unpublished opinion *Breedlove v. Callahan*, 1997 WL 572145 (10th Cir. (Okla.)). Plaintiff applied for disability on June 13, 1994, alleging an April 10, 1993, onset of disability. The medical records cover the appropriate time frame.

Contrary to Plaintiff's assertion, the ALJ properly evaluated his subjective complaints. The ALJ noted that the objective medical findings failed to establish a

severe, disabling pain-producing condition. He also noted that Plaintiff's testimony was somewhat contradictory as to the numbness he claims to experience in his legs, that he reported no sleep or appetite disturbance, and shows no muscle weakness or atrophy in the lower extremities that would be expected to accompany disabling pain. [R. 22-23].

Plaintiff claims that the ALJ erroneously advanced lack of restrictions by any physician to preclude light work as a basis for discounting his credibility. The statement actually made by the ALJ was: "The record does not reflect functional restrictions by any physician that would preclude light work activity." [R. 23]. According to Plaintiff, Drs. Martin and Jennings opined that he was disabled and could not work because of pain. While both doctors expressed the opinion that Plaintiff was temporarily totally disabled, neither reported functional restrictions to support their conclusions.

Dr. Jennings' report was generated after the ALJ's decision and was submitted to the Appeals Council as permitted by the relevant regulations. 20 C.F.R. § 404.970(b). Since it was not before the ALJ at the time of his decision, he obviously could not cite that report. The Appeals Council denied review of the case, stating:

The Appeals Council has also considered the contentions raised in your representative's letter dated October 21, 1995, as well as the additional evidence from Merle Jennings, D.O., dated September 11 and 26, 1995, but concluded that neither the contentions nor the additional evidence provides a basis for changing the Administrative Law Judge's decision. Although Dr. Jennings concluded that you are temporarily totally disabled and that further evaluations were warranted, Dr. Jennings' report includes

only a recitation of your subjective complaints and medical history, and does not provide any current objective medical findings in support of his opinions or recommendations. In view of this, the Council finds that the weight of the evidence currently of record supports the conclusions reached in the hearing decision.

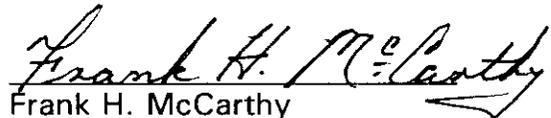
[R. 4]. The Tenth Circuit has ruled that new evidence submitted to the Appeals Council "becomes part of the administrative record to be considered when evaluating the Secretary's decision for substantial evidence." *O'Dell v. Shalala*, 44 F.3d 855, 859 (10th Cir. 1994). Consideration of Dr. Jennings' report will necessarily involve some degree of speculation as to how the ALJ would have weighed this information had it been available for the original hearing. In a similar situation, the Eighth Circuit has stated that it "consider[s] this to be a peculiar task for a reviewing court." *Riley v. Shalala*, 18 F.3d 619, 622 (8th Cir. 1994). The Appeals Council noted that Dr. Jennings' report lacked objective medical findings and concluded that the weight of the evidence supports the ALJ's decision. [R. 4]. The Court has considered Dr. Jennings' 1995 report and, like the Appeals Council, finds that it is not sufficient to require a different result. The ALJ's decision is supported by substantial evidence.

The Court rejects Plaintiff's assertion that the ALJ should have ordered additional examination. The Commissioner has broad latitude in ordering consultative examinations. Consultative examinations are appropriately ordered where there is a direct conflict in the medical evidence requiring resolution, or where the medical evidence in the record is inconclusive. *Hawkins v. Chater*, 113 F.3d 1162, 1166 (10th Cir. 1997). In this case, given the extensive testing performed on Plaintiff, the

examination by three orthopedic physicians, all of whom found no significant abnormalities, and the opinion of two of the orthopedic physicians that Plaintiff could return to full employment, the ALJ was not required to order additional consultative evaluation.

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

SO ORDERED this 30th day of January, 1998.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE 2-2-98

FILED

JAN 30 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
162 MEGAMANIA GAMBLING)
DEVICES, MORE OR LESS,)
COMPUTERS, SERVERS, "SMART")
CARDS, and RELATED EQUIPMENT)
LOCATED AT THE CHEROKEE)
NATION BINGO OUTPOST and)
CHEROKEE PALACE CATOOSA,)
TULSA COUNTY, OKLAHOMA; et al.,)
)
Defendants.)

