

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

VICTORIA LAMARR CONKLIN, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 UNITED STATES OF AMERICA, ex. rel. )  
 BRUCE BABBITT, Secretary of the Department )  
 of Interior, )  
 )  
 Defendants. )

ENTERED ON DOCKET  
DATE 5-29-98

Case No. 97-CV-789-H(M)

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

ORDER

This matter comes before the Court on the Report and Recommendation of the United States Magistrate Judge (Docket # 8) with respect to Plaintiff Victoria LaMarr Conklin's appeal of the determination of the Secretary of the Department of the Interior regarding the validity of a holographic codicil of the decedent Abe M. Conklin, an Osage Indian. The Magistrate Judge has recommended that the decision of the Secretary disapproving the validity of the holographic codicil be affirmed. Plaintiff filed her objections to the report and recommendation on April 30, 1998 (Docket # 9). Defendants responded to Plaintiff's objections on April 30, 1998 (Docket # 10).

When a party objects to the report and recommendation of a Magistrate Judge, Rule 72(b) of the Federal Rules of Civil Procedure provides in pertinent part that:

[t]he district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommendation decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Fed. R. Civ. P. 72(b).

Abe M. Conklin, an Osage Indian, executed a will dated December 6, 1994, in which he provided that his Osage headright -- his interest in the income from oil wells held in trust by the United States on behalf of the Osage Indian Tribe -- was to be divided into six equal shares. The decedent further provided in his will that one share should go to his wife, the plaintiff herein, for life with the remainder to his living children of Osage Indian Blood. On August 22, 1995, Mr. Conklin wrote a letter to his lawyer, which provided that he "would like to make a codicil to my Last Will and Testament" whereby his headright interests would pass to his wife as life tenant. Mr. Conklin died on December 1, 1995. Plaintiff sought to have the letter approved as a codicil to the December 6, 1994 letter. Her efforts were rejected by the Superintendent, Osage Agency, on October 24, 1996, on the basis that the letter reflected that the decedent intended to make a codicil but did not intend that the letter should stand as a codicil. The Superintendent's decision was affirmed on July 28, 1997, on the basis that the letter merely reflected an intent to make a testamentary disposition in the future, rather than an intent that the letter itself effect a testamentary disposition.

The judiciary's role in the review of decisions of the Secretary of the Interior regarding Osage will is provided for by the Osage Indian Statutes. Act of April 18, 1912, Pub. L. No. 62-125, 37 Stat. 86, amended by Act of Oct. 21, 1978, Pub. L. No. 95-496, 92 Stat. 1660, and further amended by Osage Tribe of Indians Technical Corrections Act of 1984, Pub. L. No. 98-605, 98 Stat. 3163. In pertinent part, the Act provides the following:

No court except a Federal court shall have jurisdiction to hear a contest of a probate of a will that has been approved by the Secretary. Such appeals shall be on the record made before the Secretary and his decisions shall be binding and

shall not be reversed unless the same is against the clear weight of the evidence or erroneous in law.

1978 Act § 5(a), 92 Stat. at 1662.

The Magistrate Judge considered in detail Oklahoma authorities on the impact of Mr. Conklin's letter on his will, including Hooker v. Barton, 284 P.2d 708 (Okla. 1955) and Craig v. McVey, 195 P.2d 753 (Okla. 1948), and concluded that Oklahoma law requires that the instrument purported to be a holographic codicil must plainly reflect that it was the intention of the decedent that the instrument itself stand for the last will and testament. The Magistrate Judge found that the letter contained no language plainly reflecting that it was intended to effect an immediate change in Mr. Conklin's will or that the letter was intended by Mr. Conklin to serve as the codicil to his will. Accordingly, the Magistrate Judge concluded that the Secretary's decision was not contrary to the clear weight of the evidence or an erroneous interpretation of the law.

In her objections, Plaintiff states that she agrees that Hooker and Craig represent the state of the law in Oklahoma on these issues. Thus, Plaintiff concedes that the Secretary was not erroneous in law. However, Plaintiff contends that the Magistrate Judge has erred in applying these authorities to the facts at hand. Plaintiff contends that the letter was a valid codicil which effectively provided for Plaintiff to receive a life estate in the decedent's Osage headright.

The Court has conducted a de novo review of the record in this case and has considered the Report and Recommendation of the Magistrate Judge, Plaintiff's objections, Defendant's response, and the authorities cited by the parties. Based upon this review, the Court agrees with the Magistrate Judge, based upon the governing standard of review of the Secretary's decision, that it cannot find that the Secretary's decision was contrary to the clear weight of the evidence or

erroneous in law. Therefore, the Court finds that the Report and Recommendation (Docket # 8) affirming the Secretary's decision should be adopted in its entirety. For these reasons, Plaintiff's appeal is hereby denied (Docket # 1).

IT IS SO ORDERED.

This 28<sup>TH</sup> day of May, 1998.



Sven Erik Holmes  
United States District Judge

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

**FILED**

MAY 29 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

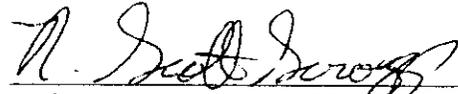
LARRY ASHBY, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 UNITED STATES POSTAL )  
 SERVICE )  
 )  
 Defendant )

Case No. 98-CV-0113K(M)

ENTERED ON DOCKET  
DATE 5-29-98

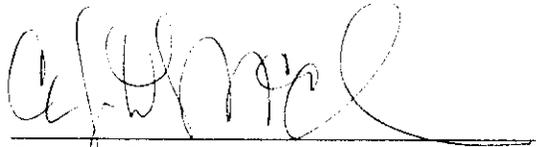
JOINT DISMISSAL

Plaintiff, Larry Ashby, and Defendant, United States Postal Service, agree to dismiss this case with prejudice.



R. Scott Scroggs, OBA No. 16889  
Nix & Scroggs  
601 S. Boulder, Suite 610  
Tulsa, Oklahoma 74119  
(918) 587-3193

ATTORNEY FOR PLAINTIFF  
LARRY ASHBY



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

ATTORNEYS FOR DEFENDANT  
UNITED STATES POSTAL SERVICE

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c/5

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

**F I L E**

MAY 28 1998

Phil Lombardi, C  
U.S. DISTRICT COI

HALCO LTD., et al,  
Plaintiff(s),  
vs.  
AMERICAN INDIAN MOTORCYCLE CO.,  
et al,  
Defendant(s).

Case No. 95-C-333-B

ENTERED ON DOCKET

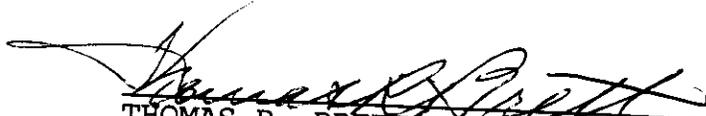
DATE MAY 29 1998

ADMINISTRATIVE CLOSING ORDER

The Parties having no objections to administrative closure of this case pending final adjudication of the Receivership action in Colorado and the Bankruptcy case in the Western District of Massachusetts , 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 purpose required to obtain a final determination of the litigation.

IF, within 60 days of a final adjudication in the cases in Colorado and Massachusetts, 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 28<sup>th</sup> day of May, 1998.

  
THOMAS R. BRETT, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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ENTERED ON DOCKET

DATE 5-29-98

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

RICK and TERESA BROWN, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 STATE FARM INSURANCE )  
 COMPANY, STATE FARM FIRE AND )  
 CASUALTY COMPANY and )  
 JOHN ROBERT GATEWOOD, )  
 individually as an agent for )  
 STATE FARM INSURANCE AGENCY )  
 and STATE FARM FIRE AND )  
 CASUALTY COMPANY, )  
 )  
 Defendants. )

Case No. 98-CV-110-H

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

**ORDER OF DISMISSAL WITH PREJUDICE**

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

**ORDERED, ADJUDGED, AND DECREED** that the above entitled action is hereby dismissed with **prejudice** to refiling.

Dated this 28<sup>TH</sup> day of May, 1998.

  
 SVEN ERIK HOLMES,  
 United States District Judge for the  
 Northern District of Oklahoma

ENTERED ON DOCKET

DATE 5-29-98

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

MAY 29 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. ) No. 98CV0185H(M)  
 )  
 KENETTE E. ROBISON, )  
 )  
 Defendant. )

**DEFAULT JUDGMENT**

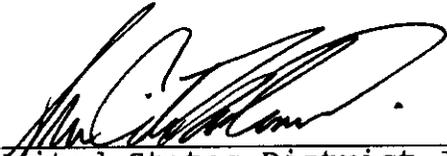
This matter comes on for consideration this 29<sup>th</sup> day of May, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Kenette E. Robison, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Kenette E. Robison, was served with Summons and Complaint on March 9, 1998. 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.

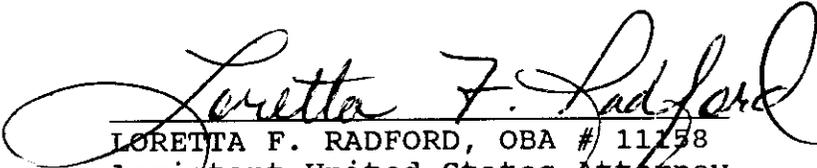
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Kenette E. Robison, for the principal amounts of \$2,840.61 and \$2,951.69, plus accrued interest of \$1,763.20 and \$2,007.44, plus administrative charges in the amount of \$80.00, plus interest

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thereafter at the rate of 8 percent and 6.79 percent per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.434 percent per annum until paid, plus costs of this action.

  
United States District Judge

Submitted By:

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

LFR/llf

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

MAY 28 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

WAYNE C. HANSON, )  
SSN: 399-32-5137, )

Plaintiff, )

v. )

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

Defendant. )

Case No. 96-CV-1100-EA

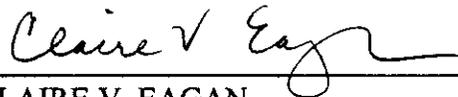
ENTERED ON DOCKET

DATE MAY 29 1998

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Commissioner's denial of benefits to plaintiff has been entered. Judgment for the defendant and against the plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 28<sup>th</sup> day of May 1998.



CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

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

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

WAYNE C. HANSON, )  
SSN: 399-32-5137, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
KENNETH S. APFEL, )  
Commissioner of Social Security,<sup>1</sup> )  
 )  
Defendant. )

MAY 28 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 96-CV-1100-EA

ENTERED ON DOCKET

DATE MAY 29 1998

**ORDER**

Claimant, Wayne C. Hanson, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of the Social Security Administration (“Commissioner”) denying claimant’s application for disability benefits under the Social Security Act.<sup>2</sup> In accordance with 28 U.S.C. § 636(c)(1) and (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.

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

<sup>2</sup> On October 8, 1993, claimant applied for disability insurance benefits under Title II (42 U.S.C. § 401 *et seq.*) and for Supplemental Security Income under Title XVI (42 U.S.C. § 1381 *et seq.*), with a protective filing date of September 8, 1993. Claimant’s application for benefits was denied in its entirety initially (December 2, 1993) and on reconsideration (March 28, 1994). A hearing before Administrative Law Judge James D. Jordan (“ALJ”) was held August 29, 1994 in Miami, Oklahoma. By decision dated March 13, 1995, the ALJ found that claimant was not disabled on or before December 31, 1992 (the date claimant was last insured for disability insurance benefits under Title II). On September 26, 1996, the Appeals Council denied review of the ALJ’s findings. Thus, the decision of the ALJ represents the Commissioner’s final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

Claimant appeals the decision of the Commissioner, alleging that the ALJ failed to properly develop the record and that the ALJ's findings are not supported by substantial evidence. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

### **I. CLAIMANT'S BACKGROUND**

Claimant was born December 27, 1936 and lived in Tulsa, Oklahoma at the time of filing his Complaint. He graduated from high school, attended college for two years, and has taken various work-related courses. Claimant reported that he has worked as a weld engineer, an electronics mechanic, and a manufacturing engineer, but that he has not been able to work since August 30, 1991 as a result of insulin-dependant diabetes mellitus with retinopathy and neuropathy. According to claimant, his diabetes has caused fatigue, blurred vision, night blindness, cataracts, foot numbness, and foot ulcers.

### **II. SOCIAL SECURITY LAW AND STANDARDS OF REVIEW**

Disability under the Social Security Act is defined as the "...inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment...." 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his "physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy...." Id., § 423(d)(2)(A). Social

Security regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. § 404.1520.<sup>3</sup>

Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). This Court's review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991).

The only issue now before the Court is whether there is substantial evidence in the record to support the final decision of the Commissioner that claimant was not disabled within the meaning of the Social Security Act. The term substantial evidence has been interpreted by the U.S. Supreme Court to require "...more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The search for adequate evidence does not allow the court to substitute its discretion for that of the agency. Cagle v. Califano, 638 F.2d 219 (10th Cir. 1981). Nevertheless, the court must review the record as a whole,

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<sup>3</sup> Step One requires the claimant to establish that he is not engaged in substantial gainful activity, as defined by 20 C.F.R. §§ 404.1510. Step Two requires that the claimant establish that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with certain impairments listed in Appendix 1 of Subpart P, Part 404, 20 C.F.R. Claimants suffering from a listed impairment or impairments "medically equivalent" to a listed impairment are determined to be disabled without further inquiry. If not, the evaluation proceeds to Step Four, where the claimant must establish that he does not retain the residual functional capacity (RFC) to perform his past relevant work. If the claimant's Step Four burden is met, the burden shifts to the Commissioner to establish at Step Five that work exists in significant numbers in the national economy which the claimant--taking into account his age, education, work experience, and RFC--can perform. See Diaz v. Secretary of Health & Human Servs., 898 F.2d 774 (10th Cir. 1990). Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work.

and “the substantiality of the evidence must take into account whatever in the record fairly detracts from its weight.” Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

### **III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform light work, subject to a restriction of no climbing. The ALJ further found that claimant had no nonexertional impairments to reduce further his occupational base of light work with no climbing. The ALJ concluded that claimant could not perform his past relevant work. But, applying the Medical-Vocational Guidelines or “grids,” and relying on vocational expert testimony, the ALJ found that there were other jobs existing in significant numbers in the national economy which claimant could perform, based on his RFC, age, education, and work experience. Having concluded that there were a significant number of jobs which claimant could perform, the ALJ concluded that claimant was not disabled within the meaning of the Social Security Act at any time through the date of the decision.

### **IV. MEDICAL HISTORY OF CLAIMANT**

Claimant was treated by Dr. Joe Starke from August 17, 1993 to December 30, 1993 for a diabetic foot ulcer on his right foot. (R. 195, 181) The callous from the foot ulcer required debridement on multiple occasions. (R. 180, 182, 186, 188, 189, 190, 193, 194, 196) Claimant was encouraged to use shoe orthotics by Dr. Starke and Dr. McGee. (R. 183, 187) Dr. Starke stated on November 2, 1993 that “[w]hile Mr. Hansen has shown overall improvement, it is difficult to do say what the long-term situation will be in regards to these foot ulcers and his ability to work. Certainly, at this point, he is unable to do any weightbearing, lifting, carrying or any work requiring

ambulation.” (R. 185) However, on December 30, 1993, Dr. Starke stated that the ulcer was “completely healed.” (R. 181)

On April 8, 1994, claimant was seen by Dr. Kathleen Dahlmann, who performed an internal medicine consultative examination. Dr. Dahlmann noted that claimant had scars on his right foot from a recently-healed ulcer and a puncture wound from a screw, but did not indicate that there were any unhealed ulcers or wounds at the time of the examination. (R. 199) She noted a diminution of sensation to pinprick in both of claimant’s legs, an absence of vibratory sense in both feet, and an absence of position sense in the right foot. Id. Dr. Dahlmann examined claimant’s vision and made no diagnosis of retinopathy or vision abnormality, other than stating that claimant’s optic fundi could not be clearly visualized. (R. 198-200) Dr. Dahlmann diagnosed claimant as having diabetes mellitus, insulin-dependant, with evidence of diabetic peripheral neuropathy. Id. She noted that claimant’s gait was safe and stable without the use of an assistive device. (R. 200)

On July 29, 1994, claimant presented to a clinic after falling the previous day and injuring his coccyx. (R. 211) Claimant testified to the ALJ that he was working in his yard, lost consciousness, and fell to the ground, causing him to injure his tailbone and bite his tongue. (R. 56-57) The treating doctor diagnosed the cause of the loss of consciousness as probably a hypoglycemic episode. (R. 211) It is noted on the clinic report that claimant said that he “started insulin on his own.” Id. The report records that claimant said that Dr. Moore, claimant’s treating physician, “told him he ‘might’ have to start insulin,” but that claimant “couldn’t get hold of Dr. Moore so he just decided to start.” Id. An x-ray showed claimant to have a minimally displaced fracture of the third or fourth coccygeal segment. (R. 212) Dr. Moore told claimant that the fracture should heal without any necessary therapy, but that he should keep weight off of it. (R. 239) Dr. Moore suggested that

claimant use a rubber ring, or “donut” to sit on. Id. As late as August 15, 1994, claimant reported continued difficulty with the healing of his tongue. (R. 207)

## V. REVIEW

### A. *The ALJ's Duty to Develop the Record*

Claimant asserts that the ALJ failed to properly develop the record by not obtaining medical evidence for the 12-month period prior to the month claimant was last insured for disability insurance benefits, regarding: (1) claimant’s vision problems and eye surgery; and (2) claimant’s diabetes mellitus and the effect of that disease on his feet.

Claimant asserts that the ALJ should have further developed the record as to claimant’s alleged vision impairment, arguing that reference was made at pages 170 and 178 of the record to an eye surgery for which the record does not contain any documenting evidence. Plaintiff’s Memorandum Brief (Docket #7) at 4. Page 178 contains no such reference. (R. 178) Page 170 contains part of a medical history of claimant as given by claimant to the UMA Adult Medicine Clinic at the University of Oklahoma College of Medicine-Tulsa. (R. 170) The medical history refers to an eye surgery performed by Dr. Joe Cole for a cataract in claimant’s right eye. Id. The Court also notes that claimant testified in the hearing before the ALJ that claimant had problems with his vision. (R. 63)

Neither of these statements is sufficient to require the ALJ to further develop the record. The regulations adopted by the Commissioner provide that:

Before we make a determination that you are not disabled we will develop your complete medical history for at least the 12 months preceding the month in which you file your application. . . . We will make every reasonable effort to help you get medical reports from you own medical sources when you give us permission to request the reports.

20 C.F.R. §404.1512(d).<sup>4</sup> The Commissioner has defined “every reasonable effort” as meaning that:

[W]e will make an initial request for evidence from your medical source and, at any time between 10 and 20 calendar days after the initial request, if the evidence has not been received, we will make one followup request to obtain the medical evidence necessary to make a determination. The medical source will have a minimum of 10 calendar days from the date of our followup request to reply, unless our experience with that source indicates that a longer period is advisable in a particular case.

20 C.F.R. §404.1512(d)(1). Here, claimant made no mention of eye surgery or Dr. Cole as a medical source in any of his statements in Social Security Administration forms, even in answer to direct questions to list all physicians claimant had seen since his alleged onset of disability. Claimant failed to mention eye surgery or Dr. Cole as a medical source in claimant’s initial application for disability benefits (R. 81-89), request for reconsideration (R. 101, 144-155), or request for hearing by an ALJ (R. 121-157). At the hearing before the ALJ, the ALJ asked claimant’s attorney whether there was any additional evidence that should be included in the file. (R. 38) Claimant did not raise the omission of evidence of eye surgery or Dr. Cole as a medical source. Id. Nor did claimant assert the possible existence of another medical source in his request for review by the Appeals Council. (R. 6-17) In fact, claimant’s attorney was directly questioned by the ALJ about the lack of medical evidence from the period beginning with claimant’s alleged onset date and ending with claimant’s date last insured. (R. 79-80) Claimant’s attorney responded that he was trying to obtain evidence

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<sup>4</sup> Claimant protectively filed for disability benefits on September 8, 1993, alleging an onset date of August 30, 1991. Claimant’s last-insured date was December 31, 1992. According to 20 C.F.R. §404.1512(d)(2), the relevant time period at issue in this case is August 30, 1991 through the 12-month period preceding December 31, 1992.

of a job evaluation made shortly after claimant was diagnosed with diabetes.<sup>5</sup> (R. 80) Claimant's attorney went on to say:

I'll be quite honest with you. The onset date, if we can't come up with this evidence, his evaluation process on that job from '89 and subsequent evaluations, it will have to rest solely and for all if we cannot come up with additional documentation. [sic]

Id. Finally, the ALJ in his report specifically stated "[claimant's] vision is correctable to 20/30 with glasses and no examination has indicated significant retinopathy. *He has apparently had surgery for cataracts*, but there is no evidence of recurrence." (R. 23)(emphasis added).

Although the ALJ has a basic obligation to ensure that an adequate record is developed during the disability hearing consistent with the issues raised, it is not the ALJ's duty to become the claimant's advocate. Henrie v. United States Dept. of Health and Human Servs., 13 F.3d 359, 360-361 (10th Cir. 1993). The Tenth Circuit has stated that "when the claimant is represented by counsel at the hearing, the ALJ should ordinarily be entitled to rely on the claimant's counsel to structure and present claimant's case in a way that the claimant's claims are adequately explored." Hawkins v. Chater, 113 F.3d 1162, 1167-1168 (10th Cir. 1997). It is appropriate for the ALJ to require counsel to identify issues requiring further development. An "ALJ does not have to exhaust every possible line of inquiry in an attempt to pursue every potential line of questioning. The standard is one of reasonable good judgment." Id. at 1168. It cannot be said in this case that the ALJ failed to exercise reasonable good judgment or to comply with the dictates of 20 C.F.R. § 404.1512(d).

Nor did the ALJ fail to exercise reasonable judgment or comply with § 404.1512(d) in not further developing the record as to evidence from the 12-month period prior to the month claimant

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<sup>5</sup> Claimant's attorney asked that he be given two weeks to produce the records of past job evaluations. The ALJ gave claimant two weeks to produce the records. (R. 38) Apparently, no such records were ever produced.

was last insured for disability insurance benefits regarding claimant's diabetes mellitus and the effect of that disease on his feet. Claimant again points to the medical history of claimant as given by claimant to the UMA Adult Medicine Clinic at the University of Oklahoma College of Medicine-Tulsa as showing that there are medical records which the ALJ failed to consider. Plaintiff's Memorandum Brief (Docket #7) at 4 (citing R. 167).

The ALJ has a basic duty of inquiry to fully and fairly develop the record as to material issues. Baca v. Department of Health & Human Servs., 5 F.3d 476, 479-80 (10th Cir. 1993). The Tenth Circuit has noted that it is difficult to decide what quantum of evidence of a disabling impairment or combination of impairments a claimant must establish before the ALJ will be required to look further. Hawkins, 113 F.3d at 1166 (10th Cir. 1997). The court stated:

As is usual in the law, the extreme cases are easy to decide; the cases that fit clearly within the framework of the regulations give us little pause. The difficult cases are those where there is some evidence in the record or some allegation by a claimant of a possibly disabling condition, but that evidence, by itself, is less than compelling. How much evidence must a claimant adduce in order to raise an issue requiring further investigation? Our review of the cases and the regulations leads us to conclude that the starting place must be the presence of some objective evidence in the record suggesting the existence of a condition which could have a material impact on the disability decision requiring further investigation. Isolated and unsupported comments by the claimant are insufficient, by themselves, to raise the suspicion of the existence of a nonexertional impairment.

Id. at 1167 (citations omitted). Thus, only where there is presented some objective evidence which suggests a reasonable possibility that an impairment exists which could have a material impact on the disability decision does it become incumbent upon the ALJ to investigate further. Id.

Social Security regulations provide that "[i]f you do not give us the medical and other evidence that we need and request, we will have to make a decision based on information available in your case." 20 C.F.R. § 1516. The regulations also provide that "[i]f your medical sources cannot

or will not give us sufficient medical evidence about your impairment for us to determine whether you are disabled or blind, we may ask you to have one or more physical or mental examinations or tests.” 20 C.F.R. § 1517. The ALJ precisely followed these regulations. As stated *supra*, the Commissioner obtained the records of the medical sources listed by claimant. The Commissioner requested a consultative examination of claimant in regard to his diabetes and its effects. The ALJ specifically asked claimant whether there was any additional evidence needed to complete the record and claimant did not raise the existence of any other medical evidence. The only additional evidence claimant did mention was certain job evaluations, which the ALJ gave claimant the opportunity to produce and claimant failed to produce.

To whatever extent the record is deficient, it is because the claimant failed to present the medical evidence needed and requested by the Commissioner. A consultative examination was performed on claimant in April 1994. The medical evidence adduced from this examination was used by the ALJ in making his determination of disability. No further development of the record was required.

***B. Substantial Evidence***

Claimant asserts that the ALJ’s determination that claimant could perform light work is error, alleging that substantial evidence does not support a finding that claimant is able to stand for the length of time required by light work.

A claimant bears the burden of proving disability. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984). The ALJ, in considering the effects of claimant’s diabetes, found:

[T]he evidence shows that the claimant is able to control his glucose much more than he actually does. His doctors report that even the episode of the fall in which he fractured his coccyx was apparently induced by his failure to properly take either

medication or meals, and even when he was brought back to consciousness, the mere placement of sugar in his mouth, without following it with a meal or a snack, was improper. They also remark on the report that the claimant started taking insulin on his own; that his doctor had said he "might" need insulin, and being unable to reach his doctor, the claimant just started taking insulin on his own initiative. . . . The claimant reported numerous hypoglycemic symptoms to Dr. Dahlmann, the consultative examiner, and claimed to have had the foot ulcer since 1991. However, the claimant's treating sources suggest that the hypoglycemic symptoms are a direct result of the self-prescribed insulin. Other evidence shows that the foot ulcer was the result of stepping on a screw the month prior to obtaining treatment, that is, July 1993, and that later ulcers were the result of blisters from new shoes. The claimant has been given the education course for diabetics more than once and it has been recommended more than once that he obtain special orthotics for his foot because the ulcer seemed to be at a pressure point. However, the claimant has not followed his doctors [sic] advice on these matters. Although he claimed to be following the ADA diet, it was revealed that he regularly consumed two cups of peanuts per day, completely contrary to the fat consumption advice. He is also frequently noncompliant with checking his blood sugar. Nevertheless, the evidence shows that if [sic] is frequently within normal limits, which shows that proper attention is effective. His vision is correctable to 20/30 with glasses and no examination has indicated significant retinopathy. He has apparently had surgery for cataracts, but there is no evidence of recurrence. The neuropathy has not resulted in sustained disorganization of motor function in two extremities and his gait is safe and stable.

The undersigned concludes that the claimant retains the residual functional capacity to perform work activities at the light exertional level, with no climbing. According to 20 CFR §404.1567(b) and §416.967(b), light work involves lifting no more than 20 pounds at a time with frequent lifting and carrying of objects weighing up to 10 pounds. By definition a job is in this category when it requires a good deal of standing and walking or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. This is consistent with the claimant's own admission that he could walk for ½ mile and lift 40 pounds. Although the claimant was restricted to nonweight-bearing by his physician while the foot ulcer was being treated, this period did not last for 12 months, even with the lack of compliance by the claimant. Both Dr. Starke and Dr. McGee have specifically discussed foot care and footwear with the claimant and he went through an Education Class for Diabetics which contained the same instructions. In fact, because of his non-compliance, he was instructed to go through part of it again. Nevertheless, none of his doctors have precluded work, except for that limited time.

