

ENTERED ON DOCKET

DATE 6-30-98

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

F I L E D

JUN 30 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDY HOLLOWAY,)
)
Plaintiff,)
)
vs.)
)
MULTIMEDIA GAMES, INC.)
)
Defendant.)

No. 97-C-572-K

ADMINISTRATIVE CLOSING ORDER

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

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 30 day of June, 1998.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

FILED

JUN 30 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TERIA FLUD,

Plaintiff,

vs.

Case No. 97-CV-1082K (J)

INDEPENDENT SCHOOL
DISTRICT NO. 181006 OF
CRAIG COUNTY, OKLAHOMA,

Defendant.

ENTERED ON DOCKET

DATE 6-30-98

ORDER OF DISMISSAL WITH PREJUDICE

The above-entitled matter came on for consideration on 6-30, 1998, before the undersigned. The plaintiff, Teria Flud, was represented by Jennifer P. Foster of Sanders & Sanders, P.C. The defendant was represented by Frederick J. Hegenbart of Rosenstein, Fist & Ringold. The matter came on for consideration on the parties' joint stipulation of dismissal with prejudice. After reviewing the stipulation of the parties and being fully apprised, the Court finds:

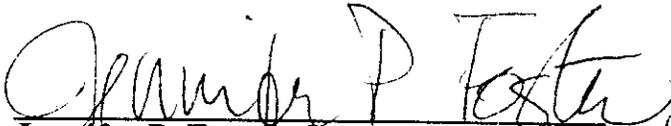
1. The parties have settled the above-entitled litigation and have agreed to bear their own attorneys' fees and costs and stipulated to a dismissal of this action with prejudice.
2. This action should be and is dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT the above-entitled action is dismissed with prejudice and each party is to bear its own attorneys' fees and costs.


United States District Court Judge

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APPROVED AS TO FORM:



Jennifer P. Foster, OBA No. 13484
SANDERS & SANDERS, P.C.
624 S. Denver, Suite 202
Tulsa, OK 74119

Attorneys for Plaintiff, Teria Flud



Frederick J. Hegenbart, OBA No. 10846
ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 700
Tulsa, OK 74103
(918) 585-9211

Attorney for Defendant, Independent School
District No. 6 of Craig County, Oklahoma

lrh:kw
06-24-98

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

FILED
JUN 30 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

COUNTRY MUTUAL INSURANCE COMPANY,)
an Illinois Corporation,)

Plaintiff,)

vs.)

Case No.: 97 CIV 758 H (J)

RICKEY NORRIS, JOHN R.)
EVANS, JR., SPRINGER CLINIC INC.,)
and HEALTH COST CONTROLS)

Defendants.)

ENTERED ON DOCKET

DATE 6-30-98

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the undersigned, the attorneys for all parties to this action, and stipulate to the Court that all claims of all parties herein may be dismissed with prejudice as to the refiling of the same for the reason that the claims of all parties have been settled and compromised.

Dated this 24 day of June, 1998.



THOMAS E. BAKER, OBA #11054
DANIEL, BAKER & HOWARD
2431 E. 51st St., Ste. 306
Tulsa, OK 74105
(918) 749-5988

Dated this 26th day of June, 1998.



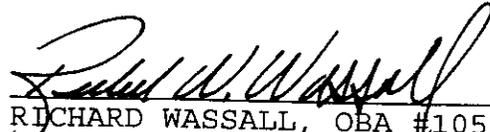
SHEILA M. POWERS, OBA #013757
100 W. 5th St., Ste. 800
Tulsa, OK 74103-4216
(918) 583-1777

ATTORNEY FOR SPRINGER CLINIC, INC.

23

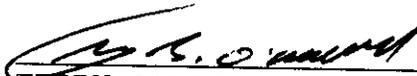
OTJ

Dated this 29th day of June, 1998.



RICHARD WASSALL, OBA #10512
P.O. Box 1560
Tulsa, OK 74101-1560
(918) 584-6457

Dated this 26 day of June, 1998.



TERRY O'DONNELL, OBA #13110

ATTORNEY FOR HEALTH COST CONTROLS

DATE 6-30-98

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

F I L E D

JUN 30 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MICHAEL LEWIS, et al.,)
)
 Plaintiffs,)
)
 v.)
)
 ARMELLINI ENGINEERING, INC., et al.,)
)
 Defendants.)

No. 94-C-805-K

ADMINISTRATIVE CLOSING ORDER

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

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 30 day of June, 1998.

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

DATE 6-30-98

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

F I L E D

JUN 30 1998

IVA R. WILSON,)
)
 Plaintiff,)
)
 vs.)
)
 BONDED MAINTENANCE CO., et al.)
)
 Defendants.)

No. 97-C-504-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 30 day of June, 1998.

Terry C. Kern
TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 6-30-98

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

F I L E D

JUN 30 1998 *PL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STATE MUTUAL INSURANCE
COMPANY, a Georgia corporation,

Plaintiff,

v.

KAREN ADCOCK a/k/a KAREN
ADCOCK TIPTON, an individual,

Defendant.

Case No. 97-CV-680-H

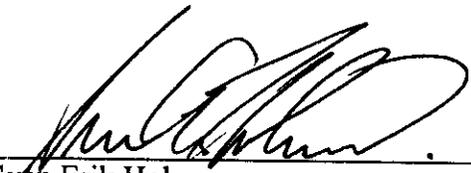
ADMINISTRATIVE CLOSING ORDER

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

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

IT IS SO ORDERED.

This 30TH day of June, 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

JUN 30 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ABED DAMAJ,)
)
Plaintiff,)
)
vs.)
)
FARMERS INSURANCE)
COMPANY,)
INC., d/b/a FARMERS)
INSURANCE GROUP OF)
COMPANIES,)
)
Defendant.)

No. 94-CV-531-~~M~~ H
(formerly 94-CV-5331-H)

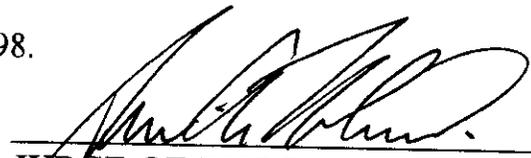
ENTERED ON DOCKET
DATE 6-30-98

ORDER OF DISMISSAL WITH PREJUDICE

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

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

DATED this 30TH day of JUNE, 1998.



JUDGE OF THE DISTRICT COURT

95

F I L E D

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

JUN 30 1998 *M*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GARY L. MATTHEWS,

Plaintiff,

v.

BROKEN ARROW MEDICAL CENTER,
INC., an Oklahoma non-profit
corporation,

Defendants.

Case No. 97-CV-396-H

ENTERED ON DOCKET
DATE 6-30-98

ADMINISTRATIVE CLOSING ORDER

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

The parties are ordered to notify the Court within thirty days from the file date of this order as to whether this matter should be reopened or dismissed with prejudice. If the parties have not by appropriate motion reopened this matter at the conclusion of that thirty-day period, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 30TH day of June, 1998.



Sven Erik Holmes
United States District Judge

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Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; that the Defendant, State of Oklahoma *ex rel.* Oklahoma Tax Commission, appears by Kim D. Ashley, Assistant General Counsel; that the Defendants, Debera Deann Joice and Spouse of Debera Deann Joice who is one and the same person as Curtis Stewart, appear not, having previously filed their Disclaimer; and the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of James W. Joice aka James Walter Joice, Deceased; Deborah Joice aka Deborah J. Joice nka Deborah J. Hudson; Spouse of Deborah J. Hudson who is one and the same person as Gary L. Hudson; James Carroll Joice; Spouse, if any, of James Carroll Joice; Cathy Sue Joice; Spouse of Cathy Sue Joice who is one and the same person as Johnny Wood; Malinda Ann Joice; Spouse, if any, of Malinda Ann Joice; Vickie Leona Joice Parrish; and Spouse of Vickie Leona Joice Parrish who is one and the same person as Thurman D. Parris, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Deborah Joice aka Deborah J. Joice nka Deborah J. Hudson, executed a Waiver of Service of Summons on January 23, 1997; that the Defendant, Spouse of Deborah J. Hudson is one and the same person as Gary L. Hudson and executed a Waiver of Service of Summons on January 23, 1997; that the Defendant, James Carroll Joice, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on December 3, 1997; that Spouse, if any, of James Carroll Joice, was served by publication as is evidenced by Proof of Publication filed October 28, 1997; that the Defendant, Debera Deann Joice, is also known as Debra DeeAnn Joice Stewart, and was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on or

before April 21, 1998; that the Defendant, Spouse of Debera Deann Joice aka Debra DeeAnn Joice Stewart, is one and the same person as Curtis Stewart and was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on or before April 21, 1998; that the Defendant, Cathy Sue Joice, is also known as Cathy Sue Joice Wood and was served with Summons and Complaint by a United States Deputy Marshal on May 14, 1998; that the Defendant, Spouse of Cathy Sue Joice aka Cathy Sue Joice Wood, is one and the same person as Johnny Wood and was served with Summons and Complaint by a United States Deputy Marshal on May 14, 1998; that the Defendant, Malinda Ann Joice, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on April 21, 1996; that Spouse, if any, of Malinda Ann Joice, was served by publication as is evidenced by Proof of Publication filed October 28, 1997; that the Defendant, Vickie Leona Joice Parrish, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on April 18, 1998; that the Defendant, Spouse of Vickie Leona Joice Parrish, is one and the same person as Thurman D. Parrish and was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on April 18, 1998.