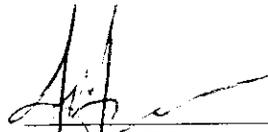
CIVIL ACTION NO. 97-CV-1140-K(J) ✓
Chief Judge Terry C. Kern

**DISMISSAL OF DECLARATORY JUDGMENT COMPLAINT
WITHOUT PREJUDICE**

COMES NOW the Seneca-Cayuga Tribe of Oklahoma, and pursuant to Fed. R. Civ. P.41(a)(1) dismisses without prejudice its claim for declaratory judgment filed as MULTIMEDIA GAMES, INC., a Texas Corporation; and SENECA-CAYUGA TRIBE OF OKLAHOMA, Plaintiff v. THE UNITED STATES DEPARTMENT OF JUSTICE; JANET RENO, Attorney General of the United States; and STEPHEN C. LEWIS, United States Attorney for the Northern District of Oklahoma, Defendants, 98-CV-1-BU(W).

Respectfully submitted,

LAW OFFICE OF JESS GREEN



JESS GREEN OBA #3564
Attorney for the Seneca-Cayuga Tribe
of Oklahoma
301 E. Main
Ada, OK 74820
Tele:580/436-1946 Fax:580/332-5180



CERTIFICATE OF MAILING

I, the undersigned, do hereby certify that on this 29th day of January, 1998, a true and correct copy of the above and foregoing Dismissal of Declaratory Judgment Complaint Without Prejudice was mailed, via certified mailing, to:

Stephen C. Lewis, U.S. Atty.
Northern District of Oklahoma
333 W. 4th St., Ste. 3460
Tulsa, OK 74103

Janet Reno, Atty. General
U.S. Department of Justice
5111 Main Justice Bldg.
10th St. & Constitution Ave. NW
Washington, DC 20530

Graydon Dean Luthey, Jr., Atty.
Hall, Estill, Hardwick, Gable,
Golden & Nelson
320 S. Boston Ave., Ste. 400
Tulsa, OK 74103-3708

Layn R. Phillips, Atty.
Urell & Manella, LLP
1800 Avenue of the Stars, Ste. 900
Los Angeles, CA 90067-4276



JESS GREEN

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

DATE 2-2-98

SAMUEL A. COLLETTE, SR.,)
)
 Plaintiff,)
)
 vs.)
)
 BOART LONGYEAR, et al.,)
)
)
)
)
)
 Defendants.)

Case No. 96-C-1154-K ✓

FILED
JAN 30 1998 *h*

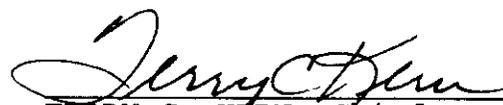
Phil Lombardi, Clerk
U.S. DISTRICT COURT

O R D E R

The Court notes that service has not been made on Defendants in this action commenced December 12, 1996. On January 21, 1998, this Court issued an order, pursuant to Fed.R.Civ.P. 4(m), directing plaintiff to serve the Defendants within seven days of the date of that Order. The Order stated that the case would be dismissed without prejudice if service was not made.

Pursuant to that Order and Fed.R.Civ.P 4(m), this case is dismissed without prejudice.

IT IS SO ORDERED THIS 29 DAY OF JANUARY, 1998.


 TERRY C. KERN, Chief
 UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 2-2-98

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

QUINN AARON KLEIN,

Plaintiff,

vs.

MARIA DIANE KLEIN,

Defendant.

)
)
)
)
)
)
)
)
)
)

No. 97-CV-937-K ✓

F I L E D

JAN 30 1998

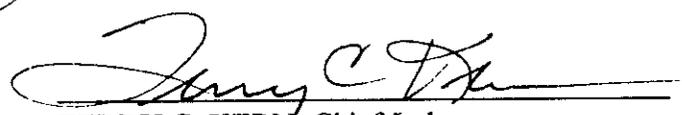
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On October 15, 1997, Plaintiff filed a civil rights complaint pursuant to 42 U.S.C. § 1983, and subsequently filed a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a), as amended by The Prison Litigation Reform Act, Pub.L.No. 104-134, 110 Stat. 1321 (1996). On October 30, 1997, the Court granted leave to proceed in forma pauperis and Plaintiff was directed to pay an initial partial filing fee of \$2.38, or show cause in writing for his failure to do so, on or before November 29, 1997. Plaintiff was specifically advised that his case could be dismissed if he failed to comply with the Order.

Upon review of the record, the Court finds that as of this date Plaintiff has neither paid the initial partial filing fee nor shown cause in writing for his failure to do so as directed in the October 30, 1997 Order. Accordingly, Plaintiff's complaint is hereby **dismissed without prejudice** for failure to pay the filing fee. See Local Rule 5.1(F).

SO ORDERED this 29 day of January, 1998.



TERRY C. KERN, Chief Judge
United States District Court

4

ENTERED ON DOCKET

DATE 2-2-98

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

CARLA SHORES,)
)
 Plaintiff,)
)
 vs.)
)
 STATE OF OKLAHOMA, et al.,)
)
 Defendants.)