(R. 23)(citations omitted).

This Court's review of the decision of the Commissioner is limited to whether the decision is supported by substantial evidence. Substantial evidence is more than a scintilla and less than a preponderance. Richardson, 91 S. Ct. at 1427.

Although Dr. Dahlmann, as stated above, noted a diminution of sensation to pinprick in both of claimant's legs, an absence of vibratory sense in both feet, and an absence of position sense in the right foot, she found that claimant's gait was safe and stable without the use of an assistive device. (R. 199-200) Claimant testified that he could walk for one-half mile. (R. 61) Claimant testified that he could not stand for more than 25 minutes or sit for more than an hour (R. 61-62), but the ALJ-- after analyzing claimant's credibility in accord with Luna v. Bowen, 834 F.2d 161, 163-174 (10th Cir. 1987)--found claimant's complaints of foot pain, vision problems, and dizziness not credible. (R. 25-26) The ALJ stated:

[Claimant's] daily activities include shopping, visiting on the phone and in person, keeping up with current events on the radio and TV, running a hand vacuum, watering the lawn, doing other "miscellaneous" chores, paying his own bills, and using his ham radio for up to 25 hours per week. His report to his doctors in August 1993 indicates that he was walking up to 3 miles per day before his foot injury, which certainly indicates that there was no significant limitation on walking prior to the ulcer occurrence. Even with the ulcer on the right foot, he continued to drive and apparently continued with his part time work. He was obviously still doing his yard work in August 1994 when he passed out, fell, and minimally fractured his coccyx. The testimony of claimant's girlfriend that she was there and helped him with his recovery by putting sugar in his mouth does not add to the claimant's credibility. The occurrence of this event is not questioned.

Consequently, the undersigned finds the claimant's allegations of severe limitations to be not credible and that the ability to perform light work is not further reduced by pain or any other exertional or non-exertional impairment or limitation.

Id. (citations omitted)

This Court generally gives great deference to the credibility determinations made by an ALJ. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). “Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence.” Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 777 (10th Cir. 1990). Considering all the evidence, both objective and subjective, this Court finds that the ALJ did not err in concluding--and demonstrating by specific and substantial evidence--that the plaintiff’s complaints were disproportionate to the objective findings and not credible beyond limiting claimant’s climbing ability.

*C. New Evidence*

Subsequent to the hearing before the ALJ, claimant submitted additional medical evidence to the Appeals Council. This evidence included medical records dated August 1993 to June 1995 from the UMA Adult Medicine Clinic at the University of Oklahoma College of Medicine-Tulsa (R. 218-238) and four letters to claimant from Dr. Moore from the period of October 1993 to August 1994 (R. 239-242). Claimant correctly points out that this new evidence must be included in the review by this Court as to whether the ALJ’s determination of disability is supported by substantial evidence.<sup>6</sup> “[N]ew evidence becomes part of the administrative record to be considered when evaluating the [Commissioner’s] decision for substantial evidence.” O’Dell v. Shalala, 44 F.3d 855,

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<sup>6</sup> The Appeals Council denied review of the case, stating:

The Appeals Council has also considered the additional evidence from George Moor [sic], M.D., dated October 8, 1993 through August 2, 1994 and from UMA Adult Medicine Clinic dated August 1993 to June 1995, but concluded that this additional evidence does not provide a basis for changing the Administrative Law Judge’s decision.

(R. 6) The Appeals Council decision apparently entailed an examination of the entire record, including the new evidence, and necessarily embodies in its conclusion that the additional evidence fails to provide a basis for changing the ALJ’s decision. See 20 C.F.R. § 404.970(b).

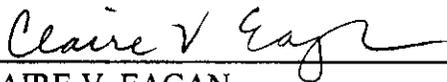
859 (10th Cir. 1994). However, even upon inclusion of this new evidence in the administrative record, this Court concludes that the decision of the ALJ is supported by substantial evidence.

The letters to claimant from Dr. Moore contain no more than statements that claimant is healing well and should have fewer hypoglycemic episodes after taking reduced doses of insulin. (R. 239-242) The medical records from the UMA Medical Center document claimant's statements of pain in his feet and foot spasms. (R. 227-231) In 1995, claimant was diagnosed with "painful diabetic neuropathy." (R. 227) These statements are not enough to tip the scales. Complaints of severe foot pain were not new and were found by the ALJ to not be fully credible. (R. 25) In full consideration of the record, it is clear that the ALJ's conclusion regarding claimant's ability to perform light work is supported by substantial evidence.

#### VI. CONCLUSION

The decision of the Commissioner is supported by substantial evidence and the correct legal standards were applied. The decision is **AFFIRMED**.

DATED this 28<sup>th</sup> day of May, 1998.

  
\_\_\_\_\_  
CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

**MAY 28 1998**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

RON ANDERSON, et al., )  
)  
Plaintiffs )  
)  
vs. )  
)  
MONSANTO COMPANY, et al. )  
)  
Defendants )

Case No. 98-CV-0260BU(M)

ENTERED ON DOCKET

DATE MAY 29 1998

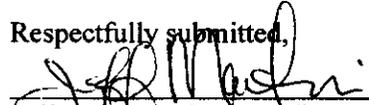
**DISMISSAL WITHOUT PREJUDICE**

COMES NOW the following Plaintiffs, Tammy Bell, William Reed, and Keith Thomas, by and through their attorney of record, Jeff Martin, and dismisses this action without prejudice to the bringing of a subsequent action against both Defendants.

This voluntary dismissal without an order of the Court and without Defendants' agreement is authorized under Rule 41 of The Federal Rules of Civil Procedure because Defendants have not filed an Answer or a Motion for Summary Judgment herein and Rules 23(e) & 66 do not apply.

Defendants are hereby notified that Plaintiff Ron Anderson will continue his action against both.

Respectfully submitted,

  
\_\_\_\_\_  
Jeffrey A. Martin, OBA #15573  
624 S. Denver  
Tulsa, Oklahoma 74119  
(918) 583.4165

**Certificate of Mailing**

I, Jeff Martin, do hereby certify that on the 28th day of May, 1998, I mailed or hand delivered a true and correct copy of the foregoing instrument, with postage fully prepaid thereon, to:

J. Patrick Cremin, Esq.  
Hall, Estill  
320 S. Boston, #400  
Tulsa, Oklahoma 74103

  
\_\_\_\_\_  
Jeff Martin, OBA #15573

**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 MAY 29 1998

Case No. 97-C-865-BU(J) ✓

**FILED**

MAY 28 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**REPORT & RECOMMENDATION**

Plaintiffs filed a § 1983 action and numerous state tort claims against Defendants. Each Defendant filed separate motions to dismiss or in the alternative for summary judgment. By minute orders dated December 3, 1997, and March 10, 1998, the District Judge referred the motions to the Magistrate Judge for Report and Recommendation. A hearing was held on all pending dispositive motions on May 5, 1998.

**I. FACTS**

On June 29, 1995, Phyllis Vaden "sold" a van to Pat Perkins. Ms. Perkins gave Ms. Vaden a cashier's check for \$10,000. On June 30, 1995, the cashier's check was dishonored by the bank. Phyllis Vaden delivered to Pat Perkins a signed but unnotarized assignment of the certificate of title.

On July 7, 1995, Ms. Vaden obtained a duplicate title for the van. In addition, Ms. Vaden reportedly contacted several law enforcement agencies in Oklahoma and Missouri to report the incident. Ms. Vaden additionally contacted her insured, Allstate Insurance Company ("Allstate").

The parties represented in open court that Pat Perkins, representing herself as the owner of the van by using the title she obtained from Phyllis Vaden, sold the van to Commerce Auto Sales on or about July 10, 1995. On July 12, 1995, the van was sold by Commerce Auto Sales to Mr. and Mrs. Freeman. Commerce assigned the certificate of title to the Freemans, and the Freemans registered their purchase of the van with the State of Oklahoma. On July 17, 1995, the State of Oklahoma issued a certificate of title to the Freemans.

Allstate paid Ms. Vaden for the loss of the van sometime during the week of September 7, 1995. Vaden assigned the duplicate title to Allstate. Allstate did not register this assignment with the State of Oklahoma.

On September 22, 1995, officers from several law enforcement agencies (including Grove, Commerce, and the Oklahoma Highway Patrol) went to the Freeman's residence. The officers told Mr. Freeman that the van had been reported stolen. According to Mr. Freeman, the officers related the Vaden "sales transaction" to him. Mr. Freeman produced his title to the van and the bill of sale. The officers seized the van. Defendants state that the van was seized as stolen property. Plaintiffs assert that the van was seized and turned over to Allstate, and that the officers

informed Plaintiffs that they could contact the Allstate representative if they wanted to recoup some of their loss.

Plaintiff notes that Allstate sent a tow truck from Sapulpa Auto Pool on September 26, 1995, to obtain the van. Plaintiff states that he talked to an Allstate adjustor on that date and was told that it was "probable" that Plaintiffs would be able to purchase the van.

The Freemans assert that they believed, at the time, that the City of Grove was in charge of the seizure, and that on September 28, 1995, they filed a civil replevin action for the return of the van. Defendant asserts that the law enforcement authorities determined that no evidentiary reasons existed to continue to hold the van and therefore on October 18, 1995, a Petition in the Nature of Interpleader was filed in the District Court of Ottawa County to determine the proper ownership of the van. Plaintiffs state that during the week of June 12, 1996, Allstate's representative contacted Plaintiffs and informed Plaintiffs that Allstate would return the van to Plaintiffs. The parties agreed to an "Order Determining Ownership" which was filed in the state court on August 30, 1996. Allstate returned the van to Plaintiffs on September 21, 1996. Plaintiffs additionally assert that the van was returned damaged.

## **II. MOTIONS TO DISMISS STATE LAW CLAIMS**

### **A. MOTION BY DEFENDANT CITY OF GROVE TO DISMISS STATE LAW CLAIMS**

The City of Grove filed a Motion to Dismiss or in the Alternative for Summary Judgment [Doc. Nos. 5-1, 5-2] with respect to Plaintiffs' state tort law claims.

Defendant notes that Plaintiff did not comply with the Oklahoma Governmental Tort Claims Act and therefore Plaintiffs' state tort claims are now barred. Plaintiffs acknowledged and confessed Defendant's Motion. [Doc. No.16-1]. The undersigned Magistrate Judge recommends that the District Court **GRANT** Defendant's Motion to Dismiss or in the Alternative for Summary Judgment. [Doc. Nos. 5-1, 5-2, 16-1].

**B. DEFENDANT CITY OF COMMERCE'S MOTION TO DISMISS STATE LAW CLAIMS**

Defendant City of Commerce filed a Motion to Dismiss Plaintiff's state tort law claims pursuant to the GTCA. Plaintiff confesses this portion of the Defendant's motion. The Magistrate Judge recommends that the District Court **GRANT** Defendant City of Commerce's Motion to Dismiss Plaintiff's state tort claims.<sup>1/</sup> Defendant's Motion to Dismiss should be granted in part, to dismiss the state tort claims. [Doc. No. 15-1, 15-2].

**III. MOTION TO DISMISS BY DEFENDANT OKLAHOMA HIGHWAY PATROL**

Defendant Oklahoma Highway Patrol ("OHP") requests that this Court dismiss Plaintiff's action against the OHP due to Eleventh Amendment immunity.

"A State is not a person within the meaning of § 1983." Will v. Michigan Dept. of State Police, 491 U.S. 58, 64 (1989). Thus, although "[s]ection 1983 provides a federal forum to remedy many deprivations of civil liberties, . . . it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties." Id. at 66. Moreover, "in the absence of consent a suit in which the

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<sup>1/</sup> The Magistrate Judge addresses separately Defendant's Motion to Dismiss Plaintiff's Section 1983 claim, below.

State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984) (citations omitted). See also Eastwood v. Dep't of Corrections of State of Okla., 846 F.2d 627 (10th Cir. 1988) (suit against the Department of Corrections barred by the Eleventh Amendment which prohibits suits in federal court against a state by its own citizens or by citizens of another state).

The State of Oklahoma has not expressly waived its Eleventh Amendment immunity. See, e.g., Nichols v. Department of Corrections, 631 P.2d 746, 750-51 (Okla. 1981). Therefore, the State is immune from suit by the Plaintiff in federal court. Plaintiff has named the Oklahoma Highway Patrol. The undersigned Magistrate Judge recommends that the District Court dismiss all claims against the Oklahoma Highway Patrol. Such a dismissal does not preclude Plaintiff from bringing an action against state officials in "their personal capacity," and does not preclude the filing of this action by Plaintiff in State court against the State of Oklahoma.

Plaintiffs cite to Florida Department of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982). In that case, the district court did adjudicate the disposition of property in an *in rem* action involving the State of Florida. The Supreme Court held, however, that "the federal court had jurisdiction to secure possession of the property from the named state officials, since they had no colorable basis on which to retain possession of the artifacts. The court did not have power, however, to adjudicate the State's interest in the property without the State's consent." Id. at 683. Nothing in this case

suggests that the State of Oklahoma has agreed that the federal courts should adjudicate this matter.

The United States Magistrate Judge recommends that the District Court **GRANT** Defendant Oklahoma Highway Patrol's Motion to Dismiss. [Doc. No. 37-1].

Defendant Oklahoma Highway Patrol additionally filed a Motion for a Protective Order and a Motion to Stay Discovery. [Doc. Nos. 38-1, 38-2]. At the hearing of this matter Defendant agreed to produce certain documents to Plaintiffs. The Magistrate Judge hereby **DENIES** the motion without prejudice to Defendant later asserting particular claims of privilege. [Doc. Nos. 38-1, 38-2].

#### **IV. MOTION BY CITY OF COMMERCE TO DISMISS § 1983 CLAIMS**

In addition to requesting that the Court dismiss the state tort claims which Plaintiffs assert against Commerce, Commerce requests that the Court dismiss the § 1983 claim. [Doc. Nos. 15-1, 15-2]. Commerce asserts that the Police Chief from the City of Commerce was present during the seizure of the van but that the Police Chief did not participate in the seizure. Plaintiffs assert that the Police Chief took Plaintiffs' title over Plaintiffs' objection, made a copy of the title, and returned only the copy of the title to the Plaintiffs. Defendant acknowledges that the Police Chief made a copy of Plaintiffs' title and returned a copy of the title to Plaintiffs. The Magistrate Judge recommends that the Motion to Dismiss the § 1983 claim be overruled for the reasons discussed below.

#### A. INVOLVEMENT OF COMMERCE POLICE OFFICERS

Defendant initially asserts that the Commerce police officers were not involved in the events which occurred at the Freemans' residence. Defendant notes that Commerce police officers were present at the scene and made a copy of a title but that is the extent of their involvement. Defendant argues that the City of Commerce cannot be held liable under § 1983 merely for being present at the scene.

In Specht v. Jensen, 832 F.2d 1516 (10th Cir. 1987), the Tenth Circuit addressed a § 1983 action arising from an alleged illegal search of the Specht's home. Following a jury verdict for the Spechts, defendants appealed alleging that the trial court erred in not granting a judgment notwithstanding the verdict.

In Specht, Mr. Jacobs, a private citizen was attempting to repossess a computer which he believed to be in the possession of the Specht's son. Jacobs obtained a court order of possession and writ of assistance directing the sheriff to assist him in obtaining the computer. Jacobs and two friends called a supervisor with the local police department. The supervisor told his replacement to "take care of" them. Jacobs learned the location of Specht's business office and telephoned the owner of the building to request that he unlock the building. Accompanied by a local police officer, Jacobs and his friends searched the office looking for the computer. They located nothing. The next morning Jacobs again went to the police station and requested that someone accompany him to the Specht residence. Jacobs told the officers that the order he had had the same authority as a search warrant. An officer knocked on the door and asked for Mr. Specht. Mrs. Specht informed the individuals

that Mr. Specht was not at home. The officer told Mrs. Specht that he had a search warrant and that if she did not cooperate she would be taken to jail. Mrs. Specht was additionally told that she could not telephone her attorney. The officers and Jacobs left after approximately forty minutes.

The defendants in Specht contended that their participation in the searches was insufficient as a matter of law to establish § 1983 liability. The Tenth Circuit Court of Appeals disagreed. The activities by the officers in Specht consisted of more than just "standing by." One of the officers requested that a building be unlocked and an officer told Mrs. Specht that she could not call her attorney and that he would take her to jail if she obstructed the search. The Tenth Circuit concluded that the activities of the officers in this case were sufficient to establish a cause of action under § 1983. In addition, the Court referred to Booker v. City of Atlanta, 776 F.2d 272, 272 (11th Cir. 1985) (police presence, even absent active participation, could provide an intimidating "cachet of legality" establishing a constitutional violation), and Harris v. City of Roseburg, 664 F.2d 1121, 1127 (9th Cir. 1981) (issue of whether police officer did more than merely "stand by in case of trouble" involves factual determination).

In this case, the activities by the Commerce police officers consist, at the very least, of an officer being present at the scene and of an officer making a copy of the Freemans' title to the van. These activities are not as involved as the activities by the officers in Specht, but the Magistrate Judge concludes that the activities are sufficient to present a factual issue for determination by the jury. The Magistrate Judge cannot

say, as a matter of law, that the activities of the Commerce police officers do not create a cause of action under § 1983. See, e.g., Booker v. City of Atlanta, 776 F.2d 772 (11th Cir. 1985).

**B. "RIGHT" TO SEIZE THE VEHICLE**

Defendant asserts that Defendant did not seize or participate in the seizure of the vehicle. However, Defendant additionally argues that if Defendant had participated in the seizure the seizure was justified and Defendant's actions would have been proper. Defendant relies on Wolfe v. Faulkner, 628 P.2d 700 (Okla. 1981) and 47 O.S. § 4-105(e).

The statute provides that "[a]ny police officer who has reason to believe or upon receiving information that a motor vehicle has been stolen shall have and is hereby vested with authority to confiscate and hold such vehicle until satisfactory proof of ownership is established." 47 O.S. 1991, § 4-105(e). In accordance with the statute, a police officer can seize a vehicle until proof of ownership is established. In this case, the Freemans showed the officers their title to the vehicle, which could constitute the proof of ownership as required by the statute. Furthermore, in Wolfe, the court noted that

[b]ased upon the statutory provisions of this section the law enforcement officers were acting within their scope of authority to confiscate and hold the truck. It does not follow, however, that such authority automatically relieves the officers of a duty to determine if satisfactory proof of ownership is established in another before they release a vehicle.

Wolfe 628 P.2d at 704. In this case, part of Plaintiffs' complaint is that the van was, after seizure "turned over" to Allstate.<sup>2/</sup>

Regardless, Defendant asserts that the compliance with state law in some way insulates Defendant from liability. At issue, however, is whether or not Defendant's conduct was "under color of state law" and in violation of the U.S. Constitution. Therefore, regardless of whether or not Defendant's actions would be sanctioned or permissible under state law, the issue is whether or not the actions were appropriate under federal law.

Plaintiffs' version of the facts is that all of the police officers on the scene knew the "story" behind how the Plaintiffs' acquired the van, and that the officers knew and understood that Plaintiffs' had not stolen the van but had purchased the van and were therefore "good faith purchasers." In Wolfenbarger v. Williams, 826 F.2d 930 (10th Cir. 1987), the Tenth Circuit Court of Appeals addressed whether the seizure by police of stolen items which had been purchased in good faith by a pawnbroker, and the subsequent turning over of the items to the original owner by the police, constituted a violation of the U.S. Constitution. Wolfenbarger sued in federal court alleging a violation of 42 U.S.C. § 1983 due to the seizure by police officers of property in her shop (which had been reported as stolen) without a warrant. The police officers later turned the property over to the "original owner" without a judicial determination of ownership. The Tenth Circuit noted that good faith purchasers for value have a

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<sup>2/</sup> This fact is disputed by the parties and the Court in no way intends to make a "finding" as to whether or not this occurred.

property interest in the property. The Court concluded that the officers should have known that seizing the "stolen property" and turning it over to the "original owner" did not allow sufficient due process for Wolfenbarger. In addition the Court observed that

an officer must have justification for the intrusion and must discover the items he is searching for through inadvertence. "But where the discovery is anticipated," observed Justice Stewart writing for the court, "where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different." Justice Stewart explained that in such a situation, "the requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as "per se unreasonable" in the absence of "exigent circumstances."

Defendant additionally refers the Court to Smith v. Walsh, 833 F. Supp. 844 (W.D. Okla. 1993) which is factually similar to the present case. However, in Smith, the District Court emphasized that the officers did not turn possession of the disputed property over to either party claiming a stake in the property. As noted, Plaintiffs claim that Allstate was in some manner behind the procurement of the van by the police officers and that the police turned the van over to Allstate. In addition, in Smith, both parties claiming "title" to the property were present at the scene.

**V. MOTION BY DEFENDANT ALLSTATE TO DISMISS § 1983 ACTION AND STATE CLAIMS**

**A. RES JUDICATA BASED ON STATE COURT INTERPLEADER ACTION**

Defendant asserts that an interpleader action was previously filed and adjudicated in state court, that Plaintiff had the opportunity to present any and all claims in the state court action, that Plaintiff did not present any additional claims, and

that Plaintiff is now barred from presenting any such claims. Plaintiff asserts that the prior state court action was limited to a criminal interpleader action, that pursuant to statute such an action is limited in nature and that Plaintiff could not have presented any additional causes of action in the state court action. The Magistrate Judge agrees with the Plaintiff and finds that the state court interpleader action is not res judicata to the issues presented in this proceeding.

The state court interpleader action was filed October 18, 1995. *Exhibit 3 to Allstate's Exhibit Supplement to Brief in Support of Motion to Dismiss, filed December 1, 1997.* In that proceeding, the Plaintiff, the State of Oklahoma "pray[ed] that the defendants, and all other persons claiming an interest in said van, be given notice and as may be ordered by the court, be required to come into court and present their claims, and that the court determine pursuant to 22 O.S. §§ 1321 *et seq.* who is entitled to the van and that plaintiffs be ordered to release it accordingly, and thereby be released of all liability, and for such other relief that the court deems just and equitable." Although the parties initially contested ownership, the parties signed an agreed order on August 30, 1996, finding title to the van in the Freemans. *Exhibit 8 to Allstate's Exhibit Supplement to Brief in Support of Motion to Dismiss, filed December 1, 1997.*

The majority of the cases referenced by Allstate deal with interpleader actions. The interpleader action in this case was unique because it involved ownership of

allegedly "stolen" goods which were "in the possession of" the police.<sup>3/</sup> The interpleader action was clearly filed pursuant to 22 O.S. § 1321.

One unpublished case referenced by Allstate is factually similar to the facts in this case. In Barrett v. Moran, 1995 WL 699833 (9th Cir. 1995), an armored vehicle owned by Loomis was robbed. Barrett was arrested and charged with the robbery. After his arrest, the F.B.I. seized \$6,052 in cash, and turned the cash over to the Las Vegas Police Department. Barrett was convicted of the robbery. Barrett filed a motion in the criminal proceeding to have the cash turned over to him. The state court ordered property which can be verified as belonging to Barrett turned over to him. The police department never complied with the order. The police department subsequently filed a complaint for interpleader and declaratory relief in state court against Barrett and Loomis seeking to have the court determine ownership to the \$6,052. The court noted that

It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.

Barrett, at 2, *citing* Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81 (1984). The court concluded based on Nevada law that the first suit barred a subsequent § 1983 action.

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<sup>3/</sup> The parties have indicated that Allstate claimed the van the day after the police took the van from the Freemans. Consequently, although the state filed the interpleader action to determine ownership of the van, Allstate apparently had possession of the van.

The key issue is whether or not, under the facts of this case, Oklahoma law would preclude a subsequent action. Few cases have interpreted 22 O.S. 1991, § 1321. However, the statute appears very limited. The statute provides that within fifteen days of the time that the "owner" of the property is known, the peace officer shall inform the owner that the property is in the custody of the police officer. "The owner of the property or designated representative of the owner may make application to the magistrate for the return of the property. The application shall be on a form provided by the Administrative Director of the Courts and made available through the court clerk or the victim-witness coordinator. The court application has been made and notice provided, the magistrate shall docket the application for a hearing as provided in this section." 22 O.S. 1991, § 3121(C). In addition, the applicant is to notify the last person in possession of the property prior to the seizure of the property of the hearing by certified mail. The hearing should be held "not less than ten days or more than twenty days after the court has been notified that the notice has been served or published." 22 O.S. 1991, § 3121(C). In addition, "[f]or the sole purpose of conducting a due process hearing to establish ownership of the property, 'magistrate' as used in this section shall mean a judge of the district court, associate district judge, special judge or the judge of a municipal criminal court of record. . . ." 22 O.S. 1991, § 3121(C).

If the magistrate determines that the property is needed as evidence, the magistrate determines ownership and the time frame for the future release of the property. 22 O.S. 1991, § 3121(D). If the property is not needed as evidence, the

magistrate may release the property upon proof of ownership. Notice must be given to an applicant and to the last person in possession of the property prior to seizure. 22 O.S. 1991, § 3121(E).

Although few cases have interpreted the provisions of this statute, the statute appears relatively limited. The statute contemplates a due process hearing for the sole purpose of determining ownership. Applicants are to file "responses" by completing forms which are provided to them. No statutory provisions are made for the filing of additional claims or counterclaims. The court concludes that this statutory provision was not intended as a "full-blown" civil proceeding. A proceeding brought under this statute is limited to the determination of the ownership of the property. The parties in the state court proceeding were therefore not required to bring any and all claims against each other in the very limited state court interpleader proceeding. Consequently, Plaintiffs were not required to bring the §1983 and the other state claims in the limited state court interpleader action.

**B. SECTION 1983 CLAIM AGAINST ALLSTATE**

Allstate asserts that Plaintiffs do not have a §1983 claim against Allstate. Allstate notes that reporting a crime to the proper authorities and asserting a claim to the vehicle in the interpleader action is simply not sufficient conduct to establish a civil rights claim. Allstate asserts that a post-deprivation hearing satisfies Plaintiffs' "civil rights." Allstate also asserts that Plaintiff cannot satisfy the state actor requirement of § 1983.

**(a) Deprivation Without Due Process**

Allstate asserts that the interpleader hearing satisfied due process requirements and therefore Plaintiff's rights were not violated. Plaintiffs, however, initially argue that the van should never have been seized by the police, and that if the van should not have been initially seized, a subsequent due process hearing would not adequately protect Plaintiffs' rights against an improper seizure. Plaintiffs also claim that the interpleader action was an abusive process and did not afford adequate rights to them. Plaintiffs additionally argue that Allstate, not the state of Oklahoma held the van, and that neither Allstate nor the state contemplated a due process hearing until after Plaintiffs sued the City of Grove. Plaintiffs maintain that Allstate and the state conspired against Plaintiffs to deprive them of their van.

Allstate relies on Williams v. Soligo, 104 F.3d 1060 (8th Cir. 1997). In that case, Williams purchased a truck from an auction. The police later impounded the truck and released it to a prior owner who had reported it stolen.<sup>4/</sup> Williams sued the city and the police officer who impounded the truck asserting state law claims and Section 1983 claims. Williams settled with the city.