The Court further finds that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of James W. Joice aka James Walter Joice, Deceased; Spouse, if any, of James Carroll Joice; and Spouse, if any, of Malinda Ann Joice, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning September 4, 1997, and continuing through October 9, 1997, as more fully appears from the verified proof of publication duly

filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(C)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of James W. Joice aka James Walter Joice, Deceased; Spouse, if any, of James Carroll Joice; and Spouse, if any, of Malinda Ann Joice, and service cannot be made upon said Defendants by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of James W. Joice aka James Walter Joice, Deceased; Spouse, if any, of James Carroll Joice; and Spouse, if any, of Malinda Ann Joice. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on

January 16, 1997; that the Defendant, State of Oklahoma *ex rel.* Oklahoma Tax Commission, filed its Answer on January 24, 1997; that the Defendants, Debera Deann Joice aka Debra DeeAnn Joice Stewart and Spouse of Debera Deann Joice aka Debra DeeAnn Joice Stewart who is one and the same person as Curtis Stewart, filed their Disclaimer on May 7, 1998; that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of James W. Joice aka James Walter Joice, Deceased; Deborah Joice aka Deborah J. Joice nka Deborah J. Hudson; Spouse of Deborah J. Hudson who is one and the same person as Gary L. Hudson; James Carroll Joice; Spouse, if any, of James Carroll Joice; Cathy Sue Joice aka Cathy Sue Joice Wood; Spouse of Cathy Sue Joice aka Cathy Sue Joice Wood who is one and the same person as Johnny Wood; Malinda Ann Joice; Spouse, if any, of Malinda Ann Joice; Vickie Leona Joice Parrish; and Spouse of Vickie Leona Joice Parrish who is one and the same person as Thurman D. Parrish, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot Two (2), Block Two (2), ARK RIDGE ESTATES to the County of Tulsa, an Addition to the City of Jenks, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that this a suit brought for the further purpose of judicially determining the death James Walter Joice, judicially terminating the joint tenancy of James W. Joice aka James Walter Joice and Deborah Joice aka Deborah J. Joice nka Deborah J. Hudson, and judicially determining the heirs of James Walter Joice.

The Court further finds that James W. Joice aka James Walter Joice (hereinafter referred to by either of these names) and Deborah Joice aka Deborah J. Joice nka Deborah J. Hudson (hereinafter referred to by any of these names) became the record owners of the real property involved in this action by virtue of that certain Warranty Deed dated December 4, 1990, from the Secretary of Veterans Affairs to James W. Joice and Deborah Joice, husband and wife, as joint tenants, and not as tenants in common, with full right of survivorship, the whole estate to vest in the survivor in the event of the death of either, which Warranty Deed was filed of record on December 6, 1990, in Book 5292, Page 1409, in the records of the County Clerk of Tulsa County, Oklahoma.

The Court further finds that on December 5, 1990, James W. Joice and Deborah Joice aka Deborah J. Joice executed and delivered to the United States of America, acting on behalf of the Secretary of Veterans Affairs, their mortgage note in the amount of \$80,000.00, payable in monthly installments, with interest thereon at the rate of 7.5 percent per annum.

The Court further finds that as security for the payment of the above-described note, James W. Joice and Deborah Joice aka Deborah J. Joice, husband and wife, executed and delivered to the United States of America, acting on behalf of the Secretary of Veterans Affairs, a real estate mortgage dated December 5, 1990, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on December 6, 1990, in Book 5292, Page 1410, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 8, 1994, a Decree of Divorce was entered in the District Court, Tulsa County, State of Oklahoma, Case No. FD 94 00237, Deborah J. Joice vs. James Walter Joice.

The Court further finds that the contingency pertaining to the subject property set forth in paragraph 6 of the March 8, 1994 Decree of Divorce did not occur. Therefore, the Decree of Divorce did not specifically dispose of the subject property and the subject property remained held in joint ownership by James Walter Joice and Deborah Joice.

The Court further finds that James Walter Joice died on April 19, 1996, in Tulsa, Tulsa County, Oklahoma. Upon the death of James Walter Joice, the subject property vested in his surviving joint tenant, Deborah Joice, by operation of law. A copy of a Certificate of Death certifying James Walter Joice's death was attached as Exhibit "C" to the Complaint in this case.

The Court further finds that James W. Joice aka James Walter Joice, now deceased, and Deborah Joice aka Deborah J. Joice nka Deborah J. Hudson, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the note and mortgage, after full credit for all payments made, the principal sum of \$74,435.77, plus administrative charges in the amount of \$505.00, plus accrued interest in the amount of \$2,607.27 as of August 15, 1996, plus interest accruing thereafter at the rate of 7.5 percent per annum per day until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$689.07 (\$421.07 publication fees, \$160.00 abstracting fees; \$100.00 evidentiary affidavit fee; \$8.00 fee for recording Notice of Lis Pendens).

The Court further finds that Plaintiff, United States of America, is entitled to a judicial determination of the death of James Walter Joice, to a judicial termination of the joint

tenancy of James W. Joice aka James Walter Joice and Deborah Joice aka Deborah J. Joice nka Deborah J. Hudson, and to a judicial determination of the heirs of James Walter Joice.

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 in the amount of \$594.81 together with interest and penalty according to law, by virtue of Tax Warrant No. STS9400077701 dated April 18, 1994, and recorded on April 27, 1994, in the records of Tulsa County, Oklahoma.

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 1993 personal property taxes in the amount of \$65.00 which became a lien on the property as of June 23, 1994.

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

The Court further finds that the Defendants, Debera Deann Joice aka Debra DeeAnn Joice Stewart and Spouse of Debera Deann Joice aka Debra DeeAnn Joice Stewart who is one and the same person as Curtis Stewart, disclaim any right, title or interest in the subject real property.

The Court further finds that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of James W. Joice aka James Walter Joice, Deceased; Deborah Joice aka Deborah J. Joice nka Deborah J. Hudson; Spouse of Deborah J. Hudson who is one and the same person as Gary L. Hudson; James Carroll Joice; Spouse, if any, of James Carroll Joice; Cathy Sue Joice aka Cathy Sue Joice Wood; Spouse of Cathy Sue Joice aka Cathy Sue Joice Wood who is one and the same person as

Johnny Wood; Malinda Ann Joice; Spouse, if any, of Malinda Ann Joice; Vickie Leona Joice Parrish; and Spouse of Vickie Leona Joice Parrish who is one and the same person as Thurman D. Parris, are in default and therefore have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the death of James Walter Joice be and the same hereby is judicially determined to have occurred on April 19, 1996 in the City of Tulsa, Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the joint tenancy of James W. Joice aka James Walter Joice and Deborah Joice aka Deborah J. Joice nka Deborah J. Hudson in the above-described real property be and the same is judicially terminated as of the date of the death of James Walter Joice on April 19, 1996.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the only known heirs of James Walter Joice, Deceased, are James Carroll Joice, Debera Deann Joice aka Debra DeeAnn Joice Stewart, Cathy Sue Joice aka Cathy Sue Joice Wood, Malinda Ann Joice, and Vickie Leona Joice Parrish, and that despite the exercise of due diligence by Plaintiff and its counsel, no other known heirs of James Walter Joice, Deceased, have been discovered and it is hereby judicially determined that James Carroll Joice, Debera Deann Joice aka Debra DeeAnn Joice Stewart, Cathy Sue Joice aka Cathy Sue Joice Wood, Malinda Ann Joice, and Vickie Leona Joice Parrish are the only known heirs of James Walter Joice, Deceased, and that James Walter Joice, Deceased, has no other known heirs, executors, administrators, devisees, trustees, successors and assigns; and the Court approves the Certificate of Publication and Mailing filed on October 28, 1997 regarding said heirs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Veterans Affairs, have and recover judgment **in rem** against Defendant, Deborah Joice aka Deborah J. Joice nka Deborah J. Hudson, in the principal sum of \$74,435.77, plus administrative charges in the amount of \$505.00, plus accrued interest in the amount of \$2,607.27 as of August 15, 1996, plus interest accruing thereafter at the rate of 7.5 percent per annum per day until judgment, plus interest thereafter at the current legal rate of 5.413 percent per annum until fully paid, plus the costs of this action in the amount of \$689.07 (\$421.07 publication fees, \$160.00 abstracting fees; \$100.00 evidentiary affidavit fee; \$8.00 fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property, plus any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma **ex rel.** Oklahoma Tax Commission, have and recover judgment **in rem** in the amount of \$594.81 together with interest and penalty according to law, by virtue of Tax Warrant No. STS9400077701 dated April 18, 1994, and recorded on April 27, 1994, in Book 5618, Page 1555 in the records of Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the amount of \$65.00 plus any accruing costs and interest for 1993 personal property taxes which became a lien on the property as of June 23, 1994.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors

and Assigns of James W. Joice aka James Walter Joice, Deceased; Deborah Joice aka Deborah J. Joice nka Deborah J. Hudson; Spouse of Deborah J. Hudson who is one and the same person as Gary L. Hudson; James Carroll Joice; Spouse, if any, of James Carroll Joice; Debera Deann Joice aka Debra DeeAnn Joice Stewart; Spouse of Debera Deann Joice aka Debra DeeAnn Joice Stewart who is one and the same person as Curtis Stewart; Cathy Sue Joice aka Cathy Sue Joice Wood; Spouse of Cathy Sue Joice aka Cathy Sue Joice Wood who is one and the same person as Johnny Wood; Malinda Ann Joice; Spouse, if any, of Malinda Ann Joice; Vickie Leona Joice Parrish; Spouse of Vickie Leona Joice Parrish who is one and the same person as Thurman D. Parrish; and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

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

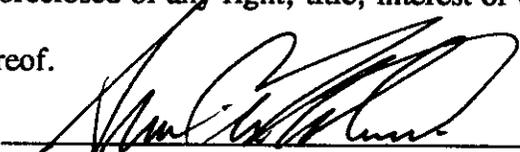
In payment of the judgment rendered herein in favor of the Defendant, State of Oklahoma *ex rel.* Oklahoma Tax Commission;

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


UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


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


DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4841
Attorney for Defendants,
County Treasurer and Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Case No. 97-CV-14-H (Joice)

WDB:css



KIM D. ASHLEY, OBA #14175

Assistant General Counsel

P.O. Box 53248

Oklahoma City, Oklahoma 73152-3248

(405) 522-5555

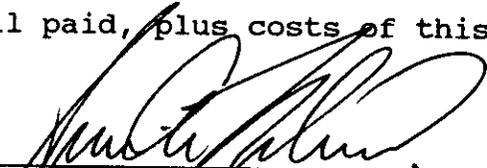
Attorney for Defendant,

State of Oklahoma *ex rel.* Oklahoma Tax Commission

Judgment of Foreclosure
Case No. 97-CV-14-H (Joice)

WDB:cas

thereafter at the rates of 8% and 7.51% 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
5.413 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 74103-3809
(918) 581-7463

LFR/LLF

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

PATRICIA LEE,

Defendant.

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No. 97CV968 H

FILED
JUN 30 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE JUN 30 1998

DEFAULT JUDGMENT

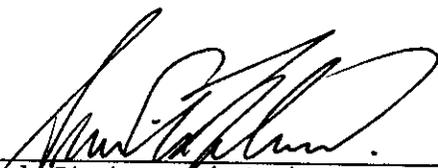
This matter comes on for consideration this 30TH day of JUNE, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Patricia Lee, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Patricia Lee, was served with Summons and Complaint on November 24, 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.