No. 97-C-284-K ✓

FILED

JAN 30 1998

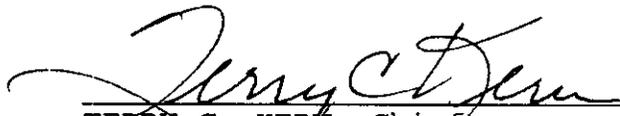
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

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

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

ORDERED this 29 day of January, 1998.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 2-2-98

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

FILED

GRUPO CARBALLOY,)
)
 Plaintiff,)
)
 vs.)
)
 BORN, INC.,)
)
 Defendant.)

No. 97-C-235-K

JAN 30 1998

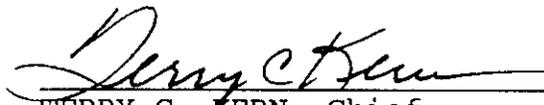
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

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

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

ORDERED this 29 day of January, 1998.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

FARMERS INSURANCE COMPANY,)
 INC.,)
)
 Plaintiff,)
)
 vs.)
)
 LARRY DEWITT, RICK PAYNE,)
 and JENNIFER PAYNE)
)
 Defendants.)

No. 97-C-660-K /

F I L E D

JAN 30 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the Motion to Dismiss of Defendants Rick and Jennifer Payne. Defendants Rick and Jennifer Payne seek to have Plaintiff Farmers Insurance Company's (Farmers) declaratory judgment action dismissed for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a).

Statement of Facts¹

On November 11, 1995, Defendant Larry Dewitt was allegedly involved in a rear end automobile collision with Defendant Rick Payne. Dewitt denied driving the automobile which collided with Payne's automobile. Farmers had issued an insurance policy to Dewitt that was in effect at the time of the accident. In October 1996, Rick Payne and wife, Jennifer Payne, filed suit against Dewitt in Oklahoma state court in Tulsa County District Court. Dewitt failed to cooperate during the discovery phase of the state case, failed to attend his own deposition, and failed to appear at the trial of the case. As a result, the state court entered judgment in favor of Rick Payne for \$74, 913.12

¹For purposes of a 12(b)(6) motion to dismiss, all factual allegations contained in the complaint are regarded as true.

and in favor of Jennifer Payne, for \$2,500 for loss of consortium. The state court apportioned Rick Payne's damages as follows: \$1,849.50 for reimbursement of medical expenses; \$335.68 for lost wages; \$ 9,021.38 for property damage; \$25,000 for pain and suffering; and \$38,706.56 as punitive damages. The state court also awarded the Paynes attorney's fees, related to prosecution of their property damage claim, and costs. *See Am. Mot. Dismiss, Ex. A, Journal of J. Entry*. Farmers filed the present action seeking a declaration from this Court, pursuant to 28 U.S.C. §§ 2201-02, that it is not required to pay the judgments to the Paynes because of Dewitt's failure to abide by the terms of his policy. Namely, Farmers seeks a declaration that it is not required to pay the judgments because Dewitt failed to cooperate in defending against the Paynes' claims in the state court case as required by his policy. Dewitt's policy with Farmers did not provide coverage for punitive damages. Plaintiff bases this action upon diversity of citizenship. Plaintiff is a Kansas corporation and Defendants are citizens and residents of Oklahoma.

Applicable Standards

A court may dismiss a complaint for failure to state a claim only if it is clear that the plaintiff can prove no set of facts in support of her claim entitling her to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L.Ed.2d 80 (1957); *Ramirez v. Oklahoma Dept. of Mental Health*, 41 F.3d 584, 586 (10th Cir. 1994). For purposes of making this determination, a court must "accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Ramirez*, 41 F.3d at 586; *Meade v. Grubbs*, 926 F.2d 994, 997 (10th Cir. 1991). Additionally, granting a motion to dismiss is a harsh remedy which must be "cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Morgan v. City of Rawlins*, 792 F.2d 975, 978 (10th Cir. 1986).

Discussion

The Defendants argue that this action should be dismissed because the amount in controversy is less than the statutorily required minimum amount for diversity actions and as a result, this Court does not have subject matter jurisdiction. 28 U.S.C. § 1332(a) sets the amount in controversy at over \$75,000 in actions based upon diversity of citizenship. The amount in controversy in declaratory judgment actions is the value of the object of the litigation. *City of Moore v. Atchison, Topeka, & Santa Fe Ry.*, 699 F.2d 507, 509 (10th Cir. 1983) (citing *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 347, 97 S. Ct. 2434, 2443, 53 L. Ed.2d 383 (1977)). The amount in controversy is determined by looking at the pecuniary effect an adverse declaration would have on either party to the lawsuit. *City of Moore*, 699 F.2d at 509. “Dismissal is appropriate only if it appears to a ‘legal certainty’ that the jurisdictional amount is not met.” *Id.* at 509 (citing *Hunt*, 423 U.S. at 346-348, 97 S. Ct. at 2443-44).