The police officer, who had conflicting reports regarding whether the truck was stolen, impounded the truck and placed a "hold" on it. After determining that the truck had been stolen, the police officer turned the license plate and the illegitimate VIN plate over to the police property room and released his "hold" on the vehicle

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<sup>4/</sup> The parties disagree on whether the van, in this case, was reported "stolen." Plaintiffs assert that the police and Allstate all knew that the van was not reported as "stolen."

without further instructions. The original owner filed a claim with the release desk which was processed and the vehicle was released to the original owner.

The case against the police officer was tried to a jury and the district court granted the police officer judgment as a matter of law at the close of the evidence. The Eighth Circuit Court of Appeals affirmed noting "this sparse record." Id. at 1061.

The Court emphasized that "mere negligence is not actionable deprivation under the Due Process Clause of the Fourteenth Amendment." The Court noted that cases involving procedural due process allege intentional deprivation of adequate process rather than inadvertent. The Court noted that although the police officer initially impounded the vehicle, the officer took no further "intentional" action to deprive the plaintiff of his vehicle.

Williams argues that if Soligo [police officer] had told the Auto Release Desk of Williams's claim, or had told Williams the "hold" had been released so Williams could submit a claim, the City would have commenced an interpleader action to resolve the competing claims of Fowler and Williams. In other words, Williams contends that in completing his investigative duties Soligo failed to protect Williams's property interest. That is a negligent deprivation claim barred by Daniels.

Id. at 1062.

Two major differences exist between Williams and this case. First, Williams presented his evidence in court before a jury and after the conclusion of his evidence the court determined as a matter of law that he had not met his burden. In contrast, in this case, Allstate requests that this Court grant a motion to dismiss. Based on the assertions by Plaintiffs, the Court concludes that a motion to dismiss or a motion for

summary judgment,<sup>5/</sup> at this stage of the litigation, must be denied. Second, in Williams, the Eighth Circuit Court of Appeals focused on the "negligent" actions of the police officers. In contrast, in this case, Plaintiffs assert that Allstate and the police officers were all well-acquainted with the facts and in some manner "conspired" to deprive Plaintiffs of the van without due process of law. Plaintiffs do not attempt to assert that Allstate's actions were negligent.

Allstate additionally asserts that Plaintiffs were not deprived of due process because they did, eventually, have a hearing. Plaintiffs argue that there was never any mention of a hearing until after Plaintiffs sued the City of Grove and that the van was improperly released to Allstate almost immediately after it was impounded by the City. The record reflects that the van was released to Allstate prior to the hearing, and that the van was seized by the police on September 22, 1995, but that the interpleader action was not commenced until October 18, 1995.<sup>6/</sup> An agreed order was entered by the parties on August 30, 1996, and the van was returned to Plaintiffs on September 21, 1996. Based on the facts as presented, the Court cannot conclude as a matter of law, at this stage of the litigation, that Plaintiffs received adequate due process hearings with respect to the ownership of the van prior to the van being taken from

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<sup>5/</sup> Allstate filed a motion to dismiss but requests that the Court alternatively approach the motion as a motion for summary judgment. Plaintiffs assert that discovery has not yet taken place in this case, and that although sufficient evidence currently supports Plaintiffs' claims, additional discovery would further substantiate those claims.

<sup>6/</sup> According to Plaintiffs, Plaintiffs sued the City of Grove, requesting return of the van on September 28, 1995. At a hearing on October 12, 1995, the Ottawa County District Attorney requested a continuance to permit the filing of additional pleadings. On October 18, 1995, he filed the interpleader action.

the Plaintiffs,<sup>71</sup> prior to the release of the van to Allstate by the state, or prior to the final determination (approximately one year later) of the ownership of the van in the state court.

**(b) Allstate as a State Actor**

Allstate additionally argues that it cannot be liable under § 1983 because it is not a state actor. Plaintiffs assert that the record contains sufficient evidence to reasonably infer that Allstate falsely reported the van as "stolen" as a pretext to seize the van, was involved in the unauthorized seizure of the van, improperly took and retained the van for over one year and engaged in a protracted "due process" litigation for "pre-textual" purposes.

Plaintiffs note that the officers who confronted the Freemans at the Freemans' residence each knew of the facts surrounding the van and that Allstate "owned" the van and had paid Vaden \$10,000 on her claim. Plaintiffs submitted an affidavit by Mr. Freeman. See Exhibits to the Freemans' Response Opposing Allstate's Motion to Dismiss and Brief in Support, filed January 9, 1998, Exhibit 4. Plaintiffs additionally refer to a document requesting the "legal registered owner" of the van submitted by Allstate to the Oklahoma Tax Commission on August 7, 1995, with "please Rush!!" written on it. Plaintiffs suggest that this indicates that Allstate realized something suspicious with respect to the title by this date and requested information on the "legal" owner of the van prior to the van being seized by the police. See Document,

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<sup>71</sup> One possibility which is not discussed in detail by the parties is whether or not the police officers should have taken the time to obtain a warrant prior to seizing the van.

Exhibit 13, Supplemental Exhibits to Reply of Defendant Allstate to the Freemans' Response Opposing Allstate's Motion to Dismiss and Brief in Support, February 3, 1998, page 39. This same document with additional handwriting stating "Also advise who current owner is" is included in Exhibit 13. Plaintiff additionally refers to a document from "Sapulpa Auto Pool." The document is dated September 15, 1995, refers to the "insured" as "Vaden," the "company" as "Allstate," and under "pick up" lists "unrecovered theft." See Document, Exhibit 13, Supplemental Exhibits to Reply of Defendant Allstate to the Freemans' Response Opposing Allstate's Motion to Dismiss and Brief in Support, February 3, 1998, page 20. Plaintiffs argue that this document indicates that at least two weeks before the van was impounded, Allstate had knowledge of the van as an "unrecovered theft" and was making arrangements to pick up the van. At oral argument, Allstate's attorney stated that he believed that the date of "September 15" was probably a typographical error and that it should reflect "September 25." Allstate's attorney's argument underscores the need for additional discovery in this case. The Court cannot, on a motion to dismiss or a motion for summary judgment, consider the representations of what an attorney believes will be a fact in the case. Affidavits are properly submitted matters for consideration by the Court. Representations by counsel of what he believes the facts will be are not evidence.

Plaintiffs refer the Court to Coleman v. Turpen, 697 F.2d 1341 (10th Cir. 1982). In Coleman, the sheriff's department hired Kiefer Wrecker Service to tow and store a camper. The owner of the camper, Mr. Coleman, was convicted of murder and

sentenced to death. At some time after the murder trial Kiefer sold the camper (valued at \$8,000) for \$600 to satisfy the sheriff department's storage bill. The sale was made without notice to Mr. Coleman. Coleman brought a section 1983 action against the sheriff and Kiefer. The district court dismissed the case as frivolous. The Tenth Circuit Court of Appeals reversed.

Kiefer's sale of the property was an integral part of the deprivation: it transformed a temporary seizure into a permanent divestment. Nevertheless, the district court found that because Kiefer's sale of the camper and tools was not under color of law, Mr. Coleman had no remedy against Kiefer under section 1983. We disagree. In Lugar v. Edmondson Oil Co., 457 U.S. 922, (1982), the Supreme Court held that activities satisfying the state action requirement of the fourteenth amendment satisfy the "under color of law" requirement of section 1983. The Court enunciated a two-part test for the existence of state action: "First, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state .... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he ... has acted together with or has obtained significant aid from state officials .... " 102 S. Ct. at 2754. The State, in enacting section 7-210, created the right exercised by Kiefer when it sold the truck. Thus, the sale satisfied the first part of the Lugar test. Id. at 2755. In applying the second part, the Court in Lugar stated that "a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." Id. at 2756. Kiefer jointly participated in seizing the truck by towing it away. Since the State has asserted a right to maintain possession of the camper, Kiefer held the truck for the State, not for Mr. Coleman. In allowing Kiefer to sell the camper, the State thus deprived Mr. Coleman of his property in joint participation with Kiefer. We hold that Kiefer's sale of the camper was state

action under the fourteenth amendment and was therefore under color of state law for purposes of section 1983.

Coleman, 697 F.2d 1341 at 1345.

Plaintiffs argue that a reasonable inference that Allstate acted as a state actor can be drawn based on the fact that the police knew all of the "Allstate facts" while the police were impounding the vehicle, and based on two documents indicating that Allstate requested a "rush" on title information on the van and that Allstate had contact with Sapulpa Auto Pool approximately two weeks before the van was impounded. The Court has reviewed the documents and the affidavits and concludes that based on the information submitted thus far, a reasonable conclusion could be drawn that Allstate was acting as a "state actor."

In addition, in accordance with Coleman, arguably, the deprivation was caused by the exercise of a right or privilege created by the state or by a rule of conduct imposed by the state. Plaintiffs argue that Allstate, through the police, impounded Plaintiffs' van pursuant to state statute, and that Allstate took possession of the van and "held" it at Sapulpa Auto Pool. In addition, arguably Allstate was a state actor. Plaintiff argues that Allstate "acted together with or . . . obtained significant aid from state officials . . . ." Coleman, 697 F.2d 1341 at 1345. The Magistrate Judge recommends that Allstate's Motion to Dismiss Plaintiffs' Section 1983 claim be denied.

## **C. STATE CAUSES OF ACTION AGAINST ALLSTATE**

### **1. Jurisdiction Over State Causes of Action**

Allstate asserts that the Court has subject matter jurisdiction solely due to the § 1983 claim. Allstate asserts that the Court should dismiss Plaintiffs' remaining state claims because the § 1983 claim should be dismissed. However, as noted above, the Magistrate Judge recommends that the § 1983 claim should not be dismissed. Therefore, the remaining state causes of action should not be dismissed based solely on this reason. Allstate additionally asserts that the state law claims predominate, and the Court should dismiss them on that basis. However, due to the interrelatedness of these issues, the Magistrate Judge recommends that the District Court retain the supplemental state claims.

### **2. Conversion Action & Injury to Personal Property**

Allstate asserts that the state court interpleader action bars the further re-litigation of the issues of conversion and injury to personal property. As discussed above, the state court action determined ownership of the van, but in a very limited proceeding. Other claims have not been fully adjudicated. Plaintiffs action for conversion could address whether or not Allstate wrongfully obtained possession of the van on September 27, 1995 and wrongfully declined to release the van. Plaintiffs action for damage involves whether or not the vehicle was damaged while it was in Allstate's possession, and any out-of-pocket losses incurred by Plaintiffs. The Magistrate Judge recommends that the District Court **deny** the motion to dismiss the claim of conversion and injury to personal property.

### 3. Malicious Prosecution/Abuse of Process

Allstate notes that malicious prosecution actions are not favored by the court and that they require five elements. The elements include: (1) the bringing of the original action by defendant; (2) its successful termination in plaintiff's favor; (3) want of probable cause to join the plaintiff; (4) malice, and (5) damages. See Young v. First State Bank, Watonga, 628 P.2d 707 (Okla. 1981). Allstate asserts that the first, third, and fourth elements are not met.

Allstate specifically asserts that the third element is not present (want of probable cause to join Plaintiff), and that Plaintiff's were properly joined in the interpleader action because Plaintiff's had a claim to the vehicle in question. In Young, the court noted:

Probable cause for an action does not mean legal cause. If it did, every plaintiff who failed to recover in his lawsuit could be liable to an action for malicious prosecution. Probable cause has been defined as reasonable cause that of an honest suspicion or belief on the part of the instigator thereof, founded upon facts sufficiently strong to warrant the average person in believing the charge to be true.

Young, 628 P.2d at 710 (citations omitted).

Plaintiff was joined in the interpleader action in state court, and a judgment was entered in favor of Plaintiff in that action. Plaintiff does not assert how the element of "lack of probable cause" is met. The Magistrate Judge concludes that Plaintiff cannot establish this third element, and recommends that Plaintiff's cause of action for malicious prosecution be **DISMISSED**.

Plaintiff additionally asserts a claim against Allstate for abuse of process. Allstate notes that the elements of an abuse of process claim include: (1) the improper use of the Court's process, (2) primarily for ulterior or improper purposes, (3) with resulting damage to the Plaintiff asserting the misuse. Greenberg v. Wolfberg, 890 P.2d 895, 905 (Okla. 1994) (emphasis in original).

Plaintiff asserts that "Allstate had no basis for telling its insured to report as 'stolen' a vehicle which was sold and title given, simply because the seller, its insured, accepted a bad check; nor did not have [sic] any basis for litigating the declaratory judgment action by asserting frivolous defenses so that it could keep the Freemans from obtaining possession of their property." See Plaintiff's Response Opposing Allstate's Motion to Dismiss and Brief in Support, filed January 9, 1998, [Doc. No. 20-1] at 23-24.

The tort of "abuse of process" requires the use/abuse of the judicial process. Plaintiff's assertion that Allstate improperly requested that the insured report the vehicle as stolen is not related to the use of judicial process and therefore does not support Plaintiff's claim.

Plaintiff's other argument is that Allstate had no basis for "litigating" the interpleader action by asserting "frivolous defenses." Neither party devotes more than a few paragraphs in their briefs to this argument.

The quintessence of abuse of process is "not the wrongfulness of the prosecution, but some extortionate perversion of lawfully initiated process to illegitimate ends." The tort's elements are (1) the improper use of the court's process [FN47] (2) primarily for an ulterior or improper

purpose (3) with resulting damage to the plaintiff asserting the misuse. Although a plaintiff in a predicate action may have been motivated by bad intention, there is no abuse if the court's process is used legitimately to its authorized conclusion. The party who asserts the abuse-of-process claim is not required to prove (1) the underlying action was brought without probable cause or (2) that he/she prevailed in that proceeding. Neither is it necessary that the action, in which the abuse is alleged to have occurred, be concluded.

FN47. The word "process", as used in the tort of "abuse of process", encompasses the entire range of procedures incident to the litigation process. See Nienstedt v. Wetzel, 133 Ariz. 348, 651 P.2d 876, 880 (1982).

Greenberg v. Wolfberg, 890 P.2d895, 905 (Okla. 1994).

Plaintiffs asserts that Allstate improperly filed frivolous defenses in the interpleader action with the ulterior purpose of preventing Plaintiffs from obtaining possession of the property. Allstate asserts only that Plaintiffs were appropriate parties in the interpleader action and that Allstate asserted a legitimate claim. Based on the arguments of the parties the Magistrate Judge recommends that, at this stage of the litigation, the District Court **DENY** Allstate's Motion to dismiss Plaintiffs' abuse of process claim.

#### 4. Invasion and Unreasonable Intrusion

Allstate asserts that Plaintiffs' cause of action is based solely on the issues in the interpleader action and therefore barred because this cause of action was not asserted in the interpleader action. This argument has been previously addressed.

Allstate additionally asserts that Plaintiffs cannot meet the elements of this cause of action. Allstate notes that none of its actions can be classified as an unreasonable intrusion, that although Oklahoma recognizes an "invasion of privacy" tort, the act must be "highly-offensive-to-a-reasonable-person." Allstate asserts that none of their actions can be asserted to have met this test. The determination of Allstate's arguments require factual determinations which are inappropriate at this stage of the litigation. The Magistrate Judge recommends that the District Court **DENY** Allstate's Motion to Dismiss this cause of action.

#### 5. Intentional Infliction of Emotional Distress

Allstate asserts that a cause of action for intentional infliction of emotional distress must be based on conduct which is "so outrageous in character, and extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as utterly atrocious, and utterly intolerable in a civilized community." Breeden v. League Services Corp., 575 P.2d 1374, 1376 (Okla. 1978). The court must determine if the complained of conduct is sufficiently outrageous and the emotional distress sufficiently severe before the issues are tried. Id. at 1377.

Plaintiffs assert that Allstate's conduct is a classic example of conduct sufficient to meet this tort. At this stage of the litigation, when Plaintiff has not yet begun discovery, the Magistrate Judge concludes that the Motion to Dismiss should be **DENIED**. Allstate may, if the facts as they develop support it, re-urge this Motion.

#### 6. Prima Facie Tort

Allstate notes that this tort theory is limited and derives initially from an article in the Oklahoma Bar Journal. Allstate devotes four pages in its brief to discussing each Oklahoma case which has addressed prima facie tort and the requirements that have developed for such a cause of action. Allstate summarizes by explaining that the tort is available solely for the intentional interference with a person's business or professional relations and that the conduct complained of must have, as its sole purpose, a specific, malicious, malevolent motive. If the "primary object" is not to injure the plaintiff, than an action for prima facie tort is not met.

Plaintiffs do not respond to Allstate's arguments. The Magistrate Judge recommends that the District Court **GRANT** Allstate's Motion to Dismiss Plaintiffs' prima facie tort claim.

### **CONCLUSION**

The United States Magistrate Judge recommends that Defendant City of Grove's Motions to Dismiss be **Granted** [Doc. No.5-1, 5-2, 16-1]. Plaintiff's state tort law claims should be dismissed, but Plaintiff's Section 1983 claims should remain. The United States Magistrate Judge recommends that Defendant City of Commerce's Motion to Dismiss be **Granted in part and Denied in part**. Plaintiff's state tort law claims against Defendant should be dismissed. Plaintiff's Section 1983 claim(s) were not challenged by the motion should remain. [Doc. No. 15-1].

The United States Magistrate Judge recommends that the District Court **Grant** Defendant Oklahoma Highway Patrol's Motion to Dismiss. [Doc. No. 37-1]. In

addition, the Magistrate Judge hereby **Denies** without prejudice to Defendant later asserting particular claims of privilege, Defendant's Motion for Protective Order and Motion for Stay. [Doc. Nos. 38-1, 38-2].

The United States Magistrate Judge recommends that Allstate's Motion to Dismiss should be **Granted in Part and Denied in Part**. The Motion to Dismiss the § 1983 claim, the conversion and injury to personal property claim, the abuse of process claim, the invasion and unreasonable intrusion claim, and the intentional infliction of emotional distress claim, should be **Denied**. The Motion to Dismiss the malicious prosecution and the prima facie tort claims should be **Granted**. [Doc. No. 7-1].

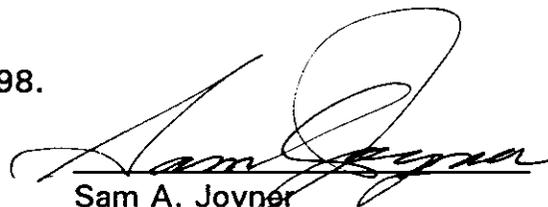
#### **OBJECTIONS**

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b).

The failure to file written objections to this report and recommendation may bar the party failing to object from appealing any of the factual or legal findings in this report and recommendation that are ultimately accepted or adopted by the district

court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 28 day of May 1998.

A handwritten signature in black ink, appearing to read "Sam A. Joyner", written over a horizontal line.

Sam A. Joyner  
United States Magistrate Judge



amount of \$87.00, plus interest thereafter at the rate of 3 percent per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 4.34 percent per annum until paid, plus costs of this action.

A handwritten signature in cursive script, appearing to read "Jerry T. ...".  
United States District Judge

Submitted By:

A handwritten signature in cursive script, appearing to read "Loretta F. Radford".  
LORETTA F. RADFORD, OEA # 11158  
Assistant United States Attorney  
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LFR/sba





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

IN RE:

OKLAHOMA PLAZA INVESTORS,

Debtor,

OKLAHOMA PLAZA INVESTORS, LTD.,

Appellant,

vs.

WAL-MART STORES, INC.,

Appellee.

Case No. 97-CV-607-E(M) ✓

Adv. No. 90-151-C

Bk. No. 89-1236-C

**FILED**

MAY 27 1998

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

ENTERED ON DOCKET

DATE MAY 28 1998

REPORT AND RECOMMENDATION

The instant appeal from the United States Bankruptcy Court for the Northern District of Oklahoma is before the undersigned United States Magistrate Judge for report and recommendation. The appeal has been fully briefed and the parties presented argument in a hearing held December 9, 1997.

Debtor, Oklahoma Plaza Investors, Ltd. ("Oklahoma Plaza") appeals from the order of the Bankruptcy Court, Stephen J. Covey, J., finding that Wal-Mart did not breach its lease with Oklahoma Plaza when it ceased operating a retail store in the subject premises. For the reasons hereafter discussed, the undersigned United States Magistrate Judge RECOMMENDS that the decision of the Bankruptcy Court be AFFIRMED.

## JURISDICTION AND STANDARD OF REVIEW

The District Court has jurisdiction over this appeal under 28 U.S.C. § 158. The Bankruptcy Court's legal conclusions are subject to *de novo* review. *Phillips v. White (In re White)*, 25 F.3rd 931, 933 (10th Cir. 1994). The Bankruptcy Court's findings of fact are reviewed under the "clearly erroneous" standard. *Bartmann v. Maverick Tube Corp.*, 853 F.2d 1540 (10th Cir. 1988).

## PROCEDURAL HISTORY AND FACTS

On May 6, 1977, Oklahoma Plaza's predecessor and Wal-Mart entered into a 20 year lease at Rolling Hills Shopping Center in Catoosa, Oklahoma. Under the terms of the lease, Wal-Mart paid rent of an annual base amount of \$59,400 plus an additional amount depending on the store's gross sales. The lease contained a "Use of Premises" clause, which stated:

It is understood and agreed that the demised premises being leased will be used by the Lessee [Wal-Mart] in the operation of a discount store, but Lessor [Oklahoma Plaza] agrees the store may be used for any lawful purpose other than the operation of a supermarket. . .

The lease also included a "Default Clause" which provided:

If the demised premises shall be deserted for a period of 30 days, or if Lessee shall be adjudicated a bankrupt, or if a trustee or receiver of Lessee's property be appointed, or if Lessee shall make an assignment of the benefit of creditors, or if default shall at any time be made by Lessee in the payment of rent reserved herein, or any installment thereof for more than 10 days after written notice of such default by the Lessor, or if there shall be default in the performance of any other covenant, agreement, condition, rule or regulation herein contained or hereafter established on the part of the Lessee for 30 days after written notice of such

default by the Lessor . . . . In such case, the Lessor may, at its option, relet the demised premises . . .

In December 1988 Wal-Mart closed its store at the Rolling Hills location but continued to meet the financial obligations imposed by the lease: payment of rent, taxes, insurance, utilities, and maintenance. Oklahoma Plaza, a debtor in bankruptcy, filed an adversary action in Bankruptcy Court alleging: (1) breach of express provisions of the lease; (2) breach of an implied covenant of continuous operation; and (3) tortious breach of contract. The Bankruptcy Court, Stephen J. Covey, J., found that the terms of the lease were unambiguous and that by ceasing operations at the site, Wal-Mart had deserted the premises in violation of the Default Clause. Damages for Wal-Mart's breach of the lease were set at \$131,096.

Wal-Mart appealed the decision to the district court. The Court found that the term "deserted" was not unambiguous within the context of the lease and remanded the case to the Bankruptcy Court for an examination of extrinsic evidence as to the intended meaning of the term "deserted," the Use of Premises Clause, and for re-examination of whether Wal-Mart breached the lease, in light of the extrinsic evidence.

On remand, the Bankruptcy Court conducted an evidentiary hearing, taking testimony from expert witnesses and the parties who actually negotiated the lease. The Court found that the evidence adduced at the hearing established the following by a preponderance of the evidence:

1. That the Use of Premises clause did not impose upon Wal-Mart a continuous operations obligation. The Use of Premises clause merely delineated the uses to which the demised premises could be put. [emphasis in original]

2. That it was and is very unusual for a lease to contain a continuous operations clause and that if this was the intention of the parties, it would have been clearly delineated in the lease in a separate paragraph.

3. That Wal-Mart never did enter into a lease containing a continuous operations clause and King and Latch<sup>1</sup> understood this. [footnote added].

4. That Wal-Mart did not "desert" the premises when it ceased operating a retail store because it continued paying base rent, taxes, insurance and common area maintenance costs.

[R. 300, p. 2] Based upon the foregoing findings of fact, the Bankruptcy Court determined that Wal-Mart did not breach the lease when it ceased operating a retail store on the subject premises. *Id.*

#### DISCUSSION

Oklahoma Plaza asks this Court to consider whether on remand the Bankruptcy Court erred in its determination concerning the meaning of the subject lease provisions and the consequent reversal of its earlier decision granting relief to Oklahoma Plaza.<sup>2</sup> Oklahoma Plaza maintains that the subject lease was a Wal-Mart form lease and Wal-Mart is responsible for any ambiguity in its terms. It argues that the lease was not

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<sup>1</sup> Latch was the owner of the property, King was the owner's agent who negotiated and executed the lease for the owner.

<sup>2</sup> In its Order filed May 21, 1992, the Bankruptcy Court awarded Oklahoma Plaza \$31,096.00 for water damage to the building caused by bursting pipes. That issue was not addressed in the first appeal, on remand, or in the subject bankruptcy order. Oklahoma Plaza argues that the Bankruptcy Order should be modified to include an order for these damages. At the hearing, Wal-Mart represented it had no objection to that award, acknowledged that it owed the amount and assured the Court the debt would be satisfied. In view of these representations, the substance of that issue is not addressed in this report, although it is recommended that the Court require Wal-Mart to consent to judgment or the case be remanded for entry of judgment in the amount of \$31,096.00.

ambiguous; that its terms clearly required Wal-Mart to operate a discount store on the premises for the full term of the lease; and that case law supports such a construction of the lease. Oklahoma Plaza also argues that the Bankruptcy Court's findings of fact and conclusions of law are inadequate under the requirements of Fed.R.Civ.P. 52(a).

The question whether the lease terms were ambiguous was determined by the district court in the previous appeal. That question was not before the Bankruptcy Court on remand, nor is it before this court. On remand the Bankruptcy Court was charged with examining extrinsic evidence to make factual determinations as to the parties intentions upon entering into the lease.

An examination of the record reveals that no one connected with the negotiation or execution of the lease intended that Wal-Mart be saddled with an obligation to operate a store on the leased premises for the twenty-year term of the lease. In response to direct questioning by the Bankruptcy Court, Mr. King testified to his understanding of the term "deserted" as used in the lease:

[D]esertion to me means turn your back on the project and – you know, maybe I'm looking at this wrong, but when I think of desertion I think of somebody that stops their economic requirements, their monetary requirements.

\* \* \*

I would say that desertion in a lease ties to the monetary standards of the lease. . . . Not the physical.

\* \* \*

[M]aybe desertion is a poor choice of words, but desertion to me means that you stop paying the economic part of it, not that you close the store up.

[R. 310, p. 175-179]. The Bankruptcy Court's factual findings are supported by the testimony introduced at the hearing following remand and should therefore be affirmed.

Oklahoma Plaza argues that the decision should be remanded because the Bankruptcy Court's Memorandum Opinion on Remand fails to adequately set forth its findings of fact and conclusions of law as required by Fed.R.Civ.P. 52(a). This Court finds that the Bankruptcy Court clearly set forth the requisite factual findings and legal conclusions in its Memorandum Order.

The conclusion that Wal-Mart did not breach the lease obviates the necessity of considering Oklahoma Plaza's arguments concerning its tortious breach of contract claim.