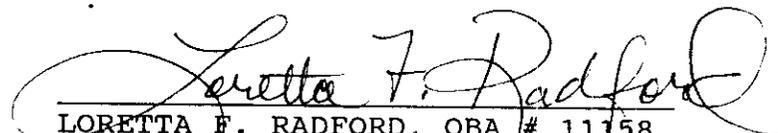
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Patricia Lee, for the principal amount of \$2,416.68, plus accrued interest of \$115.88, plus interest thereafter at the rate of 5 percent per annum until judgment, plus filing fees in the amount of \$150.00 as

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provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.413 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 74103-3809
(918) 581-7463

LFR/LLF

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 30 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

v.

Franklin S. Armstrong,

Defendant.

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No. 98CV0294H

ENTERED ON DOCKET

DATE 6-30-98

DEFAULT JUDGMENT

This matter comes on for consideration this 30TH day of JUNE, 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, Franklin S. Armstrong, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Franklin S. Armstrong, was served with Waiver and Complaint on May 1, 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, Franklin S. Armstrong, for the principal amount of \$2,072.94, plus accrued interest of \$726.56, plus administrative charges in the amount of \$45.65, plus interest thereafter at the rate of 8 percent per annum

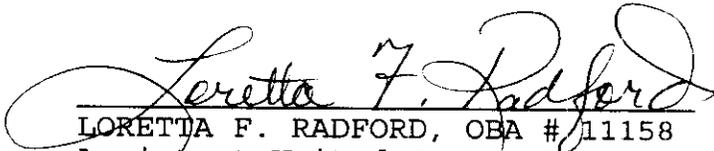
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provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.413 percent per annum until paid, plus costs of this action.



United States District Judge

Submitted By:



LORETTA F. RADFORD, OBA # 11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

LFR/sba

DATE 6-30-98

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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

CIVIL ACTION NO. 96-CV-934-B

F I L E D
JUN 29 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CLERK'S ENTRY OF PARTIAL DEFAULT AS TO DEFENDANT
1986 BLACK PONTIAC FIREBIRD

It appearing from the files and records of this Court as of June 29, 1998, and the Declaration of Assistant United States Attorney Catherine J. Depew, that all parties in interest, if any, to the defendant vehicle, against whom judgment for affirmative relief is sought in this action, have failed to plead or otherwise defend, as provided by the Federal Rules of Civil Procedure, except Ulina Jamison, as duly authorized representative for John Grice, who has executed a Stipulation for Forfeiture of the defendant vehicle, which Stipulation was filed on February 9, 1998 and;

NOW, THEREFORE, I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of the defendant vehicle as to all persons and entities, except Ulina Jamison as duly authorized representative for John Grice, who has consented to forfeiture of the 1986 Black Pontiac Firebird VIN # 1G2FW87H6GL202504 and payment of the amount of Four Hundred Fifty Dollars (\$450.00) from the net proceeds of the sale of the defendant vehicle by virtue of her Stipulation for Forfeiture set forth above.

DATED at Tulsa, Oklahoma, this 29 day of June, 1998.

PHIL LOMBARDI
Clerk, U. S. District Court

By: A. Schwelke

NAUDD\JOHNSON\FORFEIT\SAFEHOME\JAMISON\CLERKS.DEF

ENTERED ON DOCKET

DATE 6-29-98

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

FILED

JUN 26 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GEORGE L. GRAYSON,
an individual,

Plaintiff,

vs.

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

Defendants.

No. 97-CV-769-C

JUDGMENT

This matter came before the Court for consideration on the motion of summary judgment filed by defendants, Phillip E. Snow, Robert S. Jackson, and John D. Carolla, on plaintiff George L. Grayson's cause of action for deprivation of civil rights, pursuant to 42 U.S.C. § 1983; false imprisonment; intentional infliction of emotional distress; and, assault and battery. The issues having been duly considered by the Court, and a decision having been rendered in favor of defendants, Snow, Jackson, and Carolla, as to Grayson's allegations of false imprisonment and intentional infliction of emotional distress alone,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment is entered for the defendants, Snow, Jackson, and Carolla, and against plaintiff George L. Grayson on said claims.

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



H. DALE COOK
Senior United States District Judge

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

F I L E D

JUN 26 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GEORGE L. GRAYSON,
an individual,

Plaintiff,

vs.

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

Defendants.

ENTERED ON DOCKET
DATE 6-29-98

No. 97-CV-769-C

ORDER

Currently pending before the Court is a motion filed by defendants, Phillip E. Snow, Robert S. Jackson, and John D. Carolla, seeking a dismissal for failure to state a claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, or in the alternative, for summary judgment, pursuant to Rule 56.

On August 22, 1997, plaintiff, George L. Grayson, filed a complaint against defendants, Snow, Jackson, and Carolla, alleging violations of his right to privacy under the Fourth and Fourteenth Amendments, pursuant to 42 U.S.C. 1983; false imprisonment; and, intentional infliction of emotional distress. Grayson additionally pleads a claim of assault and battery against Snow alone. On September 18, 1997, defendants filed a motion to dismiss. Grayson filed his response on October 3, 1997, and defendants replied on October 14, 1997. On December 29, 1997, the Court granted defendants' motion as to the state tort claims, except for the assault and battery claim against

Snow, and denied defendants' motion to dismiss as to Grayson's section 1983 action. Grayson then moved the Court, on January 9, 1998, for leave to file an amended complaint which was filed on February 10, 1998. The amended complaint alleged essentially the same causes of action as the original complaint, but did not allege that defendants were acting within the scope of their employment while engaged in the allegedly tortious conduct. On March 2, 1998, defendants filed their amended motion styled in the alternative for dismissal or for summary judgment, to which Grayson responded on March 17, 1998; defendants' reply was filed on April 9, 1998.

As an initial matter, the Court notes that defendants are seeking either a dismissal or summary judgment and, as such, have submitted a supporting affidavit. The Court further notes that Grayson has also styled his response in the alternative and submitted exhibits thereto. As both parties have contemplated summary judgment and submitted documents in support thereof, the Court will address defendants' motion for summary judgment.

Grayson's present action stems from his arrest for lewd molestation and events subsequent thereto. On August 23, 1996, defendants effectuated a warrantless arrest of plaintiff at his home. Grayson was accused of lewd molestation by three female minors; two of these alleged victims completed sworn statements describing the alleged incident. Plaintiff was arrested shortly after these complaints were made. Thereafter, at his preliminary hearing on October 15, 1996, the charges against Grayson were dismissed as the minors recanted their stories. Plaintiff's present action follows.

The standard for granting summary judgment is rather strict. Rule 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Furthermore, the “trial court has no real discretion in determining whether to grant summary judgment A moving party must establish his right to a summary judgment as a matter of law, and beyond a reasonable doubt.” U.S. v. Gammache, 713 F.2d 588, 594 (10th Cir.1983). “Pleadings and documentary evidence are to be construed liberally in favor of a party opposing a Rule 56 motion.” First W. Gov’t Sec., Inc. v. U.S., 796 F.2d 356, 357 (10th Cir.1986). “However, it is not enough that the nonmovant’s evidence be ‘merely colorable’ or anything short of ‘significantly probative;’ . . . the nonmovant must come forward with specific facts showing a genuine issue for trial.” Frank v. U.S. West, Inc., 3 F.3d 1357, 1361 (10th Cir.1992). For the reasons set forth below, the Court finds that defendants have satisfied the strict standard governing motions for summary judgment in respect to Grayson’s state tort claims, save for the assault and battery action against Snow, and thus is entitled to same.

In regard to Grayson’s section 1983 cause of action, the Court notes that defendants have acknowledged that a material factual dispute exists as to the location of Grayson’s arrest and have abandoned their motion with respect to the section 1983 claim accordingly. Hence, Grayson’s cause of action alleging a deprivation of his civil rights will stand.

Defendants next argue that Grayson’s allegations of tortious conduct should be dismissed. Specifically, defendants assert that they are statutorily immune from Grayson’s state tort claims of false imprisonment and intentional infliction of emotional distress because suit against Oklahoma and its political subdivisions is barred by sovereign immunity; Snow also raises this defense to the assault and battery allegation. The Court finds defendants’ position with some merit as the State of Oklahoma and its political subdivisions retain sovereign immunity to suit except “to the extent

provided” in the Governmental Tort Claims Act (“GTCA”) which waives sovereign immunity for losses resulting from the tortious acts of state employees. 51 O.S. § 152.1(B). By contrast, sovereign immunity is not waived for employees acting within the scope of their employment. 51 O.S. § 163(C). It follows that defendants are entitled to statutory immunity from the state tort claims, pursuant to the State’s sovereign immunity, on the condition that they were acting within the scope of their employment while engaged in the conduct in question.

A state employee is acting within the scope of his employment provided that he is pursuing his duty in and acting in good faith.¹ 51 O.S. § 152(9). Grayson however contends, notwithstanding the statutory scheme, that his arrest constituted a false arrest in that it was not supported by probable cause. While the Oklahoma courts define the tort of false arrest as an arrest that is “made without due and legal due process, *i.e.*, probable cause,” a lack of probable cause does not take the officers’ actions outside of the scope of their employment; the test is simply whether the officers acted in good faith. Overall v. Oklahoma ex rel. Dep’t of Pub. Safety, 910 P.2d 1087, 1091 (Okla. Ct. App. 1995).²

¹ The GTCA states in pertinent part that “[s]cope of employment’ means performance by an employee acting in good faith within the duties of his office or employment” 51 O.S. § 152(9).

² As an ancillary matter, the Court agrees that the arresting officers’ good faith does not immunize or legitimize the arrest. However, sufficient probable cause existed upon which to base an arrest warrant, although no arrest warrant was secured in this case. Irrespective of Grayson’s arguments to the contrary, “probable cause does not require indubitable or necessarily convincing evidence, but only so much reasonably trustworthy information as to warrant a prudent man in believing that the [arrestee has] committed . . . an offense.” Easton v. City of Boulder, Colorado, 776 F.2d 1441, 1450 (10th Cir. 1985)(citations omitted). In the present case, the Tulsa Police Department received complaints from both the parents and the three young girls who were allegedly molested by Grayson; two of the girls filed sworn statements. Also, prior to arresting Grayson, the officers confirmed that he knew the children and that they had been in his home on the day in question. It is immaterial that the testimony came from minors as such testimony is often the only evidence that a crime has been committed. *Id.* at 1449. As the Circuit noted, “[t]o discount such testimony from the outset would only serve to discourage children and

After reviewing the pleadings and submissions of the parties, the Court cannot conclude that the officers were acting in bad faith by effectuating a warrantless arrest of plaintiff. Although presenting an unfortunate situation, nothing in the pleadings suggests that defendants were acting in bad faith. In any event, the Court has found that probable cause existed upon which to base Grayson's arrest. Accordingly, the Court concludes that defendants are entitled to summary judgment on this issue as Grayson has failed to show any factual dispute warranting trial or that the officers were acting in bad faith.