Following the standard set out in *City of Moore*, the Court must attempt to determine the pecuniary effect that an adverse declaration would have on either of the parties. Farmers argues that the effect on it of an adverse declaration would be in excess of \$75,000. Farmers asserts that the amount it would have to pay would be the sum of the judgments for Rick Payne and Jennifer Payne, totaling \$77,413.12. Alternatively, Farmers argues that the judgment for Rick Payne alone satisfies the minimum jurisdictional amount when either prejudgment interest or attorney’s fees are added because either of these amounts would be more than \$86.89, the amount necessary to put Rick Payne’s judgment over the minimum jurisdictional amount. The Defendants argue that Farmers would only have to pay \$36,206.56 to Rick Payne and \$2,500 to Jennifer Payne as a result of an adverse declaration because insurance companies are not liable for punitive damages under Oklahoma

law.

Generally, insurance companies are not liable for punitive damages arising from the conduct of their policyholders under Oklahoma law. See *Aetna Cas. and Sur. Co. v. Craig*, 771 P.2d 212, 214-16 (Okla. 1989); *Dayton Hudson Corp. v. American Mut. Liab. Ins.*, 621 P.2d 1155 (Okla. 1980). The purpose of punitive damages is “punishment of the offender and the deterrence of others, for the benefit of society, from the commission of like wrongs.” *Dayton Hudson Corp.*, 621 P.2d at 1158. Public policy concerns in support of punitive damages “require that the ultimate burden of such awards rest directly on the wrongdoer.” *Craig*, 771 P.2d at 214-16 (emphasis added). “By allowing one to insure against such awards, the burden is shifted from the wrongdoer to the otherwise innocent insurer,” and thus on to the general public in the form of higher premiums. *Id.* at 215. Such a result would eviscerate the public policy underpinning for punitive damages. *Id.* at 215. Thus, Oklahoma public policy prevents a tortfeasor from escaping the civil consequences of his wrongdoing by shifting those consequences to an insurer.² *Id.* at 215.

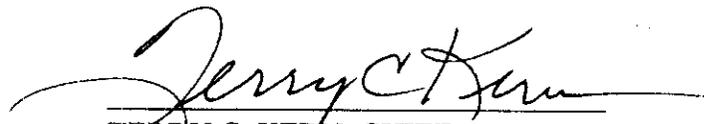
Here, the state court awarded the Paynes total damages of \$77,413.12, against Dewitt, of which \$38,706.56 were punitive damages. Because insurance companies cannot be liable for punitive damages in Oklahoma, the total pecuniary effect of an adverse declaration on Farmers would be \$38,706.56 at most, plus costs, prejudgment interest, and attorney’s fees related to the property damage claim, assuming such amounts are includable and that the judgments for the Paynes are combined. The only way in which the minimum jurisdictional amount could conceivably be met in

²Oklahoma does recognize a narrow exception to this doctrine. When employers can be held liable for tortious, unauthorized acts of their employees, the employer can protect itself from punitive damage liability through insurance. *Dayton Hudson*, 621 P.2d at 1160. The exception, however, is not applicable in this case.

the current case is if prejudgment interest, costs, and attorney's fees are greater than \$36,293.45³. The Courts finds it highly improbable that the amount of costs, attorney's fees, and prejudgment interest would exceed this amount. Prejudgment interest at the applicable rate of 9.15%, *Okla. Stat. tit. 12, § 727*, on the combined judgments of Rick and Jennifer Payne of \$38,706.56⁴ could be no more than \$3,541.65. Attorney's fees, solely related to the property damage issue, would have to be \$35,164.92 in order for the minimum jurisdictional amount to be met. The Court believes that it is most unlikely that the state court action, which did not even require a complete trial because of Dewitt's noncooperation, could result in \$35,164.92 in legal fees on property damages of less than \$10,000. The Court finds that it is a legal certainty that the minimum jurisdictional amount is not met in this case. The amount in controversy does not exceed \$75,000 as required by 28 U.S.C. § 1332(a). The Court lacks jurisdiction to hear this case pursuant to 28 U.S.C. § 1332(a).

For the foregoing reasons, the Court GRANTS Defendants' Motion to Dismiss.

ORDERED this 29 day of January, 1998.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

³The Court derived this figure by simply subtracting the amount of the Paynes' combined judgments for which Farmers could be responsible, \$38,706.56, from the minimum jurisdictional amount, \$75,000.01

⁴The appropriate figure to which a court should apply prejudgment interest would be \$38,706.56, not \$77,413.12. It would be illogical for insurance companies not to be responsible for punitive damages, but to be responsible for paying the interest on such damages.