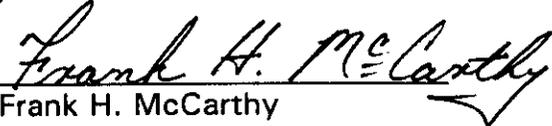
#### **CONCLUSION**

The undersigned United States Magistrate Judge RECOMMENDS that the decision of the Bankruptcy Court finding that Wal-Mart did not breach the lease with Debtor when it ceased operating a retail store on the subject premises be AFFIRMED on the condition that Wal-Mart consent to entry of judgment against it in the amount of \$31,096.00 for water damage as previously awarded by the Bankruptcy Court.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and

recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 27<sup>th</sup> Day of May 1998.

  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE

**CERTIFICATE OF SERVICE**

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

28 Day of May, 1998.  


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

**FILED**

MAY 27 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CHARLES WAGNON and )  
LORALEE WAGNON, husband and wife, )

Plaintiffs, )

vs. )

STATE FARM FIRE AND CASUALTY )  
COMPANY, )

Defendant. )

No. 94-C-972-B ✓

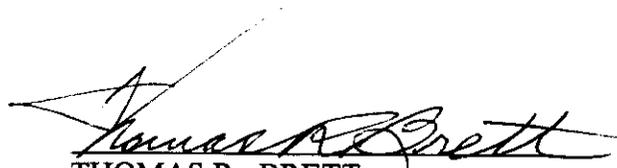
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DATE MAY 28 1998

**JUDGMENT**

In accord with the Order and Judgment of the Court of Appeals for the Tenth Circuit filed May 21, 1998, the previous judgment of this Court filed on November 2, 1995 is set aside and withdrawn. Judgment is hereby entered in favor of the defendant State Farm Fire and Casualty Company and against the plaintiffs, Charles Wagon and Lorelee Wagon. Plaintiffs' claims are hereby dismissed. Costs are assessed against the plaintiffs, as well as attorneys' fees, if timely applied for pursuant to Local Rules 54.1 and 54.2.

Dated, this 27<sup>th</sup> day of May, 1998.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE



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

ENTERED ON DOCKET

DATE 5-28-98

LOU ANN KILLION, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DELAWARE COUNTY FRIENDSHIP )  
 HOMES, INC., )  
 )  
 Defendant. )

No. 97-C-476-K

**F I L E D**

MAY 27 1998 *P*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

O R D E R

Before the Court is the motion of the defendant for summary judgment. Plaintiff brings this action pursuant to Title VII, alleging she was subjected to sexual harassment while employed by defendant and that she was wrongfully terminated in retaliation for complaining about the alleged sexual harassment.

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).

The parties have not made clear the nature of defendant's

business, although it appears to be some sort of vocational training center. In any event, plaintiff began working as a "habilitation training specialist" in December, 1994. After about three weeks on the job, she was promoted to the position of secretary to Al Knox, Vocational Services Director for defendant. Another employee, Ted Knight, began looking at plaintiff in what plaintiff perceived as an inappropriate manner. Knight told plaintiff at a training class that he wanted plaintiff to work for him because she was so "efficient". After the training class, Knight called plaintiff at work several times over a six-day period. Knight told plaintiff she had a sexy voice and "we have to stop meeting like this." On February 16, 1995, Knight called and asked plaintiff if she was married, and if so, whether it "made any difference" to her. Before February 16, 1995, plaintiff never told Knight his comments were unwelcome.

After the February 16 phone call, plaintiff went to her supervisor, Al Knox. Within twenty-five minutes, Knox set up a meeting between Knox, plaintiff, and Knight. Plaintiff's concerns were discussed and Knight apologized. After this meeting, neither Knight nor any other of defendant's employees ever did or said anything to plaintiff which she considered to be sexual harassment.

In March, 1995, another of defendant's employees, Ron Riggs, resigned his position. Plaintiff was instructed by her supervisor to take over some of Riggs' job duties, which were in the "recycling area". These additional duties including keeping the books, writing checks and balancing the cash box, as well as

keeping track of inventory and doing reports. Riggs' remaining job duties were distributed to other employees of the defendant.

Plaintiff began complaining about her additional job duties soon after they were assigned to her. She was relieved of some of the duties, but wrote a memo to Knox which advised that she would no longer be responsible for the cash box. Plaintiff was then relieved of the responsibility for the cash box. At the end of her six-month probationary period as a new employee, plaintiff received a \$.25 per hour raise, which she felt was not enough. Before she was fired, plaintiff told Knox that she refused to do the "recycling books" any more. Knox responded that by her refusal, plaintiff was being insubordinate. Plaintiff remained unwilling to do the recycling books, and was terminated July 21, 1995 for being insubordinate. The person who took over the recycling books task from plaintiff testified that the job took her less than thirty minutes per day to perform.

To make out a prima facie case of hostile work environment sexual harassment under Title VII, a plaintiff must prove: (1) she is a member of a protected group; (2) she was subject to unwelcome harassment; (3) the harassment was based on sex; and (4) the harassment altered a term, condition, or privilege of the plaintiff's employment and created an abusive working environment. Seymore v. Shawver & Sons, Inc., 111 F.3d 794, 797 (10th Cir.), cert. denied, 118 S.Ct. 342 (1997). Further, plaintiff must show some basis for imputing liability to the employer. Id. The unwelcome, sexually-oriented conduct must be "sufficiently severe

or pervasive" to alter the terms or conditions of employment. Sprague v. Thorn Americas, Inc., 129 F.3d 1355, 1365 (10th Cir.1997).

The Court concludes plaintiff has failed in her burden. The incidents involving Knight ceased once plaintiff reported them. As they stand, the incidents were not sufficiently pervasive or severe so as to alter the conditions of plaintiff's employment. See Creamer v. Laidlaw Transit, Inc., 86 F.3d 167, 170 (10th Cir.), cert. denied, 117 S.Ct. 437 (1996). To the extent plaintiff argues that the additional job duties she was assigned constitute the hostile work environment, again the Court disagrees. The undisputed facts demonstrate that the "recycling books"--which plaintiff refused to do--took less than 30 minutes per day to perform. Summary judgment is appropriate.

Regarding plaintiff's claim of retaliation, a prima facie case is established by proving (1) protected opposition to Title VII discrimination or participation in a Title VII proceeding; (2) adverse action by the employer subsequent to or contemporaneous with such employee activity; and (3) a causal connection between such activity and the employer's adverse action. Berry v. Stevinson Chevrolet, 74 F.3d 980, 985 (10th Cir.1996). Again, the Court finds that plaintiff has failed in her initial burden. The "additional duties" took less than 30 minutes per day to perform. As a district court stated under roughly similar facts: "The court is of the opinion that no reasonable juror could conclude that these actions should be construed as 'adverse employment actions'

sufficient to support a claim of retaliation." Watts v. Kroger Co., 955 F.Supp. 674, 687 (N.D.Miss.1997).

Defendant also argues that plaintiff has failed to demonstrate a causal connection between the alleged protected Title VII activity and the alleged adverse employment action. However, the Court finds that the time period of less than two months is sufficient to draw an inference of causation, viewing the record in the light most favorable to plaintiff. Admittedly, the inference is weak, since defendant had no control over the timing of the Riggs resignation.

Assuming arguendo that plaintiff has established a prima facie case of retaliation, defendant has set forth a legitimate nondiscriminatory reason for the discharge, namely insubordination. Under the burden-shifting scheme first announced in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the burden then reverts to plaintiff to show that defendant's proffered reason was not the true reason for the employment decision. Plaintiff could meet this burden "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). Defendant argues that a showing of pretext alone is insufficient to survive summary judgment. This is incorrect. A showing of pretext, in itself, is all that is required to raise the inference of discriminatory intent. No additional showing of actual discriminatory animus is necessary.

See Randle v. City of Aurora, 69 F.3d 441, 451-52 & n.17 (10th Cir.1995) (rejecting pretext-plus standard).

However, even under the appropriate standard, the Court concludes that the defendant is entitled to summary judgment. Plaintiff has offered no evidence, aside from her own opinion, that she was terminated for any reason other than her refusal to perform her assigned work duties. Plaintiff did testify in deposition that her supervisor Knox told her that, according to Director Kathryn Cearley, plaintiff was only receiving a \$.25 an hour raise because of her complaint about Knight. This alleged incident does not relate to plaintiff's discharge, which was at the behest of Knox rather than Cearley, and plaintiff has presented no further evidence on the point. Insufficient evidence of pretext has been presented.

It is the Order of the Court that the motion of the defendant for summary judgment (#6) is hereby GRANTED.

ORDERED this 26 day of May, 1998.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

DATE 5-28-98

IN THE UNITED STATES COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

BETTY F. CASH,

Plaintiff,

vs.

HAROLD CASH, JR.,

Defendant.

**FILED**

MAY 28 1998

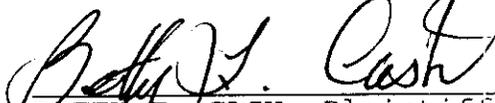
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 97-C-771-H

**STIPULATION OF DISMISSAL**

COME now the Plaintiff and Defendant and pursuant to Rule 41(a) Federal Rules of Civil Procedure, stipulate to the Plaintiff's dismissal without prejudice of the action above styled and numbered.

DATED this 27<sup>th</sup> day of May, 1998.

  
BETTY F. CASH, Plaintiff

  
PAUL E. BLEVINS, OBA #883  
Attorney for Plaintiff

HAROLD CASH, JR., Defendant

  
LINDA COLE MCGOWAN, OBA #5996  
Attorney for Defendant

*AR*

*8*

*CJ*



ENTERED ON DOCKET

DATE 5-28-98

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

THRIFTY RENT-A-CAR SYSTEM, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 WESTERN GIANT ENTERP., et al. )  
 )  
 Defendants. )

No. 97-C-1092-K

FILE  
MAY 27 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

A default judgment has been entered against the individual defendant and the corporate defendant has filed for bankruptcy protection. 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 26 day of May, 1998.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

12

ENTERED ON DOCKET

DATE 5-28-98

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

MACK OWENS, a/k/a JOHNNY DARK, )

Plaintiff, )

vs. )

Case No. 97 CV 685K(J)

TRUTH PUBLISHING COMPANY, an )

Indiana Corporation, d/b/a Federated )

Media, d/b/a/ KQLL Radio, )

Defendants. )

**F I L E D**

MAY 27 1998

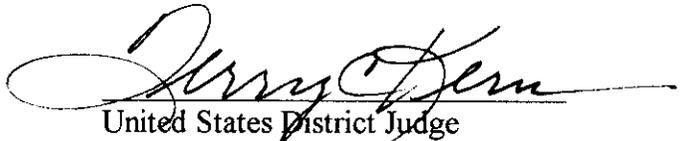
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER OF DISMISSAL**

Upon the joint stipulation and agreement of the parties,

IT IS HEREBY ORDERED that this case is dismissed with prejudice and that

each party will bear its own costs, expenses and attorneys' fees.

  
United States District Judge

Submitted By:

David E. Strecker, OBA #8687

James E. Erwin, OBA #17615

1600 NationsBank Center

15 W. Sixth Street

Tulsa, Oklahoma 74119

Phone: (918) 582-1716

Fax: (918) 582-1780

DATE 5-28-98IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA**FILED**

MAY 27 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMAJASON LANCE SULLIVENT,  
Petitioner,

vs.

Case No. 96-CV-1140-K

H.N. "SONNY" SCOTT,  
Respondent.**REPORT AND RECOMMENDATION**

Petitioner, Jason Lance Sullivent, an Oklahoma state inmate, seeks habeas corpus relief pursuant to 28 U.S.C. § 2254 alleging his right to appeal his conviction of a 1988 Tulsa County murder was hindered because of ineffective assistance of counsel and that his conviction was improperly influenced by erroneous jury instructions. The Respondent seeks dismissal of this PETITION FOR HABEAS CORPUS claiming Petitioner's claims are procedurally barred from Federal court review. The matter has been referred to the undersigned United States Magistrate Judge for report and recommendation.

For reasons stated below, the undersigned United States Magistrate Judge RECOMMENDS that the petition for habeas corpus be DISMISSED.

**BACKGROUND**

The Petitioner was convicted of first degree murder in Tulsa County Case No. CFR-87-4399 in November 1988. He was sentenced to life imprisonment in December 1988. Petitioner did not appeal his conviction. However, he asserts no appeal was filed because his counsel, without input from Petitioner, made the decision not to

pursue an appeal. Petitioner also claimed that his counsel gave notice of appeal at the time of sentencing and he believed an appeal was being filed.

Petitioner applied for state post-conviction relief in January 1996 claiming ineffective assistance of counsel, failure of the state to establish intent, and abuse of the presiding judge's discretion in promulgating jury instructions. The Tulsa County Court denied the petitioner's application in February 1996. [Dkt. 4, Ex. A]. The Court held that the Petitioner's counsel acted as a reasonably competent attorney under the facts and circumstances, and concluded that Petitioner's lack of appeal effectively waived any remaining issues. *Id.* The Oklahoma Court of Criminal Appeals, noting there were no findings made as to the Petitioner's claim that he believed his counsel was going to pursue an appeal, remanded the case for determination of whether Petitioner was denied a direct appeal through no fault of his own. [Dkt. 4, Ex. D].

On remand the Tulsa County Court reviewed the sentencing transcript and an affidavit submitted by Petitioner's counsel. The affidavit stated that the advisability of an appeal was reviewed with the Petitioner and Petitioner's family, and a decision was made by all parties not to pursue an appeal. [Dkt. 4, Ex. F]. The trial court denied post-conviction relief, finding that "Petitioner's claim that he was denied an appeal through no fault of his own is without basis in fact or in law." [Dkt. 4, Ex. E, p. 4]. The denial was affirmed by the Oklahoma Court of Criminal Appeals which found, "the law and the evidence support the findings of the District Court." [Dkt. 4, Ex. G, p. 4].

## DISCUSSION

As a preliminary matter, the Court finds that Petitioner has met the exhaustion requirements of 28 U.S.C. § 2254. The Court further finds that an evidentiary hearing is not necessary as the issues can be resolved on the record. *Townsend v. Sain*, 372 U.S. 293 (1963).

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the last state court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 2565, 115 L.Ed. 2d 640 (1991).

The Tulsa County Court denied the Petitioner's application for post-conviction relief because the issues of error raised could have been raised during trial or on appeal, and under Oklahoma law, *Johnson v. State*, 823 P.2d 370 (Okla. Crim. App. 1991), 22 Okla. Stat. §§ 1080, 1086, failure to assert the issues precludes their being raised by an application for post-conviction relief. In addition, it found as a matter of fact and law that the Petitioner was not denied an opportunity to perfect an appeal, and that he was adequately represented by counsel. [Dkt. 4, Ex. A, Ex. E]. The Court of Criminal Appeals affirmed, finding that Petitioner had not asserted sufficient reasons for his failure to comply with the procedural prerequisites to appeal, and thus has failed

to show that he is entitled to any relief in a post-conviction proceeding. [Dkt. 4, Ex. G].

If a state prisoner fails to meet a state procedural requirement, and the last state court to address the matter refuses, or would refuse, to address the merits of the claims because of the procedural default, the claims are procedurally barred in federal habeas proceedings. The state judgment rests on independent and adequate state procedural grounds. "On habeas review, we do not address issues that have been defaulted in state court on an independent and adequate state procedural ground, unless cause and prejudice or a fundamental miscarriage of justice is shown." *Steele v. Young*, 11 F.3d 1518, 1521 (10th Cir. 1993).

Petitioner has defaulted in state court on an independent and adequate state procedural ground. Therefore the Court must determine whether cause and prejudice or a fundamental miscarriage of justice is shown. The Court concludes that Petitioner has shown neither cause for his state default nor a fundamental miscarriage of justice.

"Cause" must be "something external to the petitioner, something that cannot fairly be attributed to him . . . ." *Coleman*, 501 U.S. at 753, 111 S.Ct. at 2566. Petitioner asserts that the "cause" for his default was his attorney not filing his direct appeal without Petitioner's knowledge or approval. The Oklahoma Court of Criminal Appeals affirmed the trial court's finding that "Petitioner's claim that he was denied an appeal through no fault of his own is without basis either in fact or in law." [Dkt. 4, Ex. E, p. 4]. The Appeals Court found "the law and the evidence support the findings of the District Court." [Dkt. 4, Ex. G, p. 4]. The Oklahoma courts thus have

specifically resolved the factual issue of the "cause" for Petitioner's default. The resolution of that factual question may only be revisited by this Court if rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1) (a determination of a factual issue made by a State court shall be presumed to be correct, unless rebutted by clear and convincing evidence). Petitioner has failed to make such a showing and this Court, therefore, presumes this finding of fact to be correct.

Petitioner contends, however, that the procedural bar should be excused because failure to consider his claims in federal court will result in a fundamental miscarriage of justice. See *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed. 2d. 640 (1991). To come within this very narrow exception, he must make a colorable showing of factual innocence. See *id.* Factual innocence means that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327, 115 S.Ct. 851, 130 L.Ed. 2d 808 (1995). Petitioner was tried and convicted of murder in the first degree which requires that the death of another human being be caused with malice aforethought. 21 Okla. Stat. § 701.7(A). He claims that intent was the only element contested at trial and that he was convicted because of jury instructions that diluted the state's burden of proof and essentially discounted his state of voluntary intoxication as eliminating the specific intent required for the crime. Thus, Petitioner asserts that while he is not innocent of the homicide, he is innocent of the specific crime he was convicted of due to a lack of intent.

Even assuming that the claimed errors in the instructions are of constitutional proportion, Petitioner has presented no evidence to support his conclusory allegations of "factual innocence." It would be pure speculation on this record to conclude that no reasonable jury could have found Petitioner guilty. Since Petitioner waived his right to address these issues on appeal, it cannot be said that a fundamental miscarriage of justice would occur unless Petitioner were relieved of the procedural bar.

### CONCLUSION

Based on the foregoing, the undersigned United States Magistrate Judge RECOMMENDS that the Petition for Writ of Habeas Corpus be DISMISSED.

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

DATED this 27<sup>th</sup> day of May, 1998.

### CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 27 Day of May, 1998.

A. Schuelke

Frank H. McCarthy  
Frank H. McCarthy

UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE 5-28-98

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

IN RE:  
R.E. HUTTON, INC.,  
Debtor,  
R.E. HUTTON, INC.,  
Appellant,  
vs.  
LAIRMORE PETROLEUM CORP.,  
Appellee.

**FILED**

MAY 27 1998

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

Case No. 98-CV-99-K(M) ✓

**REPORT AND RECOMMENDATION**

Appellee's Motion to Dismiss [Dkt. 2] is before the undersigned United States Magistrate Judge for report and recommendation.

Appellee seeks dismissal of the instant appeal from a ruling of the Bankruptcy Court for Appellant's failure to comply with Fed. R. Bankr. 8006 which requires Appellant to file a designation of record on appeal and statement of the issues on appeal within 10 days after filing the notice of appeal. There is no dispute about the time frame involved, and no dispute that Appellant has not complied with Rule 8006. On October 7, 1997, the Debtor filed its Notice of Intent to Appeal. According to the affidavit of the Chief Deputy Clerk of the Bankruptcy Court, as of February 5, 1998, Appellant had not filed a designation of record or statement of issues on appeal as required by Rule 8006.

This Court issued an order on March 10, 1998, directing Appellant to show cause before March 27, 1998, why the Motion to Dismiss should not be granted. Appellant filed its response on March 27, arguing that a Motion to Impose Sanctions filed in the Bankruptcy Court by appellee "suspended and action required to be taken by Appellant" and "operated to suspend Appellant's filing of its Statement of Issues and Designation of Record pending a ruling upon said motion by Judge Rasure." [Dkt. 5, p. 4, 5]. By order dated May 6, 1998, the undersigned United States Magistrate Judge entered an order setting the Motion to Dismiss for hearing on Monday, May 18, 1998. The matter was called for hearing at the time scheduled. Counsel for Appellant did not appear.

On Friday, May 15, Appellant filed a motion requesting continuance of the Monday hearing. Although the motion recites that counsel received the order setting the hearing on May 8, and that counsel for Appellant would be out of the country commencing May 12, on a long-scheduled trip, the motion was not filed in sufficient time to be received in chambers before the hearing.

The Court finds that:

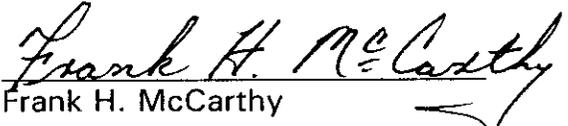
- (1) Appellant has failed to comply with the requirements of Bankr. Rule 8006;
- (2) Appellant failed to show cause for its failure to comply with Bankr. Rule 8006, as it failed to cite any authority to support its contention that the Motion to Impose Sanctions filed by Appellee suspended the operation of Rule 8006;
- (3) Appellant failed to appear at the hearing on Appellee's Motion to Dismiss; and

(4) Appellant failed to make a timely motion for continuance.

Considering the foregoing findings, the undersigned United States Magistrate Judge RECOMMENDS that Appellee's Motion to Dismiss [Dkt. 2] be GRANTED for Appellant's failure to prosecute this appeal.

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

DATED this 27<sup>th</sup> Day of May, 1998.

  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE

**CERTIFICATE OF SERVICE**

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

28 Day of May, 1998.

J. Schwelke

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

MAY 27 1998

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

BRETT R. BALES,  
SSN: 560-11-1213,

PLAINTIFF,

vs.

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

DEFENDANT.

CASE No. 97-CV-553-M

ENTERED ON DOCKET

DATE MAY 28 1998

**ORDER**

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

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

Plaintiff filed for Title II disability insurance benefits on August 1, 1991, alleging disability since May 2, 1989. [R. 48-51]. The application was denied initially and upon reconsideration. [R. 52-66]. Plaintiff filed a second Title II application for disability

insurance benefits, and a Title XVI application for supplemental security income benefits, on August 9, 1994, again alleging disability since May 2, 1989. [R. 74-80]. These claims were also denied initially and upon reconsideration. [R. 85-91, 104-109]. On September 21, 1995, a hearing before an administrative law judge (ALJ) was conducted. [R. 22-47]. The ALJ entered a favorable decision on October 27, 1995. [R. 12-15]. In that decision, the ALJ determined Plaintiff to be disabled and entitled to a period of disability commencing May 2, 1989 and continuing through the date of the decision. The ALJ denied Plaintiff's request to reopen his 1991 claim, stating:

The claimant's prior Title II application is not reopened because good cause has not been established for reopening pursuant to 20 CFR 404.989. Accordingly, the previous determination is final and binding.

[R. 14]. The Appeals Council denied review, stating that there was no basis under 20 CFR 404.970 and 416.1470 for granting review. [R. 6-7]. It acknowledged Plaintiff's request to reopen and revise the final decision made in connection with the prior [1991] application and stated: "However, the Administrative Law Judge addressed this issue." [R. 6]. Plaintiff seeks only the reversal of that portion of the decision which denied his request to reopen the prior application for disability insurance benefits.

Plaintiff contends the ALJ erred in finding that good cause had not been established to reopen the prior claim. [Plaintiff's brief, p. 3]. He asserts that, because the ALJ determined the date Plaintiff became disabled to be May 2, 1989, a de facto reopening had resulted. [Plaintiff's brief, p. 4].

It is well-established that a de facto reopening of a previous application is subject to judicial review. *Taylor for Peck v. Heckler*, 738 F.2d 1112, 1115 (10th Cir. 1984). A de facto reopening occurs when an ALJ considers the merits of a previous application and reappraises the evidence without deciding the administrative res judicata issue. *Taylor*, 738 F.2d at 1114. However, the previous application is not considered to be reopened if the ALJ merely reviews previously submitted evidence as background information and does not reappraise the evidence. *Frustaglia v. Secretary of Health and Human Services*, 829 F.2d 192, 193 (1st Cir. 1987); *Burks-Marshall v. Shalala*, 7 F.3d 1346, 1348 (8th Cir. 1993). As the Eighth Circuit explained in *Burks-Marshall*, "[t]reating any admission of evidence from prior claims as a waiver of the [Commissioner's] power not to reopen, as the claimant apparently suggests, would not be in the best interest of claimants. Such a rule might cause Administrative Law Judges to resist the admission of evidence potentially advantageous to claimants." *Id.* at 1348.

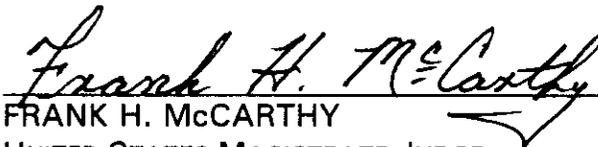
The ALJ's decision reflects consideration of the entire record as presented to him in the 1994 claims. There is nothing in the record to suggest that the ALJ reappraised the merits of Plaintiff's earlier application. The Court finds that a de facto reopening did not occur. Consequently, this case does not fall within the district court's jurisdiction to review Social Security appeals. 42 U.S.C. § 405(g); *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977) (the decision whether to reopen a claim is entirely at the Commissioner's discretion and does not fall within

the Court's jurisdiction to review Social Security Appeals as set out in 42 U.S.C. § 405(g)).

Conclusion

The Court is precluded from reviewing the decision of the ALJ denying the reopening of the 1991 claim. Accordingly, the case is DISMISSED for lack of subject matter jurisdiction.

Dated this 27<sup>th</sup> day of MAY, 1998.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

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

**FILED**

MAY 27 1998

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

WANDA SUE SWARER

441-44-9422

Plaintiff,

vs.

Case No. 97-CV-495-M ✓

KENNETH S. APFEL,

Commissioner,

Social Security Administration,

Defendant.

ENTERED ON DOCKET

DATE MAY 28 1998

ORDER

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

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

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<sup>1</sup> Plaintiff's November 18, 1994 application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held March 28, 1996. By decision dated May 20, 1996 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on April 24, 1997. 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.

(7)

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 July 22, 1945, and was 51 years old at the time of the hearing. She has an 11th grade education and has worked as an assembler, spot welder, and as a concession stand worker. She claims to be unable to work as a result of residuals from multiple physical trauma and head injuries received in an August, 1991 automobile accident. The ALJ determined that although Plaintiff could not return to her former work she was capable of performing a full range of light unskilled work, subject to the need to change positions and understanding, remembering, and carrying out simple instructions. Based on the testimony of a vocational expert, the ALJ determined that there exist occupations in the economy that Plaintiff can perform with these limitations, therefore she was not disabled under the Social Security Act. 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 despite evidence that she suffers from a mental impairment, the ALJ failed to follow the procedure mandated by Social Security regulations for evaluating complaints of mental impairments. 20 C.F.R. § 404.1520a.

The Commissioner's own regulations require that special procedures be followed and a PRT form be prepared at each level of administrative review when evaluating a mental impairment which allegedly prevents a claimant from working. 20 C.F.R. § 404.1520a; *Cruse v. United States Dep't of Health & Human Servs.*, 49 F.3d 614, 617 (10th Cir.1995). In this case the ALJ failed to follow the requisite procedure despite the fact that he included mental limitations in his RFC and PRTs were completed at previous levels of the administrative review process. Further, the record contains evidence strongly suggestive of mental problems. Based on clinical testing rehabilitation psychologist, Stephen Jordan Ph.D., diagnosed an organic mental disorder, major depression, and status post mild traumatic brain injury. [R. 403]. Rehabilitation therapists working with Plaintiff on a work capacity evaluation documented considerable impairments in her mental abilities. [R. 379]. This evidence was sufficient to trigger the ALJ's duty to complete a PRT. By failing to do so, the ALJ clearly failed to adhere to the prescribed regulations. As a result, even if there were not other significant errors in the record, the Court would have to remand the case for the ALJ to follow the special procedures and to prepare the PRT form. See *Dean v. Chater*, 94 F.3d 655 (Table), 1996 WL 459948 (10th Cir. (Okla.)).