Defendants further argue that they are statutorily immune from Grayson's complaint of intentional infliction of emotional distress. The Court also finds this assertion well founded. Oklahoma has adopted the narrow approach set forth in the Restatement of Torts (Second), sections 46 h and j, in respect to the tort of intentional infliction of emotional distress. Breeden v. League Servs. Corp., 575 P.2d 1374, 1377 (Okla. 1978). This approach requires that a defendant's actions, in order for the plaintiff to prevail under this theory, be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." Id. at 1378.

Yet, Grayson merely alleges that he was arrested in his underwear sometime in the early morning hours and concludes that he suffered emotional distress. In his pleadings, Grayson fails to show how these actions caused him severe emotional distress or to provide any authority that may

parents from reporting molestation incidents and to unjustly insulate the perpetrator of such crimes from prosecution." Id. Moreover, the officers' rush to action after interviewing the children, while unfortunate, is permissible as it is not realistic to require police departments to employ juvenile experts to solely interview children in connection with child abuse cases. Id. Even though further inquiry prior to arrest would have been desirable in this case, none was required by law. Hence, the Court finds that sufficient probable cause existed to believe that Grayson had indeed committed an offense.

persuade the Court that the officers' actions could be properly characterized as sufficiently extreme to constitute a valid cause of action. Indeed, Grayson does not even allege that anyone witnessed his arrest or that anyone, other than the officers, even viewed him in his underwear. Granted it was an unpleasant experience, the Court however cannot conclude that the officers' actions were so outrageous in character to be utterly intolerable in a civilized society. Hence, the Court finds that summary judgment for the defendants is also appropriate as to the instant claim.

However, Grayson's complaint of assault and battery against Snow will stand as Snow's reliance upon the GTCA's 'scope of employment' immunity is misplaced and will not carry the day. By definition, the acts that comprise the tort of assault and battery take it outside the scope of the GTCA. The definitions of both assault and battery require that the tortfeasor acts in an intentional or malicious manner. Brown v. Ford, 905 P.2d 223, 229 n.34 (Okla. 1995)(citing Restatement (Second) of Torts §§ 13 & 21). And, the Oklahoma courts have held that willful, malicious, and intentional conduct falls outside the scope of a state employee's employment for purposes of the GTCA. Nail v. City of Henryetta, 911 P.2d 914, 917-18 (Okla. 1996). See Houston v. Reich, 932 F.2d 883, 890 (10th Cir. 1991)(applying Oklahoma law); McMullen v. City of Del City, 920 P.2d 528, 530-31 (Okla. Ct. App. 1996). That is, GTCA immunity premised upon scope of employment is not available in situations where the alleged actions were willful, malicious, or intentional.

In his complaint, Grayson pleads that Snow, acting in a "willful, malicious, [and] intentional" manner, pulled him from the police car, "hit him several times in the stomach," and demanded "that he confess." To which, Snow merely asserts that he was acting within the scope of his employment without denying Grayson's factual averments. In light of the previous discussion and taking plaintiff's uncontradicted allegations as true, the Court simply cannot conclude that Snow was performing

legitimate police business in good faith, nor can the Court formulate a scenario under which Snow could have been acting within the scope of his employment. In short, wilful and malicious acts are not within the scope of the GTCA, and as such, the Court will not permit Snow to avail himself of said immunity. Hence, the Court denies defendants' present motion in regard to Grayson's complaint of assault and battery against Snow.

In sum, defendants have failed to show undisputed factual averments which warrant a grant of summary judgment in whole. Indeed, defendants abandoned their motion in respect to Grayson's section 1983 claim. However, the Court finds summary judgment in favor of defendants appropriate as to Grayson's state tort claims of false arrest and intentional infliction of emotional distress. Grayson, simply cannot show that the officers were acting outside the scope of their employment in effectuating the arrest in question. Moreover, the Court finds as a matter of law that adequate probable cause existed to legitimize the arrest. Likewise, the Court finds as a matter of law that Grayson's pleadings do not allege actions sufficiently egregious to be actionable under the tort intentional infliction of emotional distress. By contrast, Snow must answer Grayson's complaint of assault and battery as the mere definition of the tort precludes a grant of immunity under the GTCA. Thus, only Grayson's section 1983 and assault and battery claims will remain.

Accordingly, Snow, Jackson, and Carolla's motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, is hereby DENIED in part and GRANTED in part.

IT IS SO ORDERED this 25th day of June, 1998.



H. Dale Cook
Senior U.S. District Judge

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

FILED

JUN 26 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TERIA FLUD,

Plaintiff,

vs.

INDEPENDENT SCHOOL
DISTRICT NO. 181006 OF
CRAIG COUNTY, OKLAHOMA,

Defendant.

Case No. 97-CV-1082K (J)

ENTERED ON DOCKET

DATE 6-29-98

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

The parties, plaintiff, Teria Flud ("Flud") and the defendant, Independent School District No. 6 of Craig County, Oklahoma ("Defendant"), hereby present to this Court their stipulation of dismissal with prejudice of the above-entitled action and all claims and allegations made therein. Flud and Defendant agree and stipulate:

1. Flud and Defendant have entered into a settlement agreement whereby all the issues, allegations and claims made in the above-entitled action are resolved, discharged and released with each party bearing its own attorneys' fees and costs.

2. The parties hereby stipulate to dismissal of the above-entitled action and all claims and allegations made therein with prejudice.

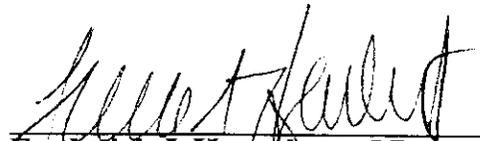
WHEREFORE, the parties stipulate that the above-entitled action be dismissed with prejudice with the parties bearing their own attorneys' fees and costs.

Dated this 21 day of June, 1998.

Jennifer P. Foster
Jennifer P. Foster
SANDERS & SANDERS, P.C.
624 S. Denver, Suite 202
Tulsa, OK 74119

Attorneys for Plaintiff, Teria Flud

015



Frederick J. Hegenbart, OBA No. 10846
ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 700
Tulsa, OK 74103
(918) 585-9211

**Attorney for Defendant, Independent
School District No. 6 of Craig County,
Oklahoma**

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

FILED
JUN 25 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THRESSA G. BOMBA,)
)
Plaintiff,)
)
v.)
)
PHOENIX HOME LIFE MUTUAL)
INSURANCE COMPANY,)
)
Defendant/Third)
Party Plaintiff,)
)
v.)
)
JAMES BOMBA, JR., PATRICK)
BOMBA, DEBRA BOMBA,)
THE ESTATE OF JAMES)
BOMBA, SR., AND)
NATIONSBANK, N.A.,)
)
Third Party Defendants.)

Case No. 97-CV-1121-K(J)

ENTERED ON DOCKET

DATE 6-25-98

JUDGMENT BY DEFAULT

This matter comes before the Clerk of this Court, pursuant to Fed. R. Civ. P. 55(b)(1) and N.D. L.R. 55.1(B), upon Motion and Affidavit of the Third-Party Plaintiff, Phoenix Home Life Mutual Insurance Company, submitted for judgment by default against Third-Party Defendant, James Bomba, Jr. It appears that the Third-Party Defendant, James Bomba, Jr., is in default and the Clerk of this Court has previously searched the records and entered default of James Bomba, Jr. It further appears upon Third-Party Plaintiff's affidavit that James Bomba, Jr. is indebted to the Third-Party Plaintiff in the amount of \$52,498.65, that default has been

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entered against James Bomba, Jr. for failure to appear and that James Bomba, Jr. is not an infant or incompetent person and is not in the military service of the United States.

IT IS THEREFORE ORDERED that Third-Party Plaintiff Phoenix Home Life Mutual Insurance Company recover from the Third-Party Defendant, James Bomba, Jr., the sum of \$52,498.65, together with interest as allowed by law, and costs in the sum of \$240.00.

So rendered this 25 day of June, 1998.


CLERK OF THE UNITED STATES DISTRICT
COURT, NORTHERN DISTRICT OF OKLAHOMA

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

THAD ASHCRAFT and DEBORAH LANE ASHCRAFT)
)
 Plaintiffs,)
)
 v.)
)
 JACK UDELL ATKINS)
)
 Defendant.)

ENTERED ON DOCKET

DATE 6-25-98

No. 97-C-832-K

FILED

JUN 24 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

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

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 24 day of June, 1998.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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

LU ANN MATLOCK,

Plaintiff,

vs.

SAINT FRANCIS HOSPITAL

Defendant.

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ENTERED ON DOCKET

DATE 6-25-98

No. 97-CV-645-K

F I L E D

JUN 24 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of the Defendant's motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

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

ORDERED THIS DAY OF 21 JUNE, 1998


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET

DATE 6-25-98

LU ANN MATLOCK,)
)
 Plaintiff,)
)
 vs.)
)
 SAINT FRANCIS HOSPITAL)
)
 Defendant.)

Phil Lombardi, Clerk

No. 97-CV-645-K

FILED
JUN 24 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the Defendant Saint Francis Hospital's (the hospital) Motion for Summary Judgment. Plaintiff has brought a claim under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (ADA), claiming that the Defendant terminated her because of a disability or a perceived disability. Plaintiff further claims that Defendant wrongfully discharged her under Oklahoma law for filing a workers' compensation claim. Finally, Plaintiff has brought causes of action for intentional and negligent infliction of emotional distress under Oklahoma law. Defendant contends that Plaintiff is not disabled as defined in the ADA and thus not protected by the ADA. Defendant also maintains that Plaintiff has produced no evidence tying her termination to her workers' compensation claim. Defendant further contends that Plaintiff has not alleged actions sufficiently extreme and severe to support an intentional infliction of emotional distress claim and that no cause of action exists in Oklahoma for negligent infliction of emotional distress.