However, the Court notes other errors in the ALJ's decision which merit discussion and further exploration on remand. The ALJ stated that the beginning date for the period under consideration is January 9, 1993, the day after the date Plaintiff's earlier (December 9, 1992) application was denied. According to the ALJ: "there is no evidentiary basis for reopening the January 8, 1993 denial determination and, therefore, the doctrine of res judicata applies to the period of time on and before January 8, 1993." [R. 13]. Plaintiff was advised that pursuant to 20 CFR 404.903(l), the denial of her request to reopen was not appealable. *Id.*

The ALJ's statement concerning the appealability of a decision not to reopen is accurate but his statement about the reopening of the earlier decision is not. The record reflects that the Commissioner reopened Plaintiff's earlier application for benefits before the case reached the ALJ. A "Disability Determination Rationale" form dated June 24, 1994 states:

The prior decision to deny disability dated January 7, 1993 *has been reopened* at the request of the claimant's attorney who has submitted additional medical evidence. [emphasis supplied]

[R. 84]. The regulations addressing the reopening of previous determinations are found at 20 CFR 404.987, *et seq.* and afford the Social Security Administration broad authority to reopen a determination. Nothing in the regulations suggest that the power to reopen is reserved to the ALJ. According to 20 CFR 404.988(b), a previous determination may be reopened within 4 years "if we find good cause, as defined in § 404.989, to reopen the case." Submission of new and material evidence is among

the reasons listed in § 404.989 for finding that there is good cause to reopen a determination.

The Disability Determination Rationale form reflects that additional medical reports covering the period from August 1991 to April 1994 were received and that the prior decision to deny disability "has been reopened." [R. 84]. In accordance with the relevant regulations, reopening of the prior decision had been accomplished by the time the case reached the ALJ. Since the prior decision was reopened, the information provided to Plaintiff concerning the applicable dates is inaccurate and likely affected the issues raised on appeal. Use of an inaccurate time frame also affected the ALJ's review of the medical evidence. When viewed in its entirety, the medical evidence strongly suggests that Plaintiff was unable to perform work for more than 12 months following her August 1991 accident.

Plaintiff was severely injured in a head-on collision. The roof of the vehicle and the steering column had to be removed to extract her from the vehicle. She suffered an intra-articular fracture of the left olecranon process (elbow); comminuted left tibia fibular fracture (crushed shin bone); left calcaneal (heel) fracture; fractured left clavicle (collar bone); and a complex laceration of the left scalp. [R. 158, 162, 164]. Surgery was performed to reduce the fractures. [R. 164-65]. The surgeon reported prognosis is guarded with regard to full recovery of extension of the elbow and with regard to healing of the distal tibial fracture. Her clavicle failed to heal. On January 22, 1992, she required surgery with bone graft. At the same time pins and wire fixation devices were removed from her elbow. She was hospitalized until February 1, 1992. [R. 205-

06]. Plaintiff's leg also failed to heal, and on March 30, 1992, surgery with bone graft was performed. [R. 292].

The records following the tibia surgery reflect gradual improvement. On April 10, 1992, orthopedic surgeon, Dr. Battenfield, advised her that a fracture boot was to be worn at all times when ambulating. [R. 427]. On May 8, 1992, Plaintiff was advised she could begin using one crutch when she was home but to continue using 2 crutches away from home. *Id.* On June 9, 1992, Dr. Battenfield wrote a letter requesting that Plaintiff be excused from jury duty due to her inability to tolerate prolonged sitting or standing. [R. 425]. By June 19, 1992, Plaintiff was using a cane for stability and wearing a cast boot at all times. [R. 424]. On August 19, 1992, she was advised to discontinue the walking boot at home [R. 422] and on October 21, 1992, she was finally instructed to discontinue all use of the boot. [R. 420]. In December 1992 she was released from Dr. Battenfield's care. Dr. Battenfield recorded that from an orthopedic standpoint she could "return to duties," however, he stated that his release was in reference to his care which was strictly orthopedic. [R. 416].

Due to the ALJ's error concerning the relevant time frame, he omitted this evidence from his discussion of Plaintiff's condition. Consequently, he did not consider whether the findings contained within these medical records meet the criteria for any of the conditions listed at 20 C.F.R. Pt. 404, Subpt. P., App.1. This section known as The Listing of Impairments ("Listings") describes, for each of the major body systems, impairments which are considered severe enough to prevent a person from

performing any gainful activity. One is considered disabled under Listing 1.11 if the medical records demonstrate the following:

Fracture of the femur, tibia, tarsal bone of pelvis with solid union not evident on X-ray and not clinically solid, when such determination is feasible, and return to full weight-bearing status did not occur or is not expected to occur within 12 months of onset.

20 C.F.R. Pt. 404, Subpt. P., App.1. §1.11. It appears that Plaintiff's comminuted left tibia fibular fracture satisfies Listing 1.11, in which case she would be considered disabled without further analysis of the record. The Court is aware that Plaintiff did not raise Listing 1.11 as one of the matters to be addressed on appeal. However, the Court is of the opinion that the ALJ's error concerning the reopening of the prior decision misled the Plaintiff as to the scope of appealable issues. It would be patently unfair to apply a waiver under such circumstances. In the same vein, it would be unfair for the Court to remand the case for benefits when the Commissioner has not analyzed the Listing requirements in the first instance. On remand, the Commissioner is directed to analyze the medical record in terms of Listing 1.11.

The ALJ also unaccountably failed to discuss a significant body of the medical evidence which was developed after the January 1993 denial decision. In June 1993 Plaintiff underwent a two-day work capacity evaluation conducted by South Tulsa Advanced Rehabilitation Therapy Center ("START"). Throughout the two-day test, Plaintiff was put through a battery of tests conducted by physical therapists. Among the many findings reported, the therapists noted Plaintiff demonstrated an unsteady gait pattern [R. 376]; considerable difficulty following test instructions [R. 377]; and

that her tolerance for sitting or standing in one position was limited [R. 379]. They observed that the longest Plaintiff was able to perform any activity was 20 to 30 minutes before pain, fatigue, or inability to continue attention to the task resulted. [R. 379]. The overall assessment was:

Mrs. Swarer displays multiple physical limitations: decreased balance; decreased left shoulder strength; decreased range of motion in the left shoulder, elbow, ankle, and bilateral hips; decreased lifting and carrying strength; decreased reach; decreased work and exercise tolerance and impaired Right/Left discrimination.

[R. 379-80]. The report also contained an objective functional assessment of Plaintiff's observed ability to lift and carry weights. [R. 378-79, 389-90]. Her observed ability to lift and carry weight is directly contrary to the ALJ's finding that Plaintiff has the capacity to perform a full range of light work. Furthermore, according to the START report, in an 8-hour day Plaintiff's full capacity for sitting was 3 hours; standing 2 hours, and walking 1 hour. In addition, her ability to use her feet and hands for repetitive movements was limited. [R. 390].

The ALJ relied, in part, upon the results of a consultative examination to conclude that Plaintiff is capable of light work. However, the record reflects that Plaintiff underwent two days of extensive objective testing, the results of which seem to demonstrate an inability to work. Since the ALJ failed to discuss these objective findings, the Court finds that irrespective of the ALJ's failure to properly consider Plaintiff's mental impairments, his conclusion concerning Plaintiff's physical ability to

perform light work after the June 1993 is not supported by substantial evidence on the current record.

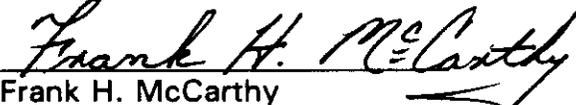
The Court recognizes that the ALJ is not required to discuss every single piece of evidence. *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996). In his decision, the ALJ stated:

Every exhibit was reviewed carefully for preparation of this decision, however, exhibits not cited were omitted for various reasons, including but not limited to the following: relate to a time not covered by the claim, illegibility, duplicity [sic], different physicians reporting the same diagnoses, physician duplication of hospitalization records, failure to state a diagnosis, statement of the claimant's complaints without a diagnosis, prescription of medication only, etc. [emphasis supplied].

[R. 15]. The ALJ probably intended to use the term "duplicative" rather than "duplicity." According to *Webster's 9th New Collegiate Dictionary*, duplicity means: "contradictory doubleness of thought, speech, or action; *especially*: the belying of one's true intentions by deceptive words or actions." However, regardless of whichever term the ALJ intended to use, the Court finds that the START records are neither duplicative, nor duplicitous. Furthermore, they do not satisfy the other criteria of the foregoing paragraph and should have been discussed by the ALJ.

The Commissioner's denial decision is REVERSED and the case remanded for further proceedings in accordance with this order.

SO ORDERED this 27<sup>th</sup> Day of May, 1998.

  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE

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

**FILED**

MAY 27 1998

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

WANDA SUE SWARER,  
SSN: 441-44-9422,

Plaintiff,

v.

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

Defendant.

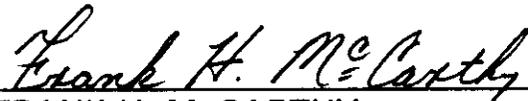
CASE NO. 97-CV-495-M ✓

ENTERED ON DOCKET

DATE MAY 28 1998

**JUDGMENT**

Judgment is hereby entered for Plaintiff and against Defendant. Dated  
this 27<sup>th</sup> day of MAY, 1998.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

⑧



UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

MAY 26 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JAMA L. DILBECK,  
SSN: 446-64-6151

Plaintiff,

v.

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

Defendant.

No. 97-C-501-J

ENTERED ON DOCKET  
DATE MAY 28 1998

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

Plaintiff, Jama L. Dilbeck, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.<sup>3/</sup> Plaintiff asserts that the Commissioner erred because (1) the ALJ did not adequately develop the record, (2) the ALJ failed to adequately evaluate Plaintiff's Residual Functional Capacity ("RFC") and, (3) the record contains insufficient evidence to support the ALJ's conclusion that Plaintiff can do her past relevant work. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

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

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

<sup>3/</sup> Administrative Law Judge Tela L. Gatewood (hereafter "ALJ") concluded that Plaintiff was not disabled by Order dated June 21, 1996. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on April 11, 1997. [R. at 3].

(11)

## I. PLAINTIFF'S BACKGROUND

Plaintiff was born on January 20, 1959. [R. at 39]. Plaintiff is a high school graduate. [R. at 30]. Plaintiff testified that she generally sleeps from 10:30 p.m. until 6:30 a.m., and additionally sleeps during the day for two to three hours at a time. [R. at 35]. Plaintiff testified that she is subject to mood swings, and that when she is not on her medication she is very withdrawn. [R. at 39]. Plaintiff stated that she suffered from bi-polar disorder and mitral valve prolapse.

## II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

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

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

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

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

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

42 U.S.C. § 423(d)(2)(A).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary<sup>6/</sup> as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to

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<sup>6/</sup> Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

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

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

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

In this case, the ALJ concluded that Plaintiff's asserted mental impairment did not interfere with her ability to return to her past relevant work as a housekeeper, switchboard operator, fast food worker or checker/stocker. The ALJ concluded that Plaintiff was not disabled.

### **IV. REVIEW**

#### **CONSIDERATION OF ATTACHED EXHIBITS**

Plaintiff attached numerous exhibits to her appellate brief that were not included in the record on appeal. One exhibit, by Plaintiff's treating physician, was not completed until after the final decision by the ALJ and the final decision by the Appeals Counsel.

Defendant refers to Cagle v. Califano, 638 F.2d 219, 221 (10th Cir. 1981), and argues that because Plaintiff cannot meet the standards established in Cagle, Plaintiff's request for a remand should be denied.

In Cagle, the Tenth Circuit Court of Appeals granted a remand for consideration of new evidence after the plaintiff established that the evidence was new and material and that there was good cause for the failure to previously incorporate the evidence into the record. The new evidence submitted by Plaintiff in this case consists of a PRT Form completed by Plaintiff's treating physician. He indicates on the Form that Plaintiff is disabled as a result of her bi-polar disorder. The evidence is certainly new because it was not completed until after the final decision of the Commissioner. Arguably the evidence is material because it is the opinion of a treating physician with respect to Plaintiff's bi-polar disorder.<sup>6/</sup> Plaintiff does not offer a reason for the failure of Plaintiff to previously submit the PRT Form. The Form was not completed until after the decision of the Commissioner, but nothing indicates that the physician could not have completed the Form earlier. Plaintiff was not represented at the hearing before the ALJ, but Plaintiff does not offer that as a reason for her failure to earlier submit the record. Regardless, the Court, after reviewing the decision of the ALJ and the record concludes that this case should be remanded to the Commissioner for further consideration. On remand the Commissioner should consider this additional report from Plaintiff's treating physician.

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<sup>6/</sup> The evidence is arguably conclusory because it lacks supporting information or detail with respect to the treating physician's conclusions.

## DEVELOPMENT OF THE RECORD

Plaintiff asserts that the ALJ failed to adequately develop the record. Plaintiff initially notes that she was not represented by counsel at the hearing before the ALJ and that the ALJ had a heightened duty to develop the record. Plaintiff additionally argues that the ALJ should have requested additional testing to determine the extent of Plaintiff's disorder. Plaintiff asserts that the ALJ erred in not contacting Plaintiff's treating physician to obtain additional information regarding Plaintiff's condition.

Although a claimant has the general duty to prove disability, a social security disability hearing is a non-adversarial proceeding and an ALJ has a duty to develop the factual record. See Musgrave v. Sullivan, 996 F.2d 1371, 1374 (10th Cir. 1992). The statutes require that "[i]n making any determination the Commissioner of Social Security shall make every reasonable effort to obtain from the individual's treating physician (or other treating health care provider) all medical evidence, including diagnostic tests, necessary in order to properly make such determination, prior to evaluating medical evidence obtained from any other source on a consultative basis." 42 U.S.C. § 423(d)(5)(B).

In Musgrave, the Tenth Circuit Court of Appeals, in examining the duty of the ALJ to develop the record, concluded that the "important inquiry is whether the ALJ asked sufficient questions to ascertain (1) the nature of a claimant's alleged impairments, (2) what on-going treatment and medication the claimant is receiving, and (3) the impact of the alleged impairment on a claimant's daily routine and activities." Musgrave, 966 F.2d at 1374.

In this case, the medical records from Dr. Trautman and Dr. Clymer both indicate that Plaintiff has bi-polar disorder. What is less clear from the record is the degree to which the bi-polar disorder affects Plaintiff's ability to function. The record contains one consultative examination by Donald R. Inbody. [R. at 127-29]. He concludes that Plaintiff has bi-polar disorder and that she is able to handle her own money. He additionally noted that "Her speech was logical, coherent and sequential with no affective disturbances or associational defects in thinking. No psychotic symptomatology was noted. She was oriented in all spheres and appears to be of average intelligence. . . . She showed no clinical disturbance in attention and concentration and judgement is felt to be intact." [R. at 128]. Dr. Inbody noted that no anxiety was noted "today" and no clinical depression was "noticed today." Dr. Inbody provides no final conclusions with regard to Plaintiff's ability to work or handle stress.

The record contains insufficient information to support the opinion of the ALJ. The records from the treating physician which were provided to the ALJ contain no final conclusions that Plaintiff cannot work or should not be subjected to stress. The treating physician record submitted by Plaintiff to the Court suggests that Plaintiff is disabled. The record from the consulting physician is inconclusive. The Court concludes that the record should be further developed with regard to whether or not Plaintiff's bi-polar disorder and other ailments prevent Plaintiff from working.

## RESIDUAL FUNCTIONAL CAPACITY

Plaintiff argues that the RFC must include a "function-by-function" assessment of Plaintiff's ability to work and that the ALJ's RFC lists solely Plaintiff's mental limitations in accordance with the Psychiatric Review Technique Form ("PRTF"). Plaintiff notes that in accordance with the regulations, the ALJ was required to assess Plaintiff's ability to understand, carry out and remember instructions; use judgment in decision-making; respond to supervisors and co-workers, and deal with changes in work routine. Plaintiff asserts that the ALJ's failure to itemize Plaintiff's ability is error. Plaintiff additionally argues that the ALJ's finding that Plaintiff could perform a low stress job is error because Plaintiff's rehabilitation counselor indicated that Plaintiff could not tolerate any stress.

Plaintiff asserts that she is disabled due to bi-polar disease and mitral valve prolapse. Plaintiff testified and the record contains complaints from Plaintiff concerning her mitral valve prolapse, hypothyroidism, and the effect that the various medications which Plaintiff takes has on her. Plaintiff additionally complained of headaches, a nervous stomach, depression and tiredness. Plaintiff testified that she has difficulty completing tasks at home and that it takes her approximately five days to mow her one acre yard. The ALJ never discusses Plaintiff's assertion of difficulties due to mitral valve prolapse, headaches, or hypothyroidism. The ALJ focuses predominantly on Plaintiff's claim of disability due to bi-polar disease. The ALJ discusses the effect bi-polar disease has on Plaintiff's mental ability to perform her job. The ALJ never discusses the possible affect on Plaintiff's physical ability to perform her job or the

possible affect of Plaintiff's various other complaints on Plaintiff's RFC. The ALJ never discusses an RFC for Plaintiff. On remand, the ALJ should develop a RFC for Plaintiff which includes her mental and physical limitations, if any.

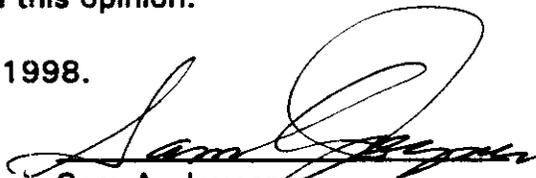
#### PAST RELEVANT WORK FINDING

Plaintiff asserts that the ALJ's conclusion that Plaintiff could return to her past relevant work is not supported by the record. Plaintiff notes that the vocational expert's testimony was based on a flawed hypothetical and therefore cannot constitute substantial evidence to support the ALJ's decision. Plaintiff additionally argues that the jobs listed by the vocational expert require that Plaintiff have contact with people despite a restriction in the hypothetical question limiting the individual's contact to no more than occasional contact with people. Plaintiff also notes that this testimony is inconsistent with the DOT (Dictionary of Occupational Titles).

On remand, after determining an appropriate RFC for Plaintiff, the ALJ should determine first, whether or not Plaintiff can return to her past relevant work, and second, if not, if any other jobs exist in the national economy which Plaintiff is capable of performing. If the ALJ consults a vocational expert, the ALJ should include, in the hypothetical question to the vocational expert, all limitations.

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

Dated this 22 day of May 1998.

  
Sam A. Joyner  
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

MAY 26 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

SHIRLEY A. CRAFTON,  
(014-30-8647)

Plaintiff,

v.

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

Defendant.

Case No. 97-CV-293-J

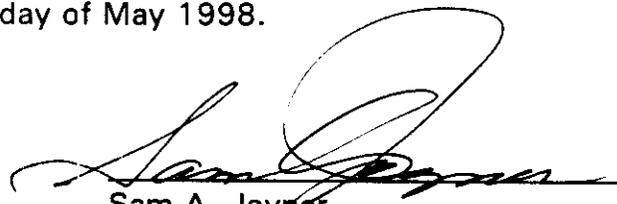
**ENTERED ON DOCKET**

**DATE** MAY 28 1998

**JUDGMENT**

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

It is so ordered this 26 day of May 1998.



Sam A. Joyner  
United States Magistrate Judge

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

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

MAY 26 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

SHIRLEY A. CRAFTON, )  
(☎014-30-8647) )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
KENNETH S. APFEL, Commissioner )  
of Social Security Administration,<sup>1/</sup> )  
 )  
Defendant. )

Case No. 97-CV-293-J

ENTERED ON DOCKET  
DATE MAY 28 1998

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

Now before the Court is Plaintiff's appeal of a decision by the Commissioner of the Social Security Administration ("Commissioner") denying her disability insurance benefits under Title II of the Social Security Act. The Administrative Law Judge ("ALJ"), Leslie S. Kauger, denied benefits at step five of the sequential evaluation process used by the Commissioner to evaluate disability claims.

The ALJ determined that Plaintiff retained the residual functional capacity ("RFC") to perform the full range of sedentary work and found that there were significant jobs in the national economy Plaintiff could perform given her RFC. On appeal, Plaintiff argues that (1) the ALJ denied Plaintiff representation, resulting in prejudice to Plaintiff; (2) the ALJ failed to fully develop the record; and (3) that the

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

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

13

ALJ's credibility determination regarding Plaintiff's subjective pain complaints is not supported by substantial evidence. The Court has meticulously reviewed the entire record and for the reasons discussed below the Commissioner's decision is **REVERSED**.

## **I. STANDARD OF REVIEW**

A disability under the Social Security Act is defined as the

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

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

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

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

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<sup>3/</sup> Step one requires the claimant to establish that he is not engaged in substantial gainful activity as defined at 20 C.F.R. §§ 404.1510 and 404.1572. Step two requires the claimant to demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 404.1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). See 20 C.F.R. § 404.1525. If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if he can perform his past work. If a claimant is unable to perform his past work, the Commissioner has the burden of proof at step five to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See, 20 C.F.R. § 404.1520; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); and Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988).

The standard of review applied by this Court to the Commissioner's disability determinations is set forth in 42 U.S.C. § 405(g). According to § 405(g), "the finding of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support the ultimate conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

To determine whether the Commissioner's decision is supported by substantial evidence, the Court will not undertake a *de novo* review of the evidence. Sisco v. U.S. Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

In addition to determining whether the Commissioner's decision is supported by substantial evidence, it is also this Court's duty to determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when

he/she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

## II. THE ALJ'S ALLEGED DENIAL OF REPRESENTATION AND HIS ALLEGED FAILURE TO DEVELOP THE RECORD

There is no constitutional or statutory right to competent counsel at proceedings before the Social Security Administration. Banta v. Chater, No. 95-6457, 1996 WL 477298, \*1 (10th Cir. Aug. 22, 1996) (citing several cases). See also, Graham v. Apfel, 129 F.3d 1420, 1422-23 (11th Cir. 1997). The Social Security Act provides that a claimant may obtain the services of an attorney in good standing or other agent qualified under the Commissioner's regulations to represent her in any proceeding before the Commissioner. 42 U.S.C. § 406(a). The Commissioner is not required to provide counsel for claimants at the expense of the Social Security Administration. Garcia v. Califano, 625 F.2d 354, 356 (10th Cir. 1980), *superceded on other grounds* by Hill v. Sullivan, 924 F.2d 972 (10th Cir. 1991).

The Social Security Act and the Commissioner's regulations do, however, require the Commissioner to

notify each claimant in writing, together with the notice to such claimant of an adverse determination, of the options for obtaining attorneys to represent individuals in presenting their cases before the Commissioner of Social Security. Such notification shall also advise the claimant of the availability to qualifying claimants of legal services organizations which provide legal services free of charge.

42 U.S.C. § 406(c). See also 20 C.F.R. § 404.1706.

The notice of denial, notice of reconsideration and notice of hearing sent to Plaintiff advised Plaintiff of her right to representation. *R. at* 26, 57, and 64. Almost two months before the hearing, the ALJ sent Plaintiff a letter notifying her of her right to obtain representation. *R. at* 159. "[Neither the pertinent statute, see 42 U.S.C. § 406(c), nor the regulations, see 20 C.F.R. § 404.1706, nor [the Tenth Circuit's] previous cases require any more advisement than was given in this case." Carter v. Chater, 73 F.3d 1019, 1021 (10th Cir. 1996).

Plaintiff filed for benefits on February 15, 1994. *R. at* 48-51. After denial at the initial and reconsideration stage, Plaintiff filed her request for a hearing before an ALJ on January 4, 1995. *R. at* 66-67. Plaintiff then requested and the ALJ granted several extensions of the hearing date so that Plaintiff could obtain representation. *R. at* 30 and 159. After several delays and almost two months before the hearing was set before the ALJ, the ALJ sent a letter to Plaintiff with the following language:

This letter is to advise you that you have thirty (30) days from the date of this letter to obtain representation. At the end of the thirty (30) days, if I have not heard from you regarding representation, I will schedule your case for a hearing and will not allow any additional delay.

*R. at* 159. See also *R. at* 160-61 for a detailed description of the efforts made by the Social Security Administration to assist Plaintiff. The hearing before the ALJ was held on December 13, 1995. Plaintiff appeared at the hearing without a representative and

the ALJ proceeded with the hearing as he had told Plaintiff he would.<sup>4/</sup> Given the facts of this case, proceeding with the hearing was not error.

The lack of counsel at a hearing before an ALJ is not an automatic ground for remand to the Commissioner. On appeal, the claimant must show clear prejudice or unfairness. Banta, 1996 WL 477298, \*1; Garcia, 625 F.2d at 356; Graham, 129 F.3d at 1422-23; Edwards v. Sullivan, 937 F.2d 580, 586 (11th Cir. 1991). A claimant may demonstrate prejudice by showing that the record at the hearing was not fully developed or that there are serious gaps in the record which could have been filled if counsel had been present. Garcia, 625 F.2d at 356; Edwards, 937 F.2d at 586.

Because a hearing before an ALJ is not an adversarial proceeding, ALJ's have a basic obligation to develop a full and fair record. When a claimant has not waived her right to representation and the claimant appears without representation, the ALJ's obligation to develop the record is heightened. When a claimant appears without counsel, the ALJ must conscientiously explore all relevant facts in the record and he must be especially diligent in ensuring that favorable as well as unfavorable facts and circumstances are elicited. Musgrave v. Sullivan, 966 F.2d 1371, 1374 (10th Cir. 1992); Henrie v. DHHS, 13 F.3d 359, 360-61 (10th Cir. 1993).

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<sup>4/</sup> Plaintiff was represented by counsel before the Appeals Council and this Court. *R.* at 10-11.

**A. VOCATIONAL FACTORS**

The ALJ relied on the GRID<sup>5/</sup> 201.07 to find Plaintiff not disabled. *R. at 23, ¶ 7.* The only prejudice identified by Plaintiff is the ALJ's alleged failure to develop the record in connection with certain findings required by the GRIDS. See 20 C.F.R. Part 404, Subpt. P, App. 2, §§ 201.00(f) and 201.07. Plaintiff is a woman of advanced age under the Social Security Regulations (i.e., 55 and over). *R. at 32.* Plaintiff is a high school graduate, but her educational experience would not allow direct entry into skilled work. *R. at 33.* Plaintiff's previous work experience was skilled and semiskilled. *R. at 45.* The ALJ found that Plaintiff had the RFC to perform a full range of sedentary work. *R. at 23, ¶ 5.* Given these factual conclusions, GRID 201.07 directs a finding of not disabled as long as Plaintiff had transferable skills as defined in 20 C.F.R. Part 404, Subpt. P, App. 2, § 201.00(f).

Section 201.00(f) provides as follows:

In order to find transferability of skills to skilled sedentary work for individuals who are of advanced age (55 and over), there must be very little, if any, vocational adjustment required in terms of tools, work processes, work settings, or the industry.

20 C.F.R. Part 404, Subpt. P, App. 2, § 201.00(f).

Plaintiff alleges that she was prejudiced in this case because the ALJ failed to adequately develop the record with regard to the following two issues: (1) what specific skills did Plaintiff have that would be transferable to sedentary work, and (2)

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<sup>5/</sup> The Medical-Vocational Guidelines, commonly referred to as the GRIDS, are located at 20 C.F.R. Pt. 404, Subpt. P, App. 2.

what degree of vocational adjustment would be required by Plaintiff to transfer those skills to sedentary work. The Court does not agree and finds the record to be adequately developed regarding these issues.

Plaintiff's past relevant work was as a cashier at the medium exertional level. The ALJ determined that Plaintiff could work as a cashier at the sedentary exertional level and the Vocational Expert confirmed that numerous sedentary cashier jobs existed in the national (121,000) and regional (15,000) economy. *R. at 45*. It strains common sense to suggest that the skills necessary to perform a cashier job at the medium exertional level would be significantly different from the skills necessary to perform a sedentary cashier job. There is, therefore, no real "transferability of skills" issue. The same skills are being used in both jobs. The only difference is that the sedentary job does not require as much exertional effort (i.e., lifting, carrying, etc.).

#### **B. MEDICAL EVIDENCE**

The Court does find that there is one significant gap in the medical record which the ALJ failed to develop -- the need for an MRI of Plaintiff's lumbar spine and Plaintiff's financial ability to obtain an MRI.<sup>6/</sup> The Commissioner's consultative examiner, Glenn W. Cosby, M.D., noted throughout his examination that Plaintiff had significant back pain. *R. at 120-128*. Plaintiff's treating physicians, Thomas A. Chandy, M.D. and Jon Cox, M.D., both recommended either a CT scan or MRI scan of Plaintiff's lumbar spine to help them evaluate her complaints of pain. *R. at 101-*

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<sup>6/</sup> There is a radiology report in the file regarding the lumbar spine. However, the report is for a Loy Wadley, a 34 year old male, not Plaintiff, a 55 year old female. *R. at 146*.

102, 132, 139, 153 and 157. Dr. Cox specifically found that an MRI would help him evaluate Plaintiff for nerve damage which might be causing her pain. *R. at* 153 and 157. Plaintiff was referred by Dr. Cox to Saint John Medical Center for an MRI. The MRI was canceled five days before it was scheduled because Plaintiff told her doctor "I can't pay for it." *R. at* 132.

The ALJ should have developed the record regarding Plaintiff's alleged financial inability to obtain an MRI. If Plaintiff cannot legitimately afford an MRI, the ALJ should have ordered one in this case. See 20 C.F.R. §§ 404.1517, 404.1519, 404.1519a, 404.1519f and 404.1519h. This is especially true in light of the fact that the ALJ found Plaintiff's testimony regarding her subjective complaints of pain not fully credible primarily because the objective findings of Plaintiff's treating physicians did not support the degree of pain alleged by Plaintiff. *R. at* 21. The ALJ cannot rely on the lack of corroboration by objective evidence when the objective tests specifically requested by Plaintiff's treating physicians to evaluate Plaintiff's complaints of pain have not been performed.

The ALJ also found Plaintiff's subjective complaints of pain not fully credible due to the lack of medication being taken by Plaintiff for severe pain. However, Plaintiff's medication list indicates that she is taking the following medication for pain and muscle spasms: Amitriptyline (1-2 as needed at bedtime), Soma (1 at bedtime), Relafen (3/day), Cyclobenzapv (3/day), Tylenol Extra Strength (2-4/day), Anacin (2-4/day), Ecotrin (2-4/day), Ibuprofen (2-4/day). *R. at* 167-68. Plaintiff is also outfitted with a TENS unit which she uses to control her pain. The record is not fully developed

regarding Plaintiff's medications - their purpose, side-effects, or effectiveness in reducing pain. The ALJ's statement that Plaintiff is not taking medication for severe pain is not supported by the record without further explanation.

**CONCLUSION**

The Commissioner's decision to deny Plaintiff disability insurance benefits under Title II of the Social Security Act is hereby **REVERSED**. This action is **REMANDED** to the Commissioner for further proceedings consistent with this Order. In particular, the ALJ should further develop the record regarding Plaintiff's medications and the need for an MRI to properly evaluate Plaintiff's complaints.

IT IS SO ORDERED.

Dated this 22 day of May 1998.

  
Sam A. Joyner  
United States Magistrate Judge





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

MAY 22 1998 *lw*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 PHILLIP S. HARTMAN aka Philip Hartman )  
 aka Phil Hartman aka Phillip Hartman )  
 aka Philip S. Hartman; )  
 CYNTHIA A. HARTMAN aka Cynthia Hartman )  
 aka Cynthia Ann Hartman; )  
 STATE OF OKLAHOMA, ex rel. )  
 Oklahoma Employment Security Commission; )  
 STATE OF OKLAHOMA, ex rel. )  
 Oklahoma Tax Commission; )  
 COUNTY TREASURER, Tulsa County, )  
 Oklahoma; )  
 BOARD OF COUNTY COMMISSIONERS, )  
 Tulsa County, Oklahoma, )  
 )  
 Defendants. )

ENTERED ON DOCKET

DATE MAY 27 1998

CIVIL ACTION NO. 97-CV-11-B

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 21<sup>ST</sup> day of June,  
1998. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern  
District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the  
Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County  
Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District  
Attorney, Tulsa County, Oklahoma; the Defendant, State of Oklahoma, ex rel. Oklahoma  
Employment Security Commission, appears not, having previously filed its Disclaimer; the  
Defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission, appears by Kim D.  
Ashley, Assistant General Counsel; and the Defendants, Phillip S. Hartman aka Philip

Hartman aka Phil Hartman aka Phillip Hartman aka Philip S. Hartman and Cynthia A. Hartman aka Cynthia Hartman aka Cynthia Ann Hartman, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Phillip S. Hartman aka Philip Hartman aka Phil Hartman aka Phillip Hartman aka Philip S. Hartman, executed a Waiver of Service of Summons on February 5, 1997; that the Defendant, Cynthia A. Hartman aka Cynthia Hartman aka Cynthia Ann Hartman, executed a Waiver of Service of Summons on February 1, 1997; that the Defendant, State of Oklahoma, ex rel. Oklahoma Employment Security Commission, was served a Summons and Complaint on January 6, 1997, by certified mail.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on January 16, 1997; that the Defendant, State of Oklahoma, ex rel. Oklahoma Employment Security Commission, filed its Disclaimer Of Interest And Consent To Judgment on January 21, 1997; the Defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission, filed its Answer on January 13, 1997; and that the Defendants, Phillip S. Hartman aka Philip Hartman aka Phil Hartman aka Phillip Hartman aka Philip S. Hartman and Cynthia A. Hartman aka Cynthia Hartman aka Cynthia Ann Hartman, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, Phillip S. Hartman, is one and the same person as Philip Hartman, Phil Hartman, Phillip Hartman, Philip S. Hartman. The Defendant, Cynthia A. Hartman, is one and the same person as Cynthia Hartman and Cynthia Ann Hartman. Phillip S. Hartman and Cynthia A. Hartman were granted a divorce on

March 16, 1994, in Case No. FD 93-08865, in Tulsa County District Court. The Defendants are both single unmarried persons.

The Court further finds that on May 14, 1992, Philip S. Hartman and Cynthia A. Hartman filed their voluntary petition in bankruptcy in Chapter 13 in the United States Bankruptcy Court for the Northern District of Oklahoma, Case No. 92-01722-C. On November 5, 1996, the United States Bankruptcy Court for the Northern District of Oklahoma entered its order modifying the automatic stay afforded the debtors by 11 U.S.C. § 362 and directing abandonment of the real property subject to this foreclosure action and which is described below.

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

Lot Ten (10), Block Six (6), SOUTHBROOK II, an Addition in the City of Tulsa, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on November 30, 1983, John C. Duffy and Kathy A. Duffy, executed and delivered to Mercury Mortgage Co., Inc., their mortgage note in the amount of \$84,384.00, payable in monthly installments, with interest thereon at the rate of 11.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, John C. Duffy and Kathy A. Duffy, husband and wife, executed and delivered to Mercury Mortgage Co., Inc., a mortgage dated November 30, 1983, covering the above-

described property. Said mortgage was recorded on December 6, 1983, in Book 4749, Page 1680, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 7, 1990, Mercury Mortgage Co., Inc., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on September 10, 1990, in Book 5275, Page 2464, in the records of Tulsa County, Oklahoma.

The Court further finds that Phillip S. Hartman and Cynthia A. Hartman, currently hold the title to the property by virtue of a General Warranty Deed, dated August 14, 1989, and recorded on August 14, 1989, in Book 5200, Page 2566, in the records of Tulsa County, Oklahoma, and are the current assumptors of the subject indebtedness.

The Court further finds that on October 1, 1990, Phillip S. Hartman and Cynthia A. Hartman entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on November 1, 1991, May 1, 1992 and July 1, 1993.

The Court further finds that the Defendants, Phillip S. Hartman aka Philip Hartman aka Phil Hartman aka Phillip Hartman aka Philip S. Hartman and Cynthia A. Hartman aka Cynthia Hartman aka Cynthia Ann Hartman, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, Phillip S. Hartman aka

Philip Hartman aka Phil Hartman aka Phillip Hartman aka Philip S. Hartman and Cynthia A. Hartman aka Cynthia Hartman aka Cynthia Ann Hartman, are indebted to the Plaintiff in the principal sum of \$81,358.12, plus penalty charges in the amount of \$1,023.65, plus accrued interest in the amount of \$45,202.01 as of May 1, 1995, plus interest accruing thereafter at the rate of 11.5 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$37.00 for the year 1993 which became a lien on the property as of June 23, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendant, State of Oklahoma, ex rel. Oklahoma Employment Security Commission, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission, has a lien on the property which is the subject matter of this action by virtue of business taxes in the amount of \$1,457.38, together with interest and penalty according to law, which became a lien on the property as of January 11, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, Phillip S. Hartman aka Philip Hartman aka Phil Hartman aka Phillip Hartman aka Philip S. Hartman and Cynthia A. Hartman aka Cynthia Hartman aka Cynthia Ann Hartman, are in default, and have no right, title or interest in the subject real property.

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

The Court further finds that the Internal Revenue Service has numerous liens upon the property by virtue of Notices of Federal Tax Liens described as follows:

Serial No.	Amount	Date	Recorded	Book	Page
7301-82-4620	\$ 3,555.20	05/10/82	05/24/82	4615	71
55271	\$ 1,585.51	09/10/85	09/16/85	4892	136
738908774	\$ 5,941.38	08/03/89	08/14/89	5200	2473
739124839	\$23,732.87	08/30/91	09/11/91	5348	1076
739205415	\$26,137.28	03/24/92	03/30/92	5392	1387
739410031*	\$ 5,941.38	09/25/94	10/04/94	5661	1667
739312416	\$ 7,456.97	10/25/93	11/03/93	5558	1216
739409676	\$17,328.43	09/12/94	09/19/94	5657	1630

\* Correcting federal tax lien No. 738908774

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

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, on behalf of the Secretary of Housing and Urban

Development, have and recover judgment in rem against the Defendants, Phillip S. Hartman aka Philip Hartman aka Phil Hartman aka Phillip Hartman aka Philip S. Hartman and Cynthia A. Hartman aka Cynthia Hartman aka Cynthia Ann Hartman, in the principal sum of \$81,358.12, plus penalty charges in the amount of \$1,023.65, plus accrued interest in the amount of \$45,202.01 as of May 1, 1995, plus interest accruing thereafter at the rate of 11.5 percent per annum until judgment, plus interest thereafter at the current legal rate of 5.434 percent per annum until paid, plus the costs of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$37.00, plus costs and interest, for personal property taxes for the year 1993, plus the costs of this action.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendant, State of Oklahoma, ex rel. Oklahoma Tax Commission, have and recover judgment in rem in the amount of \$1,457.38, together with interest and penalty according to law, for business taxes.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, Phillip S. Hartman aka Philip Hartman aka Phil Hartman aka Phillip Hartman aka Philip S. Hartman, Cynthia A. Hartman aka Cynthia Hartman aka Cynthia Ann Hartman, State of Oklahoma, ex rel. Oklahoma Employment Security Commission, 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 Defendants, Phillip S. Hartman aka Philip Hartman aka Phil Hartman aka Phillip Hartman aka Philip S. Hartman and Cynthia A. Hartman aka Cynthia Hartman aka Cynthia Ann Hartman, 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 appraisalment the real property involved herein and apply the proceeds of the sale as follows:

**First:**

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

**Second:**

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

**Third:**

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

**Fourth:**

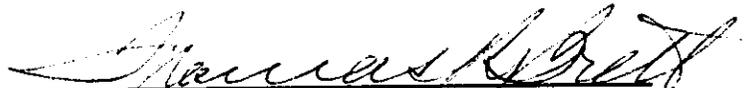
In payment of the judgment rendered herein in favor of the Defendant, County Treasurer, Tulsa County, Oklahoma.

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

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right

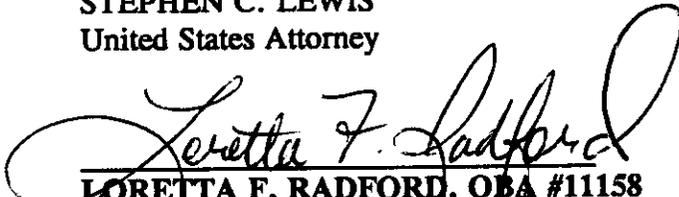
to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

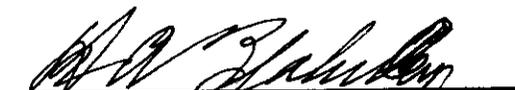
**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed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

  
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS  
United States Attorney

  
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333 West 4th Street, Suite 3460  
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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-11-B (Hartman)

LFR:css



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**KIM D. ASHLEY, OBA #14175**

Assistant General Counsel

P.O. Box 53248

Oklahoma City, Oklahoma 73152-3248

(405) 522-5555

Attorney for Defendant,

State of Oklahoma *ex rel.* Oklahoma Tax Commission

Judgment of Foreclosure

Case No. 97-CV-11-B (Hartman)

LFR:cas

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 Mickey P. Jackson, )  
 )  
 Defendant. )

No. 98CV0025K(J)

**FILED**

MAY 26 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DEFAULT JUDGMENT

This matter comes on for consideration this 22 day of May, 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, Mickey P. Jackson, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Mickey P. Jackson, was served with Summons and Complaint on April 28, 1998. 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.

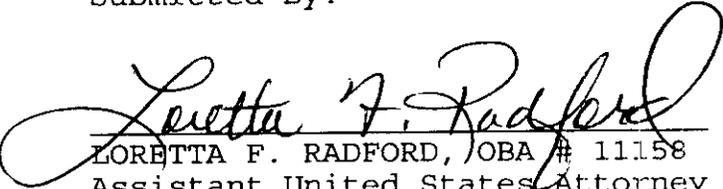
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Mickey P. Jackson, for the principal amount of \$2,748.62 and the principal amount of \$3,360.60, plus accrued interest of \$1,637.31 and \$2,071.77, plus penalties in the amount of \$5.00, plus

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administrative charges in the amount of \$40.00 and \$40.00, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.43 percent per annum until paid, plus costs of this action.

  
United States District Judge

Submitted By:

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

LFR/sba

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

MAY 26 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CARL C. SMITH, )  
)  
Plaintiff, )  
)  
v. )  
)  
KENNETH S. APFEL, )  
Commissioner, Social )  
Security Administration, )  
)  
Defendant. )

Case No. 96-C-262-M

ENTERED ON DOCKET  
DATE MAY 27 1998

**ORDER**

On March 31, 1997, this Court affirmed the decision of the Commissioner finding Plaintiff not disabled. An appeal was filed May 28, 1997, and on April 7, 1998 the case was reversed and remanded in accordance with the Tenth Circuit Court of Appeals' Order and Judgment dated February 4, 1998.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of \$5,830.00 for attorney fees and \$351.68 for court costs and filing fees for all work done before the district and circuit courts, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees in the amount of \$5,830.00 and costs of \$351.68 for a total award of \$6,181.68 under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v.*

*Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED THIS 26<sup>th</sup> day of May 1998.

  
FRANK H. McCARTHY  
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS  
United States Attorney



PHIL PINNELL, OBA #7169  
Assistant United States Attorney  
333 West 4th Street., Suite 3460  
Tulsa, Oklahoma 74103-3809  
(918) 581-7463

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

**FILED**

MAY 26 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MICHAEL C. PERRY, MICHIKO  
PERRY, DERIVATIVE ARTS CORP.,  
AND MEDIA SOURCE, INC.,

Plaintiffs,

vs.

MEGADYNE PRODUCTS, INC.,  
TERRY L. WINFREY, MICHAEL B.  
BOSHEARS, DONALD BOSHEARS,  
AND SODA-FLO INVESTMENTS, INC.,

Defendants.

Case No. 97-CV-1107H(W)

(Base File)

ENTERED ON DOCKET

DATE 5-27-98

**JOINT STIPULATION OF DISMISSAL WITHOUT PREJUDICE**

Pursuant to Rule 41(a)(1)(ii), FED.R.CIV.P., the plaintiffs and defendants jointly stipulate that this action be dismissed without prejudice. The parties will bear their own costs and attorneys' fees.

Dated: May 22, 1998.

ROSENSTEIN, FIST & RINGOLD

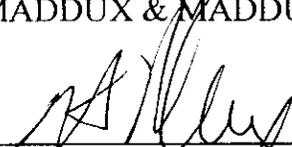
By

  
John E. Howland, OBA No. 4416  
525 S. Main St., Suite 700  
Tulsa, OK 74103-4500  
(918) 585-9211

Attorneys for Plaintiffs

MADDUX & MADDUX

By

  
H. Gregory Maddux, OBA No.  
4137 South Harvard Ave., Suite D  
Tulsa, OK 74135

Attorneys for Defendants

e/s

**F I L E D**

MAY 26 1998 *mw*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

32.4

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

MELANIE I. ALLISON, )

Plaintiff, )

vs. )

Case No.: 98-CV-0008-E (J) ✓

LEADERS LIFE INSURANCE CO., an )  
Oklahoma Insurance Company, and )  
AMERICAN FAMILY LIFE ASSURANCE )  
CO. OF COLUMBUS (AFLAC), a Foreign )  
Insurance Company, and JUDY ROBB, an )  
Individual, )

Defendant. )

ENTERED ON DOCKET  
DATE MAY 27 1998

**ORDER OF DISMISSAL**

The above matter comes on to be heard this 22<sup>nd</sup> day of May, 1998, upon the written stipulation of the parties for a dismissal of said action with prejudice, and the Court, having examined said stipulation, finds that the parties have entered into a compromise settlement covering all claims involved in the action, and the Court, being fully advised in the premises, finds that said action should be dismissed pursuant to said stipulation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff's cause of action filed herein against the Defendant be, and the same is hereby, dismissed with prejudice to any future action.

*James Allen*  
UNITED STATES DISTRICT COURT JUDGE

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

**FILE**

MAY 22 1998

Phil Lombardi, C  
U.S. DISTRICT C

\_\_\_\_\_ )  
 GEORGE GATEWOOD, ....Plaintiff, )  
 )  
 v. )  
 )  
 AMERICAN AIRLINES, INC.; and )  
 SABRE GROUP, INC., formerly known )  
 as Sabre Group, an Operating )  
 Division of American Airlines, )  
 Inc., ....Defendants. )  
 \_\_\_\_\_ )

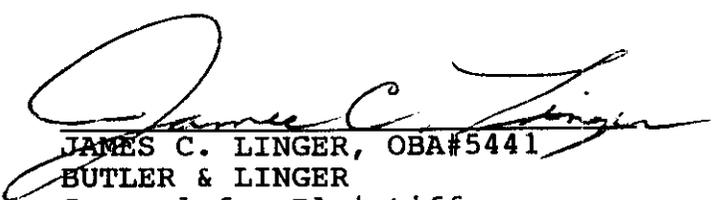
Case No. 97-CV-291-B  
consol.

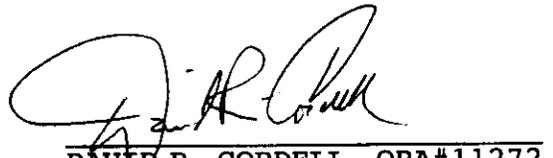
ENTERED ON DOCKET  
DATE MAY 26 1998

JOINT STIPULATION FOR PARTIAL DISMISSAL

COME now the Plaintiff and Defendants, by and through their counsel of record, pursuant to F.R.C.P. 41(a)(1)(ii), and hereby stipulate that Counts II and IV of the Amended Complaint and Demand for Jury Trial filed herein on February 17, 1998, in the above-entitled action be dismissed, but that Counts I and III of said Amended Complaint and Demand for Jury Trial be continued in the instant case.

DATED this 22nd day of May, 1998.

  
 JAMES C. LINGER, OBA#5441  
 BUTLER & LINGER  
 Counsel for Plaintiff  
 1710 South Boston Avenue  
 Tulsa, Oklahoma 74119-4810  
 (918) 585-2797  
 (918) 585-2798 facsimile

  
 DAVID R. CORDELL, OBA#11272  
 CONNER & WINTERS  
 Counsel for Defendants  
 3700 First Place Tower  
 15 East Fifth Street  
 Tulsa, Oklahoma 74103-4344  
 (918) 586-5711  
 (918) 586-8547 facsimile

*Ju*

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

**FILED**

MAY 22 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

BAIRD, KURTZ & DOBSON, )  
a general partnership )  
Plaintiff, )  
v. )  
JAMES K. SLUSSER, an individual )  
7242 S. Gary )  
Tulsa, OK 74136 )  
Defendant. )

Case No. 98-CV-305-B(M)

ENTERED ON DOCKET  
DATE MAY 26 1998

PLAINTIFF'S VOLUNTARY DISMISSAL WITHOUT PREJUDICE

Pursuant to Rule 41(a)(1), Fed. R. Civ. P., plaintiff, by and through counsel, hereby  
dismisses without prejudice its Complaint filed in the above-captioned proceeding at plaintiff's  
cost.

Respectfully submitted,

CONNER & WINTERS



David R. Cordell OBA #11272

3700 First Place Tower  
15 East 5th Street  
Tulsa, Oklahoma 74103-4344  
(918) 586-5711 telephone  
(918) 586-8547 facsimile

and  
James A. Snyder MO Bar #32849  
Stephen B. Sutton MO Bar #25109

LATHROP & GAGE L.C.  
2345 Grand Boulevard  
Kansas City, Missouri 64108  
(816) 292-2000 telephone  
(816) 292-2001 facsimile

ATTORNEYS FOR PLAINTIFF  
BAIRD, KURTZ & DOBSON

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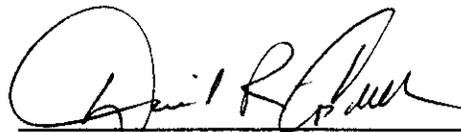
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been forwarded by first-class mail to the following:

David L. Bryant  
Bryant Law Firm  
406 South Boulder Ave. S, Suite 400  
Tulsa, OK 74103  
ATTORNEY FOR DEFENDANT

Dated: May 22, 1998



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ATTORNEY FOR DEFENDANT  
BAIRD, KURTZ & DOBSON

rgb

OBA #16326

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

**FILED**

**MAY 22 1998**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

FARMERS INSURANCE COMPANY, INC., )

Plaintiff, )

vs. )

CASE NO. 98-CV-43 B (M)

SCOTT DEVIN HELLER, AMBROSE SOLANO, )

JR. and VICKI SOLANO, )

Defendants. )

ENTERED ON DOCKET

DATE MAY 26 1998

STIPULATION OF DISMISSAL

COMES NOW the plaintiff, Farmers Insurance Company, Inc., ("Farmers") and respectfully dismisses this case pursuant to the stipulation of all the parties. Farmers further notifies the court that on April 27, 1998 the coverage questions presented in this declaratory judgement action and the liability issues presented in the underlying court claim were submitted to a mediation. All of the claims settled at the mediation. As a result, there is no reason to proceed in this action, and the undersigned counsel stipulate to the dismissal of this case.

Respectfully submitted,

KNOWLES, KING & TAYLOR

By Dennis King  
DENNIS KING - OBA #5026

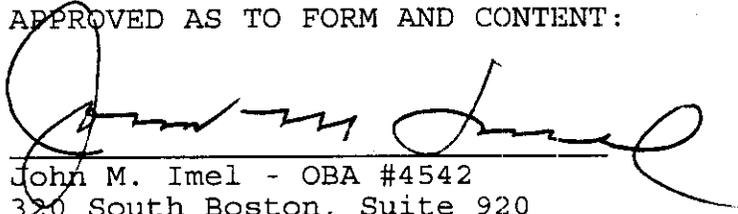
NEIL D. VAN DALSEM - OBA #16326  
603 Expressway Tower  
2431 East 51 Street  
Tulsa, OK 74105  
(918) 749-5566

Attorneys for Plaintiff Farmers  
Insurance Company, Inc.

12

ST

APPROVED AS TO FORM AND CONTENT:



---

John M. Imel - OBA #4542  
320 South Boston, Suite 920  
Tulsa, Oklahoma 74103  
Attorney for Defendant  
Scott Devin Heller



---

Michael P. Atkinson - OBA #374  
1500 Park Centre  
525 South Main  
Tulsa, Oklahoma 74103  
Attorney for Defendants Ambrose  
Solano, Jr. and Vicki Solano

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

SAMUEL L. ARNETTE, JR., )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
ATLANTIS PLASTIC FILMS, INC., )  
 )  
 )  
Defendant. )

ENTERED ON DOCKET

DATE 5-26-98

No. 97-C-342-K

**FILED**

MAY 22 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 21 day of May, 1998.

  
TERRY C. KERN, Chief  
UNITED STATES DISTRICT JUDGE

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

ENERGY TITLE CONSULTANTS, INC., )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MONEY MAN, INC., )  
 )  
 Defendant. )

ENTERED ON DOCKET

DATE 5-26-98

Case No. 97-CV 625K

**FILED**

MAY 22 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

The Court, upon consideration of the parties' Joint Stipulation of Dismissal With Prejudice, finds that the parties' Joint Stipulation should be, and the same hereby is, GRANTED.

IT IS ORDERED that this matter be dismissed with prejudice.

  
JUDGE OF THE DISTRICT COURT

Exhibit B

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

KYLE A. ARMSTRONG,

Defendant.

ENTERED ON DOCKET

DATE 5-26-98

No. 98CV0077K(M)

**F I L E D**)

MAY 22 1998 CA

DEFAULT JUDGMENT

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

This matter comes on for consideration this 21 day of May, 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, Kyle A. Armstrong, appearing not.