Statement of Facts

Defendant hired Matlock in its radiology department in 1986. Defendant considered Matlock an excellent employee. In February 1987, Defendant promoted Matlock to senior radiology

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technologist. Defendant characterizes the duties of a senior radiology technologist as including taking x-rays utilizing a variety of specialized equipment in the hospital's radiology, surgery, and emergency departments and various clerical and administrative tasks related to taking, developing, and cataloging x-rays. Defendant characterizes the physical demands of Plaintiff's position as including, among other things, "lifting patients from stretchers/wheelchairs to and from x-ray imaging tables; wearing lead aprons (ranging from 6.2 lbs. To 11.1 lbs) frequently for 15 to 45 minutes at a time (occasionally for longer periods) throughout the day as needed; frequent to constant pushing of portable x-ray machines (6.2 lbs of force on tile and 26.5 lbs of force on carpet); and frequent to constant pulling of portable x-ray machines (4.5 lbs. of force on tile and 8.3 lbs. of force on carpet)." *Def.'s Br. in Support of Mot. for Summ. J. 3 (Def.'s Br.)* (citing *Def. Ex. 3 & 34; Matlock Dep. 8-18*). Plaintiff apparently does not dispute Defendant's description of her duties as a senior radiology technician, but she does dispute Defendant's characterization of the physical demands of the position. *Pl.'s Resp. Br. to Def.'s Mot. for Summ. J. 4 (Resp. Br.)*.

On December 12, 1995, Plaintiff suffered an injury while performing work related duties. Plaintiff asserts that her injuries resulted in a condition or disorder which affected her neurological and/or musculoskeletal body systems. Plaintiff further asserts that the condition "significantly restricted the manner or duration of a particular major life activity and which also restricted her ability to perform a class of jobs or a broad range of jobs." *Resp. Br. 1*. In December 1995, employee health personnel at the hospital placed several temporary restrictions on Plaintiff's ability to perform certain physical tasks. In March, 1996 employee health personnel placed at least one permanent restriction on Plaintiff. Plaintiff claims that permanent restrictions mean permanent disabilities in employment parlance.

Subsequent to Plaintiff's injury, the hospital attempted to accommodate her physical restrictions. The hospital attempted to accommodate Plaintiff's restrictions by various scheduling mechanisms which sought to avoid assigning Plaintiff duties which would require her to perform tasks violating her restrictions. Susan Woodward, the radiology technologist who prepared work schedules for radiology technologists, testified that despite slight difficulties, she had been able to satisfactorily arrange work schedules to ensure that Plaintiff and Jennifer Gresham were able to work within their physical restrictions.¹ *Resp. Br.*, Ex. 6, 84-85. Defendant claims that scheduling according to Plaintiff's restrictions was difficult and ultimately could not be accomplished without compromising patient care. *Def. Br.* 4.

On September 19 or September 20, 1996, Defendant came to believe that additional permanent physical restrictions were placed on Plaintiff. Plaintiff asserts that Defendant mistakenly believed that the physical restrictions were made permanent at that time. After concluding that the physical restrictions had been made permanent, Sue Manuel, the Chief Radiology Technologist, informed her supervisor, Karen White, a manager in the radiology department, that Plaintiff's restrictions had been made permanent. *Resp. Br.*, Ex. 5 40-2. During this conversation, White asked Manuel if the radiology department could continue to accommodate Plaintiff given the permanent physical restrictions. *Id.* Manuel responded that it could not. Manuel did not consult Susan Woodward, the scheduler, however, prior to stating that radiology could not accommodate Plaintiff. Defendant claims that a job impact analysis it performed determined that Plaintiff's permanent physical restrictions would prevent her from performing a "significant portion" of a senior radiology

¹Jennifer Gresham, also a former radiology technologist employed by Defendant, has brought ADA and other claims against Defendant in a related case, *Gresham v. Saint Francis Hospital*, 97-C-644-K.

technologist's duties.

Plaintiff contends that she was fired on September 20, 1996. Defendant maintains, however, that Joseph Daniels, the hospital's radiology director, informed Plaintiff by letter on September 23, 1996 that she would receive a "60 day extension of leave" effectively ending her assignment in the radiology department. During the sixty day period, Defendant allowed Plaintiff to apply for other available positions within the hospital for which she was qualified. Plaintiff conceded that other positions were available within the hospital which she could perform despite her physical restrictions, but she believed those jobs were lower paying and not consonant with her level of training. After Plaintiff did not successfully obtain one of the available jobs in the hospital during the sixty day period, her employment officially ended on November 20, 1996. On December 2, 1996, Defendant informed Plaintiff by letter that it had terminated her employment.

Although, the parties' submissions are unclear as to the timing, Plaintiff filed a workers' compensation claim for the injury she suffered on December 12, 1995. Plaintiff asserts that the filing of her workers' compensation claim or Defendant's belief that she would file a workers' compensation claim resulted in Defendant terminating her. *Resp. Br. 24; Compl. ¶ 4, 10*. Plaintiff testified in her deposition that neither Sue Manual nor any of Defendant's supervisory personnel expressed any view concerning her workers' compensation status or her injury at the time the injury became known. *Matlock Dep. 25-8*.

In March of 1997, Defendant contacted Professional Rehabilitation & Occupational Services, Inc. (PROS) to provide job placement and vocational evaluation services for Plaintiff. Rhonda Blackstock, a Certified Rehabilitation Counselor and a Certified Vocational Evaluator, served Plaintiff. Blackstock concluded that Plaintiff was employable within the radiology technology field

and that a variety of radiology technology positions which met Plaintiff's physical restrictions existed within the Tulsa area. *Aff. of Rhonda Blackstock*, ¶ 6. Plaintiff agreed with Blackstock's assessment that she could work in the radiology field and Plaintiff continued to seek further employment in the radiology field. *Matlock Dep.* 62-3. Plaintiff also consulted Cheryl A. Mallon, a Vocational Rehabilitative Consultant who is a Certified Rehabilitation Counselor. Mallon determined that "[b]ecause of the experience and qualifications of Lu Ann Matlock and her unsuccessful efforts to find employment in [the radiology technology field]...she was not employable in the radiology technology field." *Aff. of Cheryl Mallon*, ¶13.

Plaintiff filed suit in this case on July 11, 1997 alleging violations of the ADA, 85 O.S. § 5, and the torts intentional and negligent infliction of emotional distress.

Summary Judgment Standard

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). Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. *Thomas v. Internat'l Business Machines*, 48 F.3d 478, 485 (10th Cir. 1995).

Discussion

Plaintiff's ADA Claim

Plaintiff alleges that Defendant, by discriminating against her and terminating her, violated the ADA. The ADA prohibits covered entities from discriminating against qualified individuals with disabilities, because of the disabilities, in regard to hiring, advancement, discharge, or other terms, conditions, or privileges of employment. 42 U.S.C. §12112(a). To qualify for relief under the ADA, a plaintiff must establish: (1) that he is a disabled person within the meaning of the ADA; (2) that he is qualified, that is, with or without reasonable accommodation (which he must describe), he is able to perform the essential functions of the job; and (3) that the employer terminated him because of his disability. *White v. York Internat'l Corp.*, 45 F.3d 357, 360-1 (10th Cir. 1995).

Defendant argues that Plaintiff's ADA claim should fail because she has not demonstrated that she is disabled within the meaning of the ADA. The ADA defines disability, with respect to an individual, as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such impairment. 42 U.S.C. § 12102(2). The regulations implementing the ADA define major life activities as including: caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i). Other major life activities include lifting. *See Lowe v. Angelos Italian Foods, Inc.*, 87 F.3d 1170, 1174 (10th Cir. 1996) (citing 29 C.F.R § 1630, App.).

In this case, Plaintiff's disability claims revolve around the major life activities of working and lifting. The Tenth Circuit has articulated the standard for showing that an impairment substantially limits working.

To demonstrate that an impairment 'substantially limits' the major life activity of working, an individual must show significant restrict[ion] in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.

Bolton v. Scrivner, 36 F.3d 939, 942 (10th Cir. 1994) (citing 29 C.F.R. § 1630.2(j)(3)(i)). "A class of jobs includes jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, while a broad range of jobs in various classes includes jobs not utilizing similar training, knowledge, skills and abilities, within that geographical area, from which the individual is also disqualified because of the impairment." *Siemon v. AT&T Corp.*, 117 F.3d 1173, 1176 (10th Cir. 1997). "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Id.* at 1176 (citing 29 C.F.R. § 1630.2(j)(3)(i)).

In this case, the evidence shows that Plaintiff is not significantly restricted in her ability to perform either a class of jobs in the radiology technology field or a broad range of jobs in various classes. Plaintiff herself testified that she could perform certain radiology technologist jobs despite her physical restrictions. *Matlock Dep.* 63. Karen Blackstock, the Certified Rehabilitation Counselor and Certified Vocational Evaluator, concluded that Plaintiff was employable within the radiology technology field and that jobs in that field which complied with Plaintiff's physical restrictions existed in the Tulsa area. Blackstock determined that radiology technology jobs in places such as out-patient clinics, chiropractic offices, minor emergency centers, dentist offices, occupational medicine facilities, and certain divisions in hospitals would be less strenuous than Plaintiff's position with Defendant and would have complied with Plaintiff's physical restrictions. Plaintiff acknowledged some radiology technology positions were less physically demanding than others. *Matlock Dep.* 21. Plaintiff's testimony does not evince a belief that she was restricted in her

ability to perform jobs in the radiology technology field.

Plaintiff's testimony and other evidence offered by Blackstock also demonstrate that Plaintiff's impairment does not restrict her from performing a broad range of jobs in various classes. Plaintiff testified that although there several other jobs which she could not perform, there are several jobs which she could have performed despite her physical restrictions. *Matlock Dep.* 88. Blackstock found that jobs existed in areas outside of radiology technology for which Plaintiff had the transferable skills to perform. Specific jobs included positions in hospital administration, clerical positions, and computer related positions. In any event, Plaintiff has produced no evidence indicating that her impairment has disqualified her from jobs which do not utilize similar training, knowledge, skills or abilities.