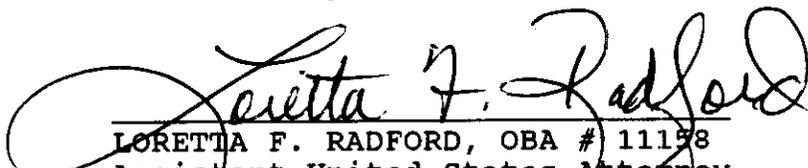
The Court being fully advised and having examined the court file finds that Defendant, Kyle A. Armstrong, was served with Summons and Complaint on April 3, 1998. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant 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, Kyle A. Armstrong, for the principal amount of \$2,685.63, plus accrued interest of \$2,289.64, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of

\$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.43 percent per annum until paid, plus costs of this action.

  
United States District Judge

Submitted By:

  
LORETTA F. RADFORD, OBA # 111178  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR/11f

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

**FILED**

**MAY 22 1998**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

RENNE L. SHOATE, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
UNITED STATES POSTAL SERVICE, )  
(MARVIN RUNYON), )  
 )  
Defendant. )

Case No. 97-CV-376-BU

ENTERED ON DOCKET

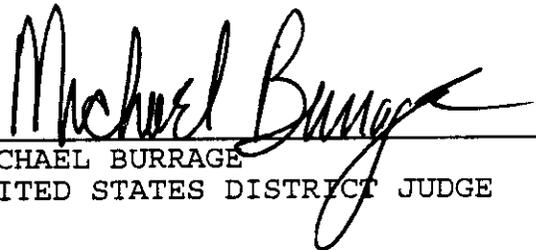
DATE **MAY 26 1998**

**JUDGMENT**

This matter came before the Court upon Defendant's Motion for Summary Judgment, and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Defendant, Marvin Runyon, Postmaster, U.S. Postal Service, and against Plaintiff, Renne L. Shoate.

DATED at Tulsa, Oklahoma, this 22<sup>nd</sup> day of May, 1998.

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

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

**FILED**

MAY 22 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

RENNE L. SHOATE, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 UNITED STATES POSTAL SERVICE )  
 (MARVIN RUNYON), )  
 )  
 Defendant. )

No. 97-CV-376-BU

ENTERED ON DOCKET  
MAY 26 1998  
DATE \_\_\_\_\_

**ORDER**

This matter comes before the Court upon Defendant's Motion for Summary Judgment as to Count I of Plaintiff's Amended Complaint.<sup>1</sup> Plaintiff has responded to the motion and Defendant has replied thereto. Upon due consideration of the parties' submissions, the Court makes its determination.

The relevant undisputed facts are as follows. Plaintiff, an African-American, entered on duty with the United States Postal Service on June 26, 1995. At that time, she served as a casual clerk in the processing area. Processing is the division of the post office concerned with the physical movement and processing of the mail. Casual clerks serve ninety-day appointments. Plaintiff's appointment to the position of casual clerk was renewed until April, 1996.

By letter dated March 18, 1996, Plaintiff requested that she be converted from a casual clerk to a temporary transitional

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<sup>1</sup> The Court has previously dismissed Count II of Plaintiff's Amended Complaint.

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employee letter carrier. Plaintiff's transfer was approved in April of 1996, but she first served a six day break in service. Consequently, Plaintiff was given a non-career temporary transitional employee appointment. As a newly appointed temporary transitional employee, Plaintiff was subject to dismissal during a ninety-day probationary period.

Plaintiff was assigned to be a letter carrier at the Donaldson Station in Tulsa, Oklahoma. Carrying and delivering mail is included in the other major division of the Postal Service -- customer service. At all times relevant to this action, Johnnie Bozarth served as station manager for the Donaldson Station. Managers of customer service were Debbie Ellis and Jamie Gonzales. All three of these individuals were Plaintiff's supervisors.

On June 4, 1996, Plaintiff, while on her mail route, stepped into a mole or gopher hole and turned her ankle. She went ahead and completed her route. Plaintiff reported for work the next day, June 5, 1996, and completed her mail route. After completing her route on June 5, 1996, she wrote a "buck slip" giving notification of her injury. No supervisor was present at the time so Plaintiff left the "buck slip" to be found the next day.

On June 6, 1996, Ms. Ellis spoke with Plaintiff about her injury. Ms. Ellis filled out paperwork required to be completed for on the job injuries. One such form was a "CA-1" form which is used to authorize immediate treatment and evaluation. On that form, Ms. Ellis indicated that treatment would be authorized at Occupational Medicine Services. Plaintiff thereafter spoke to

union steward, Jerry O'Kelley, who had overheard the conversation between Ms. Ellis and Plaintiff. Mr. O'Kelley informed Plaintiff that she had the right to see the doctor of her choice. Plaintiff, without conferring again with any supervisor or manager, left the Donaldson Station to seek treatment from Westview Medical Clinic. The CA-1 form was altered after having been signed by Ms. Ellis to reflect that treatment would be received at Westview Medical Clinic.

Ultimately, via telephone, treatment was authorized at the Westview Medical Clinic and Plaintiff was instructed to report to work with the completed documentation. Plaintiff did not report for work after leaving the Westview Medical Clinic on June 6, 1996. Plaintiff did not report for work when scheduled on June 7 and 10, 1996.

On June 10, 1996, Plaintiff's husband delivered to the Donaldson Station the OWCP-5 form filled out by Dr. Lawrence Reed of Westview Medical Clinic, plus a letter written by Dr. Reed dated June 10, 1996, which specifically stated that Plaintiff should return to work on June 11, 1996. Because Plaintiff's supervisor had an apparent discrepancy between the OWCP-5 and Dr. Reed's letter, Plaintiff obtained another letter from Dr. Reed dated June 11, 1996, which clarified the facts. Plaintiff provided that letter to her supervisor on June 12, 1996.

On June 11, 1996, a meeting was held between management at the Donaldson Station and Plaintiff. Plaintiff was informed that she was not to communicate with the union steward, Mr. O'Kelley, while

she was at work unless granted permission to do so by a supervisor.

On June 12, 1996, Plaintiff clocked in and approached Mr. O'Kelley while he was performing work duties. Plaintiff was accompanied by another person, also a postal employee. Plaintiff had a brief exchange of words with Mr. O'Kelley and handed him a letter.

On June 20, 1996, Defendant sent Plaintiff to Dr. G.W. Kelly, an occupational medicine specialist, for a second opinion. Dr. Kelly agreed with Dr. Reed's diagnosis and instructed Plaintiff to remain on limited duty for seven days.

On June 26, 1996, Plaintiff was called into a meeting wherein she was notified that she had been terminated. The "Notice of Removal" letter signed by Ms. Ellis stated that Plaintiff had "repeatedly failed to follow specific instructions and procedures of [her] supervisors." The instructions and procedures Plaintiff failed to follow included (1) reporting to work or calling in her absence on June 7 and 10, 1995; (2) talking with the union steward on June 12, 1996 without permission; (3) reporting to work at 10:00 a.m. instead of 11:30 a.m. on June 15, 1996; (4) clocking into work at 9:00 a.m. instead of 10:00 a.m. on June 17, 1996; and (5) answering the dock buzzer at the back door on June 19, 1996.

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 views the evidence and draws 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 the jury." Williams v. Rice, 983 F.2d 177, 179 (10th Cir. 1993). In other words, the non-moving party must make a showing sufficient to establish an inference of the existence of each element essential to the case. Bolden v. PRC Inc., 43 F.3d 545, 548 (10th Cir. 1994), cert. denied, 516 U.S. 826, 116 S.Ct. 92, 133 L.Ed.2d 48 (1995).

In Count I of the First Amended Complaint, Plaintiff claims that she was subjected to a racially hostile work environment at the Donaldson Station. Although hostile work environment is not explicitly mentioned in Title VII of the Civil Rights Act of 1964, it is well-settled that a victim of a racially hostile or abusive work environment may bring a cause of action pursuant to 42 U.S.C. § 2000e-2(a)(1). Bolden, 43 F.3d at 550. To constitute actionable harassment, the conduct must be "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." Id. at 550-551 (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986), quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

For Plaintiff's claim to survive summary judgment, Plaintiff's "facts must support an inference of a racially hostile environment, and support a basis for liability." Bolden 43 F.3d at 551 (citations omitted). "Specifically, it must be shown that under the totality of the circumstances (1) the harassment was pervasive or severe enough to alter the terms, conditions, or privilege of

employment, and (2) the harassment was racial or stemmed from racial animus." Id. (citation omitted). General harassment, if not racial, is not actionable. Id. Plaintiff must show "'more than a few isolated incidents of racial enmity.'" Id. (quoting Hicks v. Gates Rubber Co., 833 F.2d 1406, 1412 (10th Cir. 1987), quoting Snell v. Suffolk Co., 782 F.2d 1094, 1103 (2d Cir. 1986)). "Instead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments." Id. (citing to Hicks, 833 F.2d at 1412-1413, citing to Johnson v. Bunny, 646 F.2d 1250, 1257 (8th Cir. 1981)). If the nature of an employee's environment, however unpleasant, is not due to race, the employee has not been the victim of racial discrimination as a result of that environment. Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1537-38 (10th Cir. 1995).

In her deposition, Plaintiff testified that no racial terms were used by Ms. Ellis to her or to any one else at the Donaldson Station. Defendant's Exhibit 9, p. 98, ll. 12 & 21-23. Plaintiff, however, testified that Ms. Ellis' attitude toward her was demeaning. Id. at 98, l. 13. Plaintiff testified that after two weeks of work, she talked with Ms. Ellis about having to carry too much junk mail and "[Ms. Ellis] flew off the handle about it saying if I didn't want the job . . . if I can't do the job I need to quit and find something else." Id. at 96, ll. 15-18. Plaintiff also testified that Ms. Ellis was demeaning when Plaintiff took off for pre-arranged dental appointments for herself and a doctor's appointment for her daughter. As to the latter event, Plaintiff

described Ms. Ellis' demeanor as "very nasty." Id. at 114, l. 13.

Plaintiff further testified that she requested to come into work at an earlier time and Ms. Ellis denied the request without a reason. Id. at 140, ll. 1-16. Plaintiff also testified that on one occasion after her injury, Ms. Ellis snatched the phone from her when Plaintiff told her the call was for her. Id. at 121, ll. 4-8.

The Court finds that Plaintiff has failed to raise a genuine issue of fact as to whether she was subjected to a racially hostile work environment. Specifically, Plaintiff has failed to present sufficient facts to show that the alleged harassment was racial or stemmed from racial animus. Plaintiff conceded that no racial remarks were made to her and that she had no knowledge of the supervisors using racial terms with respect to any one at the Donaldson Station. None of the alleged comments or discussions cited by Plaintiff in support of her claim have racial implications whatsoever.

Ms. Ellis may have been unpleasant to Plaintiff on several occasions. However, as stated, general harassment, if not racial, is not actionable. Bolden, 43 F.3d at 551. Plaintiff has not presented evidence to support an inference that the alleged harassment was based upon race. The Court notes that Plaintiff was not the only African-American employee at the Donaldson Station. Indeed, the record reveals that there were eight to ten African-Americans employed at the Donaldson Station. Plaintiff's Exhibit A, p. 44, ll. 15-16. Plaintiff, however, has not shown that these

employees experienced similar treatment from Ms. Ellis. Union steward, Mr. O'Kelley, testified that Ms. Ellis was a different type of manager and that he had had a lot of employees come to him to complain about her management. However, he also testified that black employees did not make any more complaints about Ms. Ellis than white employees. Id. at 44, ll. 17-20.

Plaintiff asserts that Mr. O'Kelley observed that she was treated differently from others at the Donaldson Station. However, such observation is not supported by the record. The portion of Mr. O'Kelley's deposition testimony cited by Plaintiff only reveals that Mr. O'Kelley testified that Plaintiff was the only employee who had ever made a complaint of discrimination based upon race. Plaintiff's Exhibit A, p. 45, ll. 17-20.

In support of her racial harassment claim, Plaintiff also cites to her affidavit to the National Labor Relations Board, wherein she testified that Mr. Bozarth had told her he knew he treated employees different and that "if he looked at me I could take that as discrimination." Defendant's Exhibit 11. She also points to Ms. Ellis' notes regarding Plaintiff. The Court, however, finds that this evidence does not raise a genuine issue of fact that the conduct she was subjected to stemmed from racial animus.

Plaintiff has not shown that a reasonable jury would return a verdict in her favor on the racial harassment claim. The incidents cited by Plaintiff do not demonstrate that her work environment "was permeated with discriminatory intimidation, ridicule and

insult." Harris v. Forklift System, Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993) (citation and internal quotation marks omitted). Plaintiff has not presented evidence of "'a steady barrage of opprobrious racial comments,'" as required to show a racially hostile work environment. Hicks, 833 F.2d at 1412-13 (quoting Johnson, 646 F.2d at 1257). Accordingly, summary judgment is appropriate on the racial harassment claim.

In Count I of the First Amended Complaint, Plaintiff additionally contends that she was terminated from her employment on the basis of her race. Defendant, on the other hand, argues that she was fired for failing to follow specific instructions and procedures of her supervisors. To establish a prima facie case on a claim of discriminatory discharge for purported violation of a work rule, Plaintiff must show that (1) she was a member of a protected class, (2) that she was discharged for violating a work rule, and (3) that similarly situated non-minority employees were treated differently. Aramburu v. The Boeing Company, 112 F.3d 1398, 1403 (10th Cir. 1997).

If Plaintiff establishes a prima facie case, Defendant must articulate, and support with some evidence, a legitimate, nondiscriminatory reason for the discharge. Id. If Defendant meets this burden, Plaintiff must then present evidence raising a genuine issue that her termination was the result of race or that the reason offered by Defendant was mere pretext. Id. At the summary judgment stage, if Plaintiff can show a prima facie case of discrimination and present evidence that the employer's proffered

reason was a mere pretext, the case should go to the trier of fact.  
Id.

As to Plaintiff's prima facie case, Defendant has only challenged the third element, similarly situated non-minority employees were treated differently. Defendant maintains that Plaintiff cannot establish that she was treated differently than similarly situated non-minority employees. Plaintiff contends that Abby Simmons, a white female and a letter carrier at North Side Station, was treated differently from Plaintiff. Plaintiff testified that what she knew about Ms. Simmons and how she was treated came from Percy Palmer and Clarence Jackson. Defendant's Exhibit 9, p. 92, ll. 19-23; p. 93, ll. 1-9; p. 94, ll. 15-20. However, the testimony to support such claim is hearsay evidence. It is well-settled that the Court can only consider admissible evidence in reviewing a summary judgment motion. Thomas v. IBM, 48 F.3d 478, 485 (10th Cir. 1995). "Hearsay testimony cannot be considered because '[a] third party's description of [a witness] supposed testimony is not suitable grist for the summary judgment mill.'" Id. (citations omitted). Even if the testimony were to be considered, it does not establish that Plaintiff and Ms. Simmons were in fact similarly situated.<sup>2</sup>

Plaintiff additionally asserts that she was treated differently as she was the only transitional employee fired from

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<sup>2</sup> In her deposition, Plaintiff also testifies about Twila Nolan's handling of a claim by Walter Andrews, a white male employed at the union office. This testimony, however, is also hearsay evidence and inadmissible for summary judgment purposes.

the Donaldson Station in 1996. Plaintiff, however, offers no evidence that any of the non-minority employees were similarly situated to her but treated different, that is, they had violated a work rule but not been fired.

Even if the Court were to assume that Plaintiff has established her prima facie case, the Court finds that Plaintiff has failed to raise a genuine issue that Defendant's articulated reasons for termination were a mere pretext for discrimination. In her response brief, Plaintiff contends that she did not fail to report her accident as she reported it to her supervisors the day after it occurred. Plaintiff asserts that she had 30 days under the Employee and Labor Relations Manual to report her accident. Moreover, citing to the testimony of Barbara Flowers-Hines, Plaintiff's Exhibit R, p. 28, ll. 19-21, Plaintiff asserts that no employee prior to Plaintiff had been fired for failing to report an accident.

Upon review of the record, the Court notes that Defendant's articulated reasons for Plaintiff's termination did not include a failure to report her injury. Indeed, neither the "Notice of Removal" letter given to Plaintiff nor the testimony of Mr. Bozarth indicates that a failure to report her injury was a basis for her termination. Plaintiff has submitted an accident report wherein Ms. Ellis, in the describing Plaintiff's accident, wrote that Plaintiff did not "report [the injury] until Wed evening on 6/5." Plaintiff's Exhibit C. In the report Ms. Ellis also wrote "TE's can't be disciplined per Nate Agreement, only recourse is

termination which will be proposed." Id. This evidence, however, does not support an inference that Defendant's articulated reason for termination was a failure to report an injury. There is no evidence in the record that one of Defendant's articulated reasons for termination was a failure to report the injury. The Court, therefore, finds that Plaintiff's evidence relating to the failure to timely report an injury does not support an inference of pretext.

As to pretext, Plaintiff cites to the testimony of Mr. Bozarth that Plaintiff was not fired for talking to Mr. O'Kelley without permission. Although Mr. Bozarth testified that Plaintiff was not fired for talking with Mr. O'Kelley without permission, Defendant's articulated reason for termination was not for talking with Mr. O'Kelley but for failing to obey orders including an order not to talk with Mr. O'Kelley without permission. Plaintiff does not dispute that she was directed not to talk with Mr. O'Kelley without permission. Plaintiff cites to testimony by Mr. O'Kelley that employees have talked to him without permission from management and not been fired. However, this evidence does not show that any of these employees, prior to speaking with Mr. O'Kelley, were instructed not to do so without permission from management.

Plaintiff additionally cites to Mr. Bozarth's testimony that it was not proper to terminate an employee who was injured and chose to see her own doctor. However, Mr. Bozarth did not testify that Plaintiff was fired for visiting her own doctor. Rather, Mr. Bozarth testified that Plaintiff was terminated for failing to

follow instructions; one of which was to go to Occupational Medicine Services for examination. Plaintiff's Exhibit O, p. 29, ll. 11-15. Moreover, the record shows that under postal regulations, an injured employee, in a non-emergency situation, could be required to be examined by a postal medical officer or a contract equivalent prior to obtaining initial medical treatment. Plaintiff's Exhibit B, § 543.11.

Plaintiff further cites to Mr. O'Kelley's testimony that Mr. Bozarth told Mr. O'Kelley that he was going to fire Plaintiff because of her "compensation case, Plaintiff's Exhibit A, p. 15, ll. 17-25, p. 16, ll. 1-2;" Mr. Bozarth's testimony that it was not appropriate USPS procedure to fire a transitional employee for having a non-preventable accident, Plaintiff's Exhibit O, p. 43, ll. 21-22; and Barbara Flower-Hines' testimony that Mr. Dickerson, manager of customer services, had told her Plaintiff had been fired because she had had an "accident or something of that nature," Plaintiff's Exhibit R, p. 24, ll. 19-20. This evidence, however, does not establish a genuine issue of fact that Defendant's reasons for termination were a pretext for discrimination. Even if Plaintiff were fired for her injury rather than for failing to follow instructions of her supervisors, Title VII does not offer remedies for a discharge based upon an injury. Injury is not a protected trait under Title VII. Therefore, termination based upon an injury would not subject Defendant to liability under Title VII. See, e.g., Hazen Paper Co. v. Biggins, 507 U.S. 604, 612, 113 S.Ct. 1701, 1707, 123 L.Ed. 338 (1993) ("It cannot be true that an

employer who fires an older black worker because the worker is black thereby violates the [Age Discrimination in Employment Act]. The employee's race is an improper reason, but it is improper under Title VII, not the ADEA.")

Additionally, Plaintiff contends that Mr. O'Kelley observed that she was treated differently than other employees. However, as noted above, the deposition testimony of Mr. O'Kelley does not support such observation. Mr. O'Kelley testified that Plaintiff was the only employee who had made a complaint based upon race. Plaintiff's Exhibit A, p. 45.

Plaintiff further points to a statements of Ms. Flowers-Hines to demonstrate pretext. According to Plaintiff's deposition testimony, Ms. Flowers-Hines told Plaintiff prior to her transfer to the Donaldson Terrace Post Office that "they don't treat people of our color right." Plaintiff's Exhibit V, p. 38, ll. 12-13. Plaintiff also testified that after her termination, Ms. Flowers-Hines told her "see, I told you they didn't treat people of our color right." Id. at p. 66, ll. 6-7. The Court, however, finds that this evidence does not raise a genuine issue as to pretext. Ms. Flowers-Hines was not Plaintiff's supervisor and played no role in her termination. The Court concludes that the statements to Plaintiff were simply "stray remarks." Cone v. Longmont United Hospital Ass'n, 14 F.3d 526, 531 (10th Cir. 1994).

Having reviewed the evidence in a light most favorable to Plaintiff, the Court finds that Plaintiff has failed present sufficient evidence to require submission of her racial

discrimination claim to the jury. Williams, 983 F.2d at 179. The Court therefore finds that Defendant is entitled to summary judgment on that claim.

Based upon the foregoing, Defendant's Motion for Summary Judgment as to Count I of Plaintiff's Amended Complaint (Docket Entry #23) is **GRANTED**. Judgment shall issue forthwith. In light of the Court's ruling, Defendant's Motion in Limine to Exclude or Limit the Testimony of Witnesses Listed by Plaintiff (Docket Entry #24) is **DECLARED MOOT**.

Entered this 22<sup>nd</sup> day of May, 1998.

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

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

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

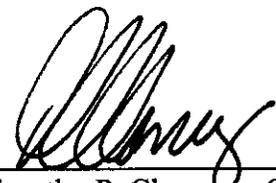
MELANIE I. ALLISON, )  
)  
Plaintiff, )  
)  
vs. )  
)  
LEADERS LIFE INSURANCE CO., an )  
Oklahoma Insurance Company, and )  
AMERICAN FAMILY LIFE ASSURANCE )  
CO. OF COLUMBUS (AFLAC), a Foreign )  
Insurance Company, and JUDY ROBB, an )  
Individual, )  
)  
Defendant. )

Case No.: 98-CV-0008-E (J)

ENTERED ON DOCKET  
DATE MAY 22 1998

**STIPULATION FOR DISMISSAL WITH PREJUDICE**

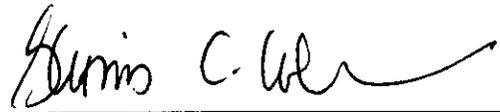
COME NOW the attorneys for the Plaintiff and the Defendant, Judy Robb, respectively, and hereby stipulate and agree that the above captioned cause may, upon order of the Court, be dismissed with prejudice to further litigation pertaining to all matters involved herein and state that a compromise settlement covering all claims involved in the above captioned cause has been made between the parties, and the said parties hereby request the Court dismiss said action with prejudice, pursuant to this stipulation.



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May 20, 1998

Phil Lombardi, Clerk  
United States District Court  
Northern District of Oklahoma  
333 West Fourth Street, Fourth Floor  
Tulsa, Oklahoma 74103

**RECEIVED**

**MAY 21 1998**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Dear Mr. Lombardi:

In re: Melanie I. Allison vs. Leaders Life Insurance Co., an Oklahoma insurance company, and American Family Life Assurance Co. of Columbus (AFLAC), a foreign insurance company, and Judy Robb, an individual, United States District Court for the Northern District of Oklahoma, No. 98-CV-0008-E (J)

Enclosed for filing in the above-captioned case is original Stipulation for Dismissal With Prejudice.

We would appreciate your file-stamping the additional copies enclosed and returning them to us in the enclosed self-addressed, stamped envelope.

Also enclosed are original and three (3) copies of proposed Order of Dismissal. We would appreciate your presenting the original Order to Judge Ellison for signature, along with a file-stamped copy of the Stipulation for Dismissal. After the Order has been signed, we would also appreciate your returning file-stamped copies to us in the enclosed envelope.

Phil Lombardi, Clerk

Page 2

May 20, 1998

Thank you for your assistance.

Sincerely,

A handwritten signature in cursive script that reads "Cynthia S. Goins".

Cynthia S. Goins, CLA  
Paralegal

csg W:\Cindy\Allison.97-1253\plcsg98.520.wpd  
Enclosures



issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment."). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

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

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

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

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

## II

For purposes of this motion, the Court accepts as true the following facts agreed to by the parties:

1. This case arises out of a dispute regarding overtime wages originally filed by Plaintiff, Dale Jean Terwilliger, on November 12, 1996, on behalf of herself and all other similarly situated employees at Home of Hope.
2. On June 18, 1997, Plaintiff's counsel filed an Amended Complaint on behalf of 50 employees who wished to participate in this litigation.
3. Based on the companionship services exemption found at 29 U.S.C. § 213(a)(15), certain personnel in the Supported Living Program, including Habilitation Training Specialists ("HTS") personnel and House Managers, were not paid for overtime incurred during the relevant time.
4. Home of Hope's Supported Living Program provides services for adult clients with developmental disabilities.
5. The Plaintiffs involved in this lawsuit were employed in Home of Hope's Supported Living Program either as HTS personnel or House Managers during the period of time from June 30, 1994 to July 1, 1996.
6. The job duties of an HTS worker include assisting clients with developmental disabilities with daily living needs, as well as providing incidental training and other support as needed.
7. The job duties of a house manager including supervising small groups of other HTS personnel working in the client's home, as well as providing assistance to individual clients with daily living needs and training.
8. Home of Hope's Supported Living Program has been in existence since 1989.
9. The services that Home of Hope provides to its clients are governed by a series of contracts with the Oklahoma State Department of Human Services ("DHS"). These contracts require that individuals receiving services provided for by the contracts receive those services in a home owned or leased by the individual.

10. The majority of Home of Hope's clients in its Supported Living Program are former residents of the Hissom Memorial Center.
11. The clients currently range in age from approximately twenty-years old to fifty-years old, with an average age of thirty-nine.
12. The purpose of Home of Hope's Supported Living Program is to provide supervision, habilitation, protection, incidental training and assistance with the activities of daily living to these clients in their own homes.
13. At the time of filing of the motions, there were forty-five clients in the Supported Living Program residing in twenty-seven homes. Ten of the twenty-seven homes, or thirty-seven percent, have a single client.
14. Six of the homes, or twenty-two percent of the total, are owned by the client or his or her legal guardian.
15. Typically, there are no more than two clients residing in each of the remaining seventeen homes.
16. The client can affect changes in staff at his or her home at any time for any reason. Many of the Plaintiffs in this lawsuit, for example, have been replaced in a particular home at the request of a client.
17. The client can change providers from Home of Hope to another agency at any time. In the event of a change in providers, the home stays with the client.
18. The client chooses the paint and decor of his or her own house, and no two houses are alike.

### III

Under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et seq., hourly workers must be compensated at a rate one-half times the regular rate for hours worked in excess of forty

hours per workweek. 29 U.S.C. § 207(a)(1).<sup>1</sup> An exemption to this general rule is found in the provision dealing with “companionship services.” This exemption states that the overtime requirements in § 207 do not apply to:

any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).

29 U.S.C. § 213(a)(15). Thus, to be covered by this exemption, employees must be engaged in “domestic service employment” and must perform “companionship services.”

Initially, the Court notes that exemptions from the FLSA must be narrowly construed. A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945). Moreover, as the Tenth Circuit has stated:

[a]n employer who asserts he is exempt from the Act “has the burden of establishing the exemption affirmatively and clearly.” The Act constitutes humanitarian and remedial legislation. Exemptions must be narrowly construed and are limited to those establishments plainly and unmistakably within the terms and the spirit of the exemption invoked.”

Schoenhals v. Cockrum, 647 F.2d 1080, 1081 (10th Cir. 1981) (citation omitted).

A

As noted above, to fall within the companionship services exemption, an employee must first be classified as a domestic service employee. “Domestic service employment” includes “persons who are frequently referred to as ‘private household workers.’” 29 C.F.R. § 552.101(a). The term “domestic service employment” is defined in the regulations as “services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed.” 29 C.F.R. § 552.3.<sup>2</sup> “However, a dwelling house used

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<sup>1</sup> Home of Hope does not dispute that it is an employer covered by the overtime provisions of the FLSA.

<sup>2</sup> In a supplemental submission, Plaintiffs argue that the private home exception does not apply since they were employed by Home of Hope and not the individual clients, relying on the language “by whom he or she is employed.” As Defendant notes, however, this construction is

primarily as a boarding or lodging house for the purpose of supplying such services to the public, as a business enterprise, is not a private home.” H.R. Rep. No. 93-913, at 74 (1974). Thus, the determinative factor in domestic service employment is that the employment must occur in a “private home.”

Plaintiffs contend that they did not perform services in the private homes of Home of Hope clients and thus are not covered by the companionship services exemption. In determining whether a living arrangement is a “private home,” instead of an institution or business enterprise, courts look to several factors concerning the residence. These factors include: (1) its source of funding; (2) access to the facility by the general public; (3) whether it is organized for profit or is a nonprofit organization; and (4) the size of the organization.” Bowler v. Deseret Village Assoc. Inc., 922 P.2d 8, 13-14 (Utah 1996) (footnotes omitted). Additionally, the Northern District of Oklahoma has considered the following facts in deciding that residences were not private homes for purposes of the statute:

Defendant acquires the residences for the clients as well as the furniture for the residences. Defendant maintains a set of keys to the residences. Defendant makes decisions as to the number of people who live in the homes, often placing two or three people together in a residence. The Defendant retains substantial authority in determining the composition of the homes. The clients who reside together are unrelated and grouped together for purposes of treatment and training. Although the clients are signatories on the leases, the Defendant also signs the leases in many situations. The clients do not pay the rent to the landlord. Instead, almost all of the money is paid directly by the state to the Defendant. In turn, those sums are paid to the landlord.

Linn v. Developmental Servs. of Tulsa, Inc., 891 F. Supp. 574, 579 (N.D. Okla. 1995). See also Lott v. Rigby, 746 F. Supp. 1084, 1087 (N.D. Ga. 1990) (stating that a state-funded group residence is not a “private home” merely because the residents “participate in parts of its upkeep in order to learn home management skills”).

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inconsistent with 29 C.F.R. § 552.109(a). Further, Plaintiff has identified no authority, and the Court is unable to locate any, that supports this view of the companionship services exemption. In fact, the Court is not aware of any cases where the subject employees were employed by the individual client, rather than by an agency.

In the instant case, Home of Hope claims that its employees provide services in private homes due to the legal interests the clients have in ownership or possession of their homes and the degree of control exercised over those homes by the clients. Specifically, Home of Hope states that all of the homes are either owned by their clients or are leased by their clients from independent third parties, with the client's name appearing on the lease. Home of Hope also argues that its clients exercise a significant degree of control over their home environment since they choose whether they will have a roommate and who that roommate will be. Clients also choose the specific home in which they live, as well as the specific furnishings for that home. Home of Hope clients also can choose their particular provider and can change providers at will. Finally, Home of Hope employees do not perform maintenance on the homes and only have keys to the premises for emergency use, pursuant to express permission from the client.

In contrast, Plaintiffs claim that the residences of Home of Hope clients are not "private homes" since "[m]ost people in America do not have a staff of people 'in their homes' assisting them with practically every daily task." Pl.'s Resp. Br. at 3. Further, Plaintiffs argue that the contracts between Home of Hope and the Oklahoma Department of Human Services give Home of Hope control over virtually everything that occurs within the client's residence, including the negotiation and leasing of the homes. Plaintiffs also contend that Oklahoma provides practically all of the money to support the residences and that Home of Hope controls how the money is spent. Further, Plaintiffs point to the deposition testimony of David Finley, who stated that Home of Hope leases vehicles for clients in Home of Hope's name and maintains trust accounts for some clients, paying the utility bills out of these accounts. Finally, Plaintiffs allege that, based on the DHS contracts and the testimony of HTS employees, Home of Hope is responsible for the maintenance of the clients' residences.

The Court finds that the residences of Home of Hope clients are distinguishable from the residences in Linn and are "private homes" for purposes of the companionship services

exemption. Unlike Linn, Home of Hope does not acquire either the residence or furniture for the client. Instead, 22% of the homes of Home of Hope clients are owned by the client or the client's parent or guardian, while the remaining residences are rented or leased in the client's names from third parties. Home of Hope does not co-sign the lease and has no property interest in the client's residence. Moreover, each client selects and purchases his or her own furniture in the home.

Second, unlike Linn, Home of Hope maintains a set of keys to the client's residence to be used only for emergencies or to be used with the client's express permission. Third, unlike Linn, the client, not Home of Hope, chooses whether he or she will have a housemate and who that housemate will be. In fact, ten of Home of Hope's twenty-seven homes are occupied by a single client.

Finally, the Court notes that, like Linn, Home of Hope pays the rent to the landlord from the client's trust account. This fact, however, is not determinative as to whether the Home of Hope clients live in "private homes." Construing the factors as a whole, the Court finds that the residences of Home of Hope clients are "private homes" as defined in the companionship services exemption. Accordingly, this requirement of the companionship services exemption has been established.

## B

In addition to being engaged in domestic service employment in a "private home," an employee must also provide "companionship services." Department of Labor regulations define "companionship services" as

those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services.

29 C.F.R. § 552.6. In the instant case, it is clear that Plaintiffs were employed to provide

fellowship, care, and protection for individuals of advanced age or infirmity.<sup>3</sup> For example, Plaintiffs assisted clients with dressing, grooming, administering medication, in addition to performing household chores and assisting clients in developing skills. Thus, this requirement of the companionship services exemption also has been established. Based on the above, the Court concludes that both requirements of the companionship services exemption have been satisfied.

#### IV

Therefore, Plaintiffs must be considered exempt from the FLSA overtime provisions unless they fall within one of the legal exceptions to the companionship services exemption. There are two exceptions in the regulations to the companionship services exemption:

(1) general household services exceeding twenty percent of the total weekly hours worked; and (2) services performed by trained personnel, "such as a registered nurse or practical nurse." When these exceptions apply, the exemption for companionship services cannot be used, and the general FLSA overtime rules govern.

Linn, 891 F. Supp. at 578 (citations omitted).<sup>4</sup> Plaintiffs claim that they are entitled to overtime compensation because they fall within both of these exceptions to the companionship services exemption.

#### A

Plaintiffs first allege that they performed general household services in excess of twenty

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<sup>3</sup> At the hearing held in this matter on April 10, 1998, Plaintiffs agreed that they performed "companionship services."

<sup>4</sup> The regulations creating these exceptions to the definition of "companionship services" provide in pertinent part as follows:

["Companionship services"] may also include the performance of general household work: Provided, however, That such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked. The term "companionship services" does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse.

29 C.F.R. § 552.6.

percent of the total weekly hours worked. Other courts considering this issue have held that household work not “directly related” to an individual resident is subject to the twenty percent limit. For example, one court has stated that:

[d]usting or cleaning the client’s room or the living room “appears to be routine, general household work, rather than work related to the individual. Cleaning a spill by the client in either room, by contrast, would be non-routine care more related to the individual than to the general household, and would not be included in the twenty percent figure.”

Toth v. Green River Reg’l Mental Health/Mental Retardation Bd., Inc., 753 F. Supp. 216, 217 (W.D. Ky. 1989) (quoting McCune v. Oregon Senior Servs. Div., 643 F. Supp. 1444, 1450 (D. Or. 1986), aff’d, 894 F.2d 1107 (9th Cir. 1990)).

Further, another court has held that “general maintenance services, including cleaning laundry areas, general household cleaning (through use of mop, duster, and vacuum), washing vehicles, cleaning the garage, and maintaining the yards and grounds” constitute general household services. Although these services benefitted the individual residents, the court stated that the services were not “directly related” to the residents since they were ultimately provided to keep the residence clean for the benefit of all employees and the family members and friends of the residents. Bowler, 922 P.2d at 15.

In the instant case, Plaintiffs claim that they performed general household work totaling more than twenty percent of the total weekly hours worked. Specifically, Plaintiffs have submitted affidavits from HTS employees that state Plaintiffs performed general household work such as cleaning and grocery shopping at least twenty percent of the hours they worked each week. Plaintiffs further rely on the responses to Defendant’s interrogatories, which indicate that Plaintiffs spent more than twenty percent of their time each week in general house cleaning activities.

In contrast, Home of Hope argues that its employees do not perform general household work, as defined in the regulations, because general household work is defined as services

provided other than to a disabled, aged, or infirm individual. Defendant bases this construction upon the definition of “companionship services” in 29 C.F.R. § 552.106, and the parallel definition of babysitting services in 29 C.F.R. § 552.5. In effect, Defendant claims that although its employees clean and dust the clients’ residences, the Court need not reach the question whether these services amount to more than twenty percent of the hours worked since Plaintiffs only perform these services with respect to a disabled or infirm individual.

The Court finds that Home of Hope’s construction of the regulations concerning general household work must be rejected. To conclude that “general household work” only includes work performed for a non-disabled individual ignores the regulations, which expressly state that companionship services (services performed for the aged or infirm) can include general household services. See 29 C.F.R. § 552.6. Defendant’s construction also ignores case authority, which focuses not on the nature of the person for whom the services are performed, but on whether the services are “directly related” to that individual. See Bowler, 922 P.2d at 15. Thus, the Court finds that the performance of general household work for a disabled individual does not exclude that work from the twenty percent household work exception.

Accordingly, the Court concludes that there are disputed issues of fact with respect to this claim which preclude the granting of summary judgment.<sup>5</sup> Home of Hope has not provided evidence which establishes that its employees did not spend more than twenty percent of their total weekly hours performing general household work. Although Home of Hope has indicated that some employees perform household work in order to assist clients with living skills, it does not indicate whether all employees performed similar household work to benefit other clients. Defendant’s motion for summary judgment on this basis is hereby denied.

## B

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<sup>5</sup> Defendant agreed at the hearing on this matter that if the Court rejected its construction of the regulations, there exists a factual dispute as to the amount of time Plaintiffs performed general household work each week.

Second, Plaintiffs claim that they are entitled to overtime compensation because they are trained personnel. The regulations provide that the term companionship services “does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse.” 29 C.F.R. § 552.6.

As the Seventh Circuit has stated:

a domestic service employee who provides “companionship services” within the meaning of 29 U.S.C. § 213(a)(15) will not qualify for overtime compensation under the “trained personnel” exception of 29 C.F.R. § 552.6 unless (1) that employee’s position involves the provision of services required to be performed by someone with training comparable in scope and duration to that of a registered or practical nurse, and (2) the employee in fact has received such training.

Cox v. Acme Health Servs., Inc., 55 F.3d 1304, 1310 (7th Cir. 1995). Moreover, “on-the-job training” is not recognized for the trained personnel exception because to do so would create an “administrative nightmare” for the state since each worker would constantly have to be reevaluated.” McCune, 894 F.2d at 1111. See also Sandt v. Holden, 698 F. Supp. 64, 68 (M.D. Pa. 1988) (holding that plaintiff, who had an eleventh grade education and who held no licenses, did not satisfy the trained personnel exception, even though having past experience as a health aide).

In applying this formulation, courts have held that training of twenty-seven hours, Toth, 753 F. Supp. at 218, sixty hours, McCune, 894 F.2d at 1110, and seventy-five hours, Cox, 55 F.3d at 1310, has not been training comparable in scope and duration to a registered or practical nurse such that the trained personnel exception would apply. In addition to the number of hours of training, courts have also examined the quality of instruction and training received in comparison to that received by a registered or practical nurse. See id. at 1310 (comparing home health aide’s training to “the extensive training in the physical, biological, social and behavioral sciences that registered and practical nurses receive”).

In the instant case, Plaintiffs claim that they were required to undergo 160 hours of training in basic education classes to maintain employment as an HTS and were required to

complete 40 additional hours of training per year. This training is composed of: thirty-two hours of basic education in developmental disabilities; ten to twelve hours of CPR and first-aid; three hours of state-mandated HIV pathogen and hazardous communications training; and sixteen hours of training in medication administration, if the employee will be administering medication to the client.

Home of Hope employees hired after a certain date must also undergo state-mandated training in six modules concerning various disability-related issues. These classes consist of ethical and legal issues (four hours), health and safety (twelve hours), skill building (twelve hours), communication (eight hours), connections (eight hours), and nuts and bolts (four hours). Employees might also participate in special training courses, such as courses in seizures, limited physical mobility, and nutrition, depending upon the needs of the client whom the employee works with. The length of training in these special courses varies with each subject. Although Plaintiffs concede that they do not receive the same amount of training as a registered or practical nurse, they allege that they are nonetheless “trained personnel.”

Home of Hope asserts that the employees are not trained personnel because “there are no special requirements for HTS workers or House Managers.” Def.’s Reply Br. at 8. Home of Hope further relies on the deposition testimony of Home of Hope Education Training Coordinator Jacquie Bullock, who states that the training received by Plaintiffs was not equivalent to that of an registered or practical nurse and that HTS personnel are not certified or licensed in any manner.

The Court finds, as a matter of law, that the general training required of HTS personnel and House Managers is not training comparable in scope and duration to that of a registered or practical nurse. Although the training is somewhat more lengthy than the training in the other cases where employees were not considered trained personnel, the training required of Home of Hope employees mainly deals with interpersonal functioning and disability-related education,

rather than extensive courses in science and biology that are required of registered or practical nurses.<sup>6</sup> Accordingly, the Court finds that Plaintiffs do not satisfy the trained personnel exception to the companionship services exemption. Defendant's motion for summary judgment on this basis is hereby granted.

## V

Plaintiffs next move for summary judgment, claiming that Home of Hope's actions were "willful," thus entitling them to a three-year statute of limitations. Plaintiffs also move for summary judgment on their claim for liquidated damages in a sum equal to their claim for overtime wages.

## A

Plaintiffs first claim that they are entitled to a three-year statute of limitations. The statute of limitations governing FLSA claims states in pertinent part as follows:

the cause of action . . . may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

29 U.S.C. § 255(a). Thus, there is a two-year statute of limitations for most FLSA claims, while a three-year applies to willful violations.

In McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988), the Supreme Court described the standard for willfulness first articulated in Trans World Airlines v. Thurston, 469 U.S. 111, 125-30 (1985). Under this standard, Plaintiff must prove that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." McLaughlin, 486 U.S. at 133. In other words, "willful" is defined as "voluntary, deliberate, and intentional," rather than merely negligent, conduct. Id. The burden is on the employee to prove

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<sup>6</sup> The Court observes that the Oklahoma State Board of Nursing requires registered nurse programs to include sixty-four semester hours and practical nursing programs to include thirty-two semester hours or 1300 clock hours. Nursing Regulation 485: 10-5-9(b) & (c).

that the employer committed a willful FLSA violation. See Gilligan v. City of Emporia, Kan., 986 F.2d 410, 413 (10th Cir. 1993).

Plaintiffs allege that the following actions demonstrate that Home of Hope committed a willful violation of the FLSA in its use of the companionship services exemption: Home of Hope's Board of Directors did not read the regulations concerning the companionship services exemption; DiAnna Hoover, the Executive Director, did not know the job functions of HTS employees; Home of Hope did not seek the advice of the Department of Labor; Home of Hope did not seek the advice of a labor or employment law expert; the Executive Director merely relied on her impressions that other agencies were applying the exemption; the Board of Directors did not conduct a meaningful investigation before applying the exemption; Dick Lowry, the Board member who moved to apply the exemption, was a corporate attorney who did not recommend any action to determine if the exemption would apply; and Home of Hope did not revoke use of the exemption for five months after learning of the Linn decision.

In contrast, Home of Hope contends that its decision to apply the companionship services exemption was not a willful violation of the FLSA. Specifically, Defendant points to the following evidence to support its position: the Board of Directors obtained an opinion from its accountant before applying the exemption; Defendant consulted its labor attorney regarding the exemption; Defendant was aware that other providers were using the exemption and discussed with them their use of the exemption; the issue was discussed at several Board meetings prior to a vote; and Defendant discussed the Linn decision with an attorney, who stated that it was not applicable to Home of Hope's operations.

The Court finds that there are disputed issues of material fact which prevent the granting of summary judgment on this claim. Particularly, the Court finds that there are disputed issues of fact with respect to the length and type of investigations conducted by Home of Hope and its Board of Directors into the use of the exemption, as well as its consultations with outside experts.

Because these disputed facts inform the issue of willfulness, Plaintiffs' motion for summary judgment on this claim is hereby denied.

B

Plaintiffs also have moved for summary judgment on their claim for liquidated damages. The FLSA provides for liquidated damages in § 216(b), which states as follows:

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in additional equal amount as liquidated damages.

29 U.S.C. § 216(b).<sup>7</sup> The Court may, however, disallow liquidated damages "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]." 29 U.S.C. § 260. If the employer meets both the good faith and reasonable grounds conditions, "the court is permitted, but not required, in its sound discretion to reduce or eliminate the liquidated damages which would otherwise be required in any judgment against the employer." 29 C.F.R. § 790.22(b).

The good faith requirement ensures that "the employer have an honest intention to ascertain and follow the dictates" of the FLSA. Renfro, 948 F.2d at 1540. The requirement that the employer have reasonable grounds for believing that its actions complied with the statute "imposes an objective standard by which to judge the employer's behavior." Id. Moreover, an employer's ignorance of the requirements of the FLSA does not constitute reasonable grounds for believing that it complied with the statute. Doty v. Elias, 733 F.2d 720, 726 (10th Cir. 1984).

The Court notes that the "same willfulness standard for the statute of limitations issue

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<sup>7</sup> The Court notes that the purpose behind the award of liquidated damages is "the reality that the retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages." Renfro v. City of Emporia, Kan., 948 F.2d 1529, 1540 (10th Cir. 1991).

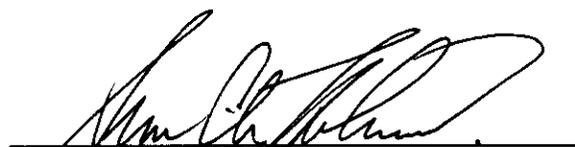
applies to the liquidated damages issue.” Brinkman v. Department of Corrections of the State of Kan., 21 F.3d 370, 373 (10th Cir. 1994). Since the Court finds that there are disputed issues of material fact as to whether Defendant’s actions were willful, the Court also finds that there are disputed issues of material fact as to whether Defendant has acted in good faith and had reasonable grounds for believing that its actions did not violate the FLSA. Accordingly, Plaintiffs’ motion for summary judgment on this basis is hereby denied.

VI

For the reasons set forth above, Defendant Home of Hope’s motion for summary judgment (Docket # 55) is hereby granted in part and denied in part. Plaintiffs’ motion for summary judgment (Docket # 57, 58, 59) is hereby denied.

IT IS SO ORDERED.

This 20<sup>TH</sup> day of May, 1998.

  
Sven Erik Holmes  
United States District Judge

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

**FILED**

MAY 21 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

OHIO NATIONAL LIFE ASSURANCE )  
CORPORATION/CINCINNATI, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
RUTH McDONALD, LIMITED GUARDIAN )  
FOR DONALD E. BROOKS and )  
DEBORAH SUE BROOKS, )

Case No. 97-CV-671-BU

ENTERED ON DOCKET  
DATE MAY 22 1998

ADMINISTRATIVE CLOSING ORDER

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

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's Complaint and Defendants' Counterclaims, shall be deemed to be dismissed with prejudice.

Entered this 21<sup>st</sup> day of May, 1998.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

101

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

**FILED**

MAY 21 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MACK OWENS, a/k/a JOHNNY DARK, )

Plaintiff, )

vs. )

Case No. 97 CV 685K(J)

TRUTH PUBLISHING COMPANY, an )

Indiana Corporation, d/b/a Federated )

Media, d/b/a/ KQLL Radio, )

Defendants. )

ENTERED ON DOCKET  
DATE MAY 22 1998

**JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE**

The Plaintiff, Mack Owens, a/k/a Johnny Dark, and the Defendant, Truth Publishing Company, Inc., jointly stipulate and agree that this case be dismissed with prejudice, each party to bear his or its own costs, expenses and attorneys' fees.

Attorney for Plaintiff

Attorneys for Defendant

  
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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

MAY 20 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

VERNON RAY CLARK, )  
SSN: 512-36-7337, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
KENNETH S. APFEL, )  
Commissioner of Social Security, )  
 )  
Defendant. )

Case No. 96-C-0992-B (E)

ENTERED ON DOCKET

DATE MAY 21 1998

ORDER

On April 8, 1998, Magistrate Judge Eagan entered her Proposed Findings and Recommendations that the decision of the Commissioner be affirmed. No objection has been filed to the Proposed Findings and Recommendations and the ten-day time limit of Fed. R. Civ. P. 72(b) has run. The Court has also independently reviewed the Proposed Findings and Recommendations and sees no reason to modify or reject those findings and recommendations.

The Proposed Findings and Recommendations are accepted as entered. It is the Order of the Court that the decision of the Commissioner is hereby **AFFIRMED**.

ORDERED this 20<sup>th</sup> day of May, 1998.

  
THOMAS R. BRETT  
SENIOR UNITED STATES DISTRICT JUDGE



equal footing; for example, unlike the rules applied when plaintiff has filed suit in federal court with a claim that, on its face, satisfies the jurisdictional amount, removal statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand.” Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994).

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

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

Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995) (citations omitted) (emphasis in original); e.g., Hughes v. E-Z Serve Petroleum Marketing Co., 932 F. Supp. 266 (N.D. Okla. 1996) (applying Laughlin and remanding case); Barber v. Albertson’s, Inc., 935 F. Supp. 1188 (N.D. Okla. 1996) (same); Martin v. Missouri Pacific R.R. Co. d/b/a Union Pacific R.R. Co., 932 F. Supp. 264 (N.D. Okla. 1996) (same); Herber v. Wal-Mart Stores, 886 F. Supp. 19, 20 (D. Wyo. 1995) (same); Homolka v. Hartford Ins. Group, Individually and d/b/a Hartford Underwriters Ins. Co., 953 F. Supp. 350 (N.D. Okla. 1995) (same); Johnson v. Wal-Mart Stores, Inc., 953 F. Supp. 351 (N.D. Okla. 1995) (same); Maxon v. Texaco Ref. & Marketing Inc., 905 F. Supp. 976 (N.D. Okla. 1995) (same).

Further, “both the requisite amount in controversy and the existence of diversity must be affirmatively established on the face of either the petition or the removal notice.” Laughlin, 50 F.3d at 873. See Asociacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia (Anpac) v. Dow Quimica de Colombia S.A., 988 F.2d 559, 565 (5th Cir. 1993) (finding defendant’s conclusory statement that “the matter in controversy exceeds [\$75,000] exclusive of

interest and costs” did not establish that removal jurisdiction was proper); Gaus v. Miles, Inc., 980 F.2d 564 (9th Cir. 1992) (mere recitation that the amount in controversy exceeds \$75,000 is not sufficient to establish removal jurisdiction).

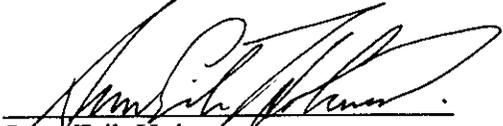
Where the face of the complaint does not affirmatively establish the requisite amount in controversy, the plain language of Laughlin requires a removing defendant to set forth, in the removal documents, not only the defendant's good faith belief that the amount in controversy exceeds \$75,000, but also facts underlying defendant's assertion. In other words, a removing defendant must set forth specific facts which form the basis of its belief that there is more than \$75,000 at issue in the case. The removing defendant bears the burden of establishing federal court jurisdiction at the time of removal, and not by supplemental submission. Laughlin, 50 F.3d at 873. See Herber, 886 F. Supp. at 20 (holding that the jurisdictional allegation is determined as of the time of the filing of the Notice of Removal). And the Tenth Circuit has clearly stated what is required to satisfy that burden. As set out in Johnson v. Wal-Mart Stores, Inc., 953 F. Supp. 351 (N.D. Okla. 1995), if the face of the petition does not affirmatively establish that the amount in controversy exceeds \$75,000.00, then the rationale of Laughlin contemplates that the removing party will undertake to perform an economic analysis of the alleged damages with underlying facts.

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

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

IT IS SO ORDERED.

This 18<sup>TH</sup> day of May, 1998.

  
Sven Erik Holmes  
United States District Judge

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

FILED *cl*

MAY 20 1998

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DEBORAH ROBINSON, D.O., )

Plaintiff, )

vs. )

No. 96-C-160-K ✓

ARMEN MAROUK, D.O.; STEPHEN )

EICHERT, D.O.; GREGORY WILSON, )

D.O.; DANIEL FIEKER, D.O.; )

OSTEOPATHIC FOUNDERS )

FOUNDATION d/b/a TULSA )

REGIONAL MEDICAL CENTER; and )

NOTAMI HOSPITAL OF OKLAHOMA )

INC., d/b/a COLUMBIA TULSA )

REGIONAL MEDICAL CENTER )

Defendants. )

ENTERED ON DOCKET

DATE 5-21-98

**JUDGMENT**

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

IT IS THEREFORE ORDERED that the Plaintiff Deborah Robinson recover of the Defendants Tulsa Regional Medical Center and Columbia Tulsa Regional Medical Center, the sum of 300,000 with interest thereon at the rate provided by law.

ORDERED this 19 day of May, 1998.

*Terry C. Kern*  
TERRY C. KERN, CHIEF  
UNITED STATES DISTRICT JUDGE

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

MAY 20 1998

DEBORAH ROBINSON, D.O., )  
 )  
 )  
 Plaintiff, )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

vs. )

No. 96-C-160-K /

ARMEN MAROUK, D.O.; STEPHEN )  
EICHERT, D.O.; GREGORY WILSON, )  
D.O.; DANIEL FIEKER, D.O.; )  
OSTEOPATHIC FOUNDERS )  
FOUNDATION d/b/a TULSA )  
REGIONAL MEDICAL CENTER; and )  
NOTAMI HOSPITAL OF OKLAHOMA )  
INC.; d/b/a COLUMBIA TULSA )  
REGIONAL MEDICAL CENTER )  
 )  
Defendants. )

ENTERED ON DOCKET  
DATE 5-21-98

**JUDGMENT**

This matter came before the Court for consideration of the Motion by Defendants Marouk, Eichert, Wilson, and Fieker for Summary Judgment against Plaintiff Deborah Robinson.

The issues having been duly considered and a decision having been rendered in accordance with the Order filed March 30, 1998,

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

ORDERED THIS DAY OF 19 MAY, 1998.

*Terry C. Keen*  
TERRY C. KEEN, CHIEF  
UNITED STATES DISTRICT JUDGE

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