Plaintiff does present the view of Cheryl Mallon, the Certified Rehabilitation Counselor and Vocational Rehabilitative Consultant, who determined that Plaintiff "was not employable within the radiology technology field." Mallon Aff., ¶ 13. Mallon based her conclusion upon the saturated job market for radiology technologists in Tulsa and Plaintiff's unsuccessful efforts to secure employment in the field.² This evidence, however, does not demonstrate that an impairment restricted Plaintiff's ability to perform jobs in the radiology technology field. Instead, this evidence simply goes to Plaintiff's ability to find employment in the field given existing market conditions. Neither Mallon nor other evidence presented by Plaintiff indicates that she did not receive a job in radiology technology because of an impairment. Plaintiff's position would hold Defendant responsible for market conditions beyond its control. The Court has found no support in the statute,

²Mallon notes that three colleges in the Tulsa area, Tulsa Community College, Tulsa Technology Center, and Bacone University, train radiology technologists and that this significantly impacts the job market for radiology technologists in the Tulsa area.

case law, or implementing regulations to support this position.³

The evidence presented by the Plaintiff also fails to show how her impairment has disqualified her from other jobs outside of radiology technology. Mallon simply states that Plaintiff's skills are not transferable and that thus no comparable positions exist for Plaintiff outside of radiology technology. This evidence does not, however, link Plaintiff's impairment with a restriction from performing a broad range of jobs that do not utilize Plaintiff's training, knowledge, skills and abilities. Plaintiff, in her affidavit, state that she cannot perform many common tasks which could potentially limit her ability to perform several types of jobs in other classes, but she fails to support those claims and she does not link those problems to other various types of jobs.

Plaintiff also argues that Defendant's reliance on *Bolton* is misplaced and Defendant misinterpreted the law by claiming she is not disabled because she can perform virtually any job. Plaintiff characterizes *Bolton* as focusing on whether the plaintiff produced enough evidence to survive summary judgment to establish disability under the ADA. *Resp. Br.* 9. Plaintiff argues that *Bolton* is inapplicable because she has produced enough evidence establishing disability. Plaintiff, however, begs the question. The issue of whether she has established disability under the ADA, by showing substantial impairment in working, is properly before the Court thus *Bolton* is clearly applicable.

Plaintiff has also misinterpreted Defendant's argument that she is not disabled because she could perform in jobs which do not call upon her training, skill and experience. A substantial

³Plaintiff's view appears to be that she is disabled within the meaning of the ADA because she cannot find a job in her field. This view would transform the ADA from a device protecting a class of workers from illegitimate discrimination to one which would improperly give a class of workers additional protection against normal workings of the market.

impairment in working requires a showing of a restriction on ability to work in either a class of jobs or broad range of jobs in various classes. Plaintiff would be entitled to go forward if the evidence showed that she were able to work in a broad range of jobs which did not utilize her training, skill, and ability, but unable to work in a class of jobs which utilized her training, skill and ability. Here, however, there is evidence that Plaintiff is restricted in neither her ability to work in jobs that take into account her training, skill and ability, jobs in radiology technology, nor in a broader range of jobs which do not take her training, skill, and ability into account.

Plaintiff has failed to offer sufficient evidence demonstrating that she suffers an actual disability under 42 U.S.C. § 12102(2)(A).

Plaintiff also argues that she was regarded as disabled under 42 U.S.C. § 12102(2)(C) and that she had a record of an impairment which constituted a disability under 42 U.S.C. § 12102(2)(B).

The Court addresses each of these contentions in turn.

The Tenth Circuit has established the standard for determining whether an employer regards an employee as disabled in the life activity of working.

[I]n order to establish a disability under the 'regarded as' prong of the ADA with respect to the major life activity of working, an individual must show that the employer regarded him or her as being substantially limited in performing either a class of jobs or broad range of jobs in various classes.

Sutton v. United Air Lines, 130 F.3d 893, 904 (10th Cir. 1997) *petition for cert. filed* (No. 97-1943).

An employer does not necessarily regard an employee as substantially limited in the major life activity of working simply because it believes that individual is incapable of performing a particular job. *Id.* at 904. Attempting to place an injured employee in positions for which the injury does not disqualify the employee is evidence that an employer does not view that employee as disabled. *See*

Sherrod v. American Airlines, 132 F.3d 1112 (5th Cir. 1998). In *Sherrod*, American Airlines refused to clear a flight attendant with an injured back for flight duty, but attempted to place her in jobs for which she was not disqualified because of her injury. The Fifth Circuit concluded that such evidence established that American Airlines viewed the plaintiff as qualified as for other positions. *Id.* at 1121. Here, the evidence shows that Defendant gave Plaintiff every opportunity to seek another position within the hospital. Defendant's efforts included informing Plaintiff that she would not be considered officially terminated for sixty days after her assignment in radiology ended, during which time the hospital would not consider any application she made for an open position the application of a new hire. Defendant's actions are not consistent with regarding Plaintiff as physically not able to perform a broad range of jobs in various classes. In addition, Plaintiff has produced no evidence demonstrating that the Defendant believed Plaintiff could not physically perform jobs in radiology technology other than the single position of radiologist technologist at the hospital.

Plaintiff contends that the reactions of her supervisors, Sue Manuel and Karen White, to the information that her restrictions had been made permanent belie Defendant's claim that it did not regard Plaintiff as disabled. Plaintiff points to Defendant's attempts to accommodate her physical restrictions after her injury as showing it regarded her as being disabled. Plaintiff's argument rests, however, on the premise that a physical restriction equates to a disability under the ADA. This is not the case. It is well established that a physical restriction is not necessarily a disability and that acknowledging the existence of a physical restriction does not translate into regarding someone as having a disability. See e.g. *Pryor v. Trane Co.*, 138 F.3d 1024, 1027-8 (5th Cir. 1998); *Snow v. Ridgeview Med. Center*, 128 F.3d 1201, 1207 (8th Cir. 1997); *Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir. 1995); *Burnett v. Western Resources, Inc.*, 929 F. Supp. 1349, 1356 (D. Kan.

1996). Defendant's accommodation of Plaintiff's work restrictions do not indicate that Defendant regarded Plaintiff as being disabled.

For the same reasons, Plaintiff has not produced evidence that shows that she had a record of an impairment which substantially limits working under 42 U.S.C. § 12102(2)(B). Plaintiff seems to broadly assert that permanent restrictions in her medical files constituted a record of an impairment. Plaintiff's assertion rests, once again, however, on the assumption that a restriction is a disability. Because the law does not automatically translate a restriction into a disability, Plaintiff's theory fails. There is no evidence that Plaintiff had a disability under 42 U.S.C. § 12102(2)(B).

Finally, Plaintiff claims that she is significantly impaired in the major life activity of lifting and is thus actually disabled. Lifting is a major life activity under the ADA. *See Lowe*, 87 F.3d at 1174. Plaintiff bases her claim of impairment in lifting on her physical restrictions against lifting and her affidavit. Medical personnel at the hospital removed Plaintiff's ten pound lifting restriction in March of 1996, well before Plaintiff's employment with Defendant ended. In addition, a substantial limitation is found by referring the capacity of a plaintiff to the capacity of an average person in the general population in the particular major life activity at issue. *See* 29 C.F.R. § 1630.2(j)(1). Plaintiff has offered no evidence from which her lifting ability could be compared to the lifting ability of an average person in the general population. Without such evidence, the Plaintiff has not produced sufficient evidence with which to demonstrate that she is disabled in terms of the major life activity of lifting.

For the foregoing reasons, summary judgment is appropriate on Plaintiff's ADA claim.

Plaintiff's Retaliatory Discharge Claim

Plaintiff next alleges that the Defendant terminated her because it believed that she would

file a workers' compensation claim and that her termination violated 85 O.S. § 5. Section 5 states:

No person, firm, partnership or corporation may discharge any employee because the employee has in good faith filed a claim, or has retained a lawyer to represent him in said claim, instituted or caused to be instituted, in good faith, any proceeding under the provisions of this title, or has testified or is about to testify in any such proceeding.

To establish a prima facie case of retaliatory discharge under section 5, a discharged employee must show: (1) employment; (2) on the job injury; (3) receipt of treatment which put the employer on notice that treatment had been rendered for a work-related injury, or that the employee in good faith instituted or caused to be instituted proceedings under the [Workers' Compensation] Act; and (4) consequent termination of employment. *Buckner v. General Motors Corp.*, 760 P.2d 803, 806 (Okla. 1988).

Defendant concedes that Plaintiff has shown the first three elements. *Def.'s Br.* 19. Defendant argues, however, that Plaintiff has failed to establish the consequent termination element of the prima facie case. "Whether there was consequent termination is dependent upon the employee producing evidence as would give rise to a legal inference the discharge was significantly motivated by retaliation for the employee exercising statutory rights." *Wallace v. Halliburton Co.*, 850 P.2d 1056, 1059 (Okla. 1993) (citing *Thompson v. Medley Material Handling, Inc.* 732 P.2d 461, 463 (Okla. 1987)).

Several factors can create an inference that a termination was motivated by retaliation. These factors include the time lapse between the employer's notice of the claim or of the employee's injury and the termination and the manner in which supervisory personnel react, and have reacted, to workers' compensation claims. *Id.* at 1059. Other factors include employer pressure on employees not to file workers' compensation claims, references to employees' claims by supervisors or other

personnel, and a pattern of terminating employees who file workers' compensation claims. *Id.* at 1059; *Taylor v. Cache Creek Nursing Centers*, 891 P.2d 607, 610 (Okla.App. 1994).

Plaintiff attempts to rely on the timing of her discharge, the simultaneous termination of Jennifer Gresham from the radiology department, and the belief of Sue Ann Manuel that neither Plaintiff nor Gresham were actually injured. *Resp. Br.* at 25. As an initial matter, Plaintiff does not explain how Manuel's disbelief of her injury actually creates an inference that she was terminated for filing a workers' compensation claim when Manuel lacked the power to terminate her. Plaintiff also fails to cite any authority for such a proposition. Evidence of Gresham's termination and of the timing of Plaintiff termination also fail to support an inference of retaliatory motive. Defendant's treatment of Gresham does not show a pattern of wrongfully discharging workers who file claims because Plaintiff has not demonstrated to the Court that Defendant wrongfully terminated or otherwise treated Gresham poorly because of her workers' compensation status. Plaintiff has also failed to produce any evidence of negative comments by her supervisors or others concerning her workers compensation status. In addition, Plaintiff has failed to produce evidence of adverse reactions to her status other than Manuel's testimony indicating doubt about the existence of her injury. Finally, the time lapse between a defendant's notice of a claim or of an injury and a plaintiff's discharge does not alone establish consequent termination. *See e.g. Taylor v. Cache Creek Nursing Centers*, 891 P.2d 607, 610 (Okla.App. 1994) (ruling that legal inference not created solely by defendant's discharge of plaintiff upon plaintiff's return from two week leave because of injury). Plaintiff has not produced evidence of a consequent discharge and therefore has not made a prima facie case of retaliatory discharge under 85 O.S. § 5. Summary Judgment is appropriate on Plaintiff's retaliatory discharge claim.

Plaintiff's Intentional and Negligent Infliction of Emotion Distress Claims

Finally, Plaintiff alleges that Defendant's conduct was so extreme that it should be liable for intentional or negligent infliction of emotional distress under Oklahoma law. In Oklahoma, Section 46 of the Restatement (Second) of Torts sets out the standard for intentional infliction of emotional distress. *Eddy v. Brown*, 715 P.2d 74, 76 (Okla. 1986); *Breeden v. League Serv. Corp.*, 575 P.2d 1374, 1377 (Okla. 1978). The applicable part of section 46 states, "(1) One who by extreme or outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." *Eddy*, 715 P.2d at 76 (citing Restatement (Second) of Torts § 46 (1965)). The trial court must initially determine if reasonable people would disagree on whether a defendant's conduct was sufficiently extreme and outrageous. *Id.* at 76. While courts should view each alleged episode of conduct in light of the environment in which it takes place, unreasonable conduct which is "neither beyond all possible bounds of decency in the setting in which it occurred nor ...can be regarded as utterly intolerable in a civilized community" is not actionable under this tort. *Id.* at 77. Here, the Plaintiff actually attempts to base her claim in large measure upon Defendant's "attitude" rather than Defendant's actual conduct. The Court finds that the Defendant's conduct was not so severe or extreme that it meets the level set by section 46. Plaintiff's intentional infliction of emotional distress claim must fail.

Plaintiff also alleges negligent infliction of emotional distress. As Defendant correctly points out, however, there is no independent tort of negligent infliction of emotional distress in Oklahoma. *Lockhart v. Loosen*, 943 P.2d 1074, 1081 (Okla. 1997). Thus, summary judgment is appropriate on

Plaintiff's intentional and negligent infliction of emotional distress claims.

Conclusion

For the foregoing reasons, the Court GRANTS Defendant's Motion for Summary Judgment as to each of Plaintiff's claims.

ORDERED this 24 day of June, 1998.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

JENNIFER GRESHAM,

Plaintiff,

vs.

SAINT FRANCIS HOSPITAL

Defendant.

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ENTERED ON DOCKET

DATE 6-25-98

No. 97-CV-644-K ✓

FILED

JUN 24 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of the Defendant's motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

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

ORDERED THIS DAY OF 24 JUNE, 1998


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

41

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

JENNIFER GRESHAM,)
)
Plaintiff,)
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vs.)
)
SAINT FRANCIS HOSPITAL)
)
)
Defendant.)

ENTERED ON DOCKET

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No. 97-CV-644-K

F I L E D

JUN 24 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the Defendant Saint Francis Hospital's (the hospital) Motion for Summary Judgment. Plaintiff has brought a claim under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (ADA), claiming that the Defendant terminated her because of a disability or a perceived disability. Plaintiff further claims that Defendant wrongfully discharged her under Oklahoma law for filing a workers' compensation claim. Finally, Plaintiff has brought causes of action for intentional and negligent infliction of emotional distress under Oklahoma law. Defendant contends that Plaintiff is not disabled as defined in the ADA and thus not protected by the ADA. Defendant also maintains that Plaintiff has produced no evidence tying her termination to her workers' compensation claim. Defendant further contends that Plaintiff has not alleged actions sufficiently extreme and severe to support an intentional infliction of emotional distress claim and that no cause of action exists in Oklahoma for negligent infliction of emotional distress.

Statement of Facts

Defendant hired Gresham in its radiology department in 1990. Defendant considered Gresham an excellent employee. In February 1993, Defendant promoted Gresham to senior

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radiology technologist. Defendant characterizes the duties of a senior radiology technician as including taking x-rays utilizing a variety of specialized equipment in the hospital's radiology, surgery, and emergency departments and various clerical and administrative tasks related to taking, developing, and cataloging x-rays. Defendant characterizes the physical demands of Plaintiff's position as including, among other things, "lifting patients from stretchers/wheelchairs to and from x-ray imaging tables; wearing lead aprons (ranging from 6.2 lbs. To 11.1 lbs) frequently for 15 to 45 minutes at a time (occasionally for longer periods) throughout the day as needed; frequent to constant pushing of portable x-ray machines (6.2 lbs of force on tile and 26.5 lbs of force on carpet); and frequent to constant pulling of portable x-ray machines (4.5 lbs. of force on tile and 8.3 lbs. of force on carpet)." *Def. 's Br. in Support of Mot. for Summ. J.* 3 (*Def. 's Br.*) (citing *Def. Ex. 3 & 34; Gresham Dep.* 14-17). Plaintiff apparently does not dispute Defendant's description of her duties as a senior radiology technician, but she does dispute Defendant's characterization of the physical demands of the position. *Pl. 's Resp. Br. to Def. 's Mot. for Summ. J.* 4 (*Resp. Br.*).

On May 14, 1996, Plaintiff suffered an injury while performing work related duties. Plaintiff asserts that her injuries resulted in a condition or disorder which affected her neurological and/or musculoskeletal body systems. Plaintiff further asserts that the condition "significantly restricted the manner or duration of a particular major life activity and which also restricted her ability to perform a class of jobs or a broad range of jobs." *Resp. Br.* 1. In late May 1996, employee health personnel at the hospital placed several temporary and at least one permanent restriction on Plaintiff's ability to perform certain physical tasks. Plaintiff claims that permanent restrictions mean permanent disabilities in employment parlance.

Subsequent to Plaintiff's injury, the hospital attempted to accommodate her physical

restrictions. The hospital attempted to accommodate Plaintiff's restrictions by various scheduling mechanisms which sought to avoid assigning Plaintiff duties which would require her to perform tasks violating her restrictions. Susan Woodward, the radiology technologist who prepared work schedules for radiology technologists, testified that despite slight difficulties, she had been able to satisfactorily arrange work schedules to ensure that Plaintiff and Lu Ann Matlock were able to work within their physical restrictions.¹ *Resp. Br.*, Ex. 6, 84-85. Defendant claims that scheduling according to Plaintiff's restrictions was difficult and ultimately could not be accomplished without compromising patient care. *Def. Br.* 4.

On September 19 or September 20, 1996, Defendant came to believe that permanent physical restrictions were placed on Plaintiff. Plaintiff asserts that Defendant mistakenly believed that the physical restrictions were made permanent at that time. After concluding that the physical restrictions had been made permanent, Sue Manuel, the Chief Radiology Technologist, informed her supervisor, Karen White, a manager in the radiology department, that Plaintiff's restrictions had been made permanent. *Resp. Br.*, Ex. 5 40-2. During this conversation, White asked Manuel if the radiology department could continue to accommodate Plaintiff given the permanent physical restrictions. *Id.* Manuel responded that it could not. Manuel did not consult Susan Woodward, the scheduler, however, prior to stating that radiology could not accommodate Plaintiff. Defendant claims that a job impact analysis it performed determined that Plaintiff's permanent physical restrictions would prevent her from performing a "significant portion" of a senior radiology technologist's duties.

¹Lu Ann Matlock, also a former radiology technologist employed by Defendant, has brought ADA and other claims against Defendant in a related case, *Matlock v. Saint Francis Hospital*, 97-C-645-K.

Plaintiff contends that she was fired on September 20, 1996. Defendant maintains, however, that Joseph Daniels, the hospital's radiology director, informed Plaintiff by letter on September 23, 1996 that she would receive a "60 day extension of leave" effectively ending her assignment in the radiology department. During the sixty day period, Defendant allowed Plaintiff to apply for other available positions within the hospital for which she was qualified. Plaintiff conceded that other positions were available within the hospital which she could perform despite her physical restrictions, but she believed those jobs were lower paying and not consonant with level of training. After Plaintiff did not successfully obtain one of the available jobs in the hospital during the sixty day period, her employment officially ended on November 20, 1996. On December 2, 1996, Defendant informed Plaintiff by letter that it had terminated her employment.

Although, the parties' submissions are unclear as to the timing, Plaintiff filed a workers' compensation claim for the injury she suffered on May 14, 1996. Plaintiff asserts that the filing of her workers' compensation claim or Defendant's belief that she would file a workers' compensation claim resulted in Defendant terminating her. *Resp. Br.* 24; *Compl.* ¶ 4, 10. Plaintiff testified in her deposition that neither Sue Manual, Karen White, nor Joseph Daniels ever expressed any view on her workers' compensation status. *Gresham Dep.* 90, 107.

In March of 1997, Defendant contacted Professional Rehabilitation & Occupational Services, Inc. (PROS) to provide job placement and vocational evaluation services for Plaintiff. Rhonda Blackstock, a Certified Rehabilitation Counselor and a Certified Vocational Evaluator, served Plaintiff. Blackstock concluded that Plaintiff was employable within the radiology technology field and that a variety of radiology technology positions which met Plaintiff's physical restrictions existed within the Tulsa area. *Aff. of Rhonda Blackstock*, ¶ 6. Plaintiff agreed with Blackstock's

assessment that she could work in the radiology field and that she seek further employment in the radiology field. *Gresham Dep.* 60. Plaintiff also consulted Cheryl A. Mallon, a Vocational Rehabilitative Consultant who is a Certified Rehabilitation Counselor. Mallon determined that “[b]ecause of the experience and qualifications of Jennifer Gresham and her unsuccessful efforts to find employment in [the radiology technology field]...she was not employable in the radiology technology field.” *Aff. of Cheryl Mallon*, ¶13.

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Discussion

Plaintiff's ADA Claim

Plaintiff alleges that Defendant, by discriminating against her and terminating her, violated the ADA. The ADA prohibits covered entities from discriminating against qualified individuals with disabilities, because of the disabilities, in regard to hiring, advancement, discharge, or other terms, conditions, or privileges of employment. 42 U.S.C. §12112(a). To qualify for relief under the ADA, a plaintiff must establish: (1) that he is a disabled person within the meaning of the ADA; (2) that he is qualified, that is, with or without reasonable accommodation (which he must describe), he is able to perform the essential functions of the job; and (3) that the employer terminated him because of his disability. *White v. York Internat'l Corp.*, 45 F.3d 357, 360-1 (10th Cir. 1995).

Defendant argues that Plaintiff's ADA claim should fail because she has not demonstrated that she is disabled within the meaning of the ADA. The ADA defines disability, with respect to an individual, as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such impairment. 42 U.S.C. § 12102(2). The regulations implementing the ADA define major life activities as including: caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i). Other major life activities include lifting. *See Lowe v. Angelos Italian Foods, Inc.*, 87 F.3d 1170, 1174 (10th Cir. 1996) (citing 29 C.F.R § 1630, App.).

In this case, Plaintiff's disability claims revolve around the major life activities of working and lifting. The Tenth Circuit has articulated the standard for showing that an impairment substantially limits working.

To demonstrate that an impairment 'substantially limits' the major life activity of working, an individual must show significant restrict[ion] in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.

Bolton v. Scrivner, 36 F.3d 939, 942 (10th Cir. 1994) (citing 29 C.F.R. § 1630.2(j)(3)(i)). "A class of jobs includes jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, while a broad range of jobs in various classes includes jobs not utilizing similar training, knowledge, skills and abilities, within that geographical area, from which the individual is also disqualified because of the impairment." *Siemon v. AT&T Corp.*, 117 F.3d 1173, 1176 (10th Cir. 1997). "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Id.* at 1176 (citing 29 C.F.R. § 1630.2(j)(3)(i)).

In this case, the evidence shows that Plaintiff is not significantly restricted in her ability to perform either a class of jobs in the radiology technology field or a broad range of jobs in various classes. Plaintiff herself testified that she could perform certain radiology technologist jobs despite her physical restrictions. *Gresham Dep.* 124. Karen Blackstock, the Certified Rehabilitation Counselor and Certified Vocational Evaluator, concluded that Plaintiff was employable within the radiology technology field and that jobs in that field which complied with Plaintiff's physical restrictions existed in the Tulsa area. Blackstock determined that radiology technology jobs in places such as out-patient clients, chiropractic offices, minor emergency centers, dentist offices, occupational medicine facilities, and certain divisions in hospitals would be less strenuous than Plaintiff's position with Defendant and would have complied with Plaintiff's physical restrictions. Plaintiff agreed with Blackstock's assessment, stating that Blackstock "has an initial workup that states in her opinion and also my opinion that we could work in x-ray fields and so we should follow

that and apply at other x-ray places.” *Gresham Dep.* 59-60. Plaintiff’s testimony does not evince a belief that she was restricted in her ability to perform jobs in the radiology technology field.

Plaintiff’s testimony and other evidence offered by Blackstock also demonstrate that Plaintiff’s impairment does not restrict her from performing a broad range of jobs in various classes. Plaintiff testified that there several other jobs in the hospital which she could have performed despite her physical restrictions. *Gresham Dep.* 50. Blackstock found that jobs existed in areas outside of radiology technology for which Plaintiff had the transferable skills to perform. Specific jobs included positions in hospital administration, clerical positions, and computer related positions. In any event, Plaintiff has produced no evidence indicating that her impairment has disqualified her from jobs which do not utilize similar training, knowledge, skills or abilities.

Plaintiff does present the view of Cheryl Mallon, the Certified Rehabilitation Counselor and Vocational Rehabilitative Consultant, who determined that Plaintiff “was not employable within the radiology technology field.” *Mallon Aff.*, ¶ 13. Mallon based her conclusion upon the saturated job market for radiology technologists in Tulsa and Plaintiff’s unsuccessful efforts to secure employment in the field.² This evidence, however, does not demonstrate that an impairment restricted Plaintiff’s ability to perform jobs in the radiology technology field. Instead, this evidence simply goes to Plaintiff’s ability to find employment in the field given existing market conditions. Neither Mallon nor other evidence presented by Plaintiff indicates that she did not receive a job in radiology technology because of an impairment. Plaintiff’s position would hold Defendant responsible for market conditions beyond its control. The Court has found no support in the statute,

²Mallon notes that three colleges in the Tulsa area, Tulsa Community College, Tulsa Technology Center, and Bacone University, train radiology technologists and that this significantly impacts the job market in the Tulsa area.

case law, or implementing regulations to support this position.³

The evidence presented by the Plaintiff also fails to show how her impairment has disqualified her from other jobs outside of radiology technology. Mallon simply states that Plaintiff's skills are not transferable and that thus no comparable positions exist for Plaintiff outside of radiology technology. This evidence does not, however, link Plaintiff's impairment with a restriction from performing a broad range of jobs that do not utilize Plaintiff's training, knowledge, skills and abilities. Plaintiff, in her affidavit, does state that she cannot perform many common tasks which could potentially limit her ability to perform several types of jobs in other classes, but she fails to support those claims and she does not link those problems to other various types of jobs.

Plaintiff also argues that Defendant's reliance on *Bolton* is misplaced and Defendant misinterpreted the law by claiming she is not disabled because she can perform virtually any job. Plaintiff characterizes *Bolton* as focusing on whether the plaintiff produced enough evidence to survive summary judgment to establish disability under the ADA. *Resp. Br.* 9. Plaintiff argues that *Bolton* is inapplicable because she has produced enough evidence establishing disability. Plaintiff, however, begs the question. The issue of whether she has established disability under the ADA, by showing substantial impairment in working, is properly before the Court thus *Bolton* is clearly applicable.

Plaintiff has also misinterpreted Defendant's argument that she is not disabled because she could perform in jobs which do not call upon her training, skill and experience. A substantial

³Plaintiff's view appears to be that she is disabled within the meaning of the ADA because she cannot find a job in her field. This view would transform the ADA from a device protecting a class of workers from illegitimate discrimination to one which would improperly give a class of workers additional protection against normal workings of the market.

impairment in working requires a showing of a restriction on ability to work in either a class of jobs or broad range of jobs in various classes. Plaintiff would be entitled to go forward if the evidence showed that she were able to work in a broad range of jobs which did not utilize her training, skill, and ability, but unable to work in a class of jobs which utilized her training, skill and ability. Here, however, there is evidence that Plaintiff is restricted in neither her ability to work in jobs that take into account her training, skill and ability, jobs in radiology technology, nor in a broader range of jobs which do not take her training, skill, and ability into account.

Plaintiff has failed to offer sufficient evidence demonstrating that she suffers an actual disability under 42 U.S.C. § 12102(2)(A).

Plaintiff also argues that she was regarded as disabled under 42 U.S.C. § 12102(2)(C) and that she had a record of an impairment which constituted a disability under 42 U.S.C. § 12102(2)(B).

The Court addresses each of these contentions in turn.

The Tenth Circuit has established the standard for determining whether an employer regards an employee as disabled in the life activity of working.

[I]n order to establish a disability under the ‘regarded as’ prong of the ADA with respect to the major life activity of working, an individual must show that the employer regarded him or her as being substantially limited in performing either a class of jobs or broad range of jobs in various classes.

Sutton v. United Air Lines, 130 F.3d 893, 904 (10th Cir. 1997), *petition for cert. filed* (No. 97-1943).

An employer does not necessarily regard an employee as substantially limited in the major life activity of working simply because it believes that individual is incapable of performing a particular job. *Id.* at 904. Attempting to place an injured employee in positions for which the injury does not disqualify the employee is evidence that an employer does not view that employee as disabled. *See*

Sherrod v. American Airlines, 132 F.3d 1112 (5th Cir. 1998). In *Sherrod*, American Airlines refused to clear a flight attendant with an injured back for flight duty, but attempted to place her in jobs for which she was not disqualified because of her injury. The Fifth Circuit concluded that such evidence established that American Airlines viewed the plaintiff as qualified as for other positions. *Id.* at 1121. Here, the evidence shows that Defendant gave Plaintiff every opportunity to seek another position within the hospital. Defendant's efforts included informing Plaintiff that she would not be considered officially terminated for sixty days after her assignment in radiology ended, during which time the hospital would not consider any application she made for an open position the application of a new hire. Defendant's actions are not consistent with regarding Plaintiff as physically not able to perform a broad range of jobs in various classes. In addition, Plaintiff has produced no evidence demonstrating that the Defendant believed Plaintiff could not physically perform jobs in radiology technology other than the single position of radiologist technologist at the hospital.

Plaintiff contends that the reactions of her supervisors, Sue Manuel and Karen White, to the information that her restrictions had been made permanent belie Defendant's claim that it did not regard Plaintiff as disabled. Plaintiff points to Defendant's attempts to accommodate her physical restrictions after her injury as showing it regarded her as being disabled. Plaintiff's argument rests, however, on the premise that a physical restriction equates to a disability under the ADA. This is not the case. It is well established that a physical restriction is not necessarily a disability and that acknowledging the existence of a physical restriction does not translate into regarding someone as having a disability. See *e.g. Pryor v. Trane Co.*, 138 F.3d 1024, 1027-8 (5th Cir. 1998); *Snow v. Ridgeview Med. Center*, 128 F.3d 1201, 1207 (8th Cir. 1997); *Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir. 1995); *Burnett v. Western Resources, Inc.*, 929 F. Supp. 1349, 1356 (D. Kan.

1996). Defendant's accommodation of Plaintiff's work restrictions do not indicate that Defendant regarded Plaintiff as being disabled.

For the same reasons, Plaintiff has not produced evidence that shows that she had a record of an impairment which substantially limits working under 42 U.S.C. § 12102(2)(B). Plaintiff seems to broadly assert that permanent restrictions in her medical files constituted a record of an impairment. Plaintiff's assertion rests, once again, however, on the assumption that a restriction is a disability. Because the law does not automatically translate a restriction into a disability, Plaintiff's theory fails. There is no evidence that Plaintiff had a disability under 42 U.S.C. § 12102(2)(B).

Finally, Plaintiff claims that she is significantly impaired in the major life activity of lifting and is thus actually disabled. Lifting is a major life activity under the ADA. *See Lowe*, 87 F.3d at 1174. Plaintiff bases her claim of impairment in lifting on her physical restrictions against lifting and her affidavit. Medical personnel at the hospital removed Plaintiff's thirty pound lifting restriction in July of 1996, well before Plaintiff's employment with Defendant ended. In addition, a substantial limitation is found by referring the capacity of a plaintiff to the capacity of an average person in the general population in the particular major life activity at issue. *See* 29 C.F.R. § 1630.2(j)(1). Plaintiff has offered no evidence from which her lifting ability could be compared to the lifting ability of an average person in the general population. Without such evidence, the Plaintiff has not produced sufficient evidence with which to demonstrate that she is disabled in terms of the major life activity of lifting.

For the foregoing reasons, summary judgment is appropriate on Plaintiff's ADA claim.

Plaintiff's Retaliatory Discharge Claim

Plaintiff next alleges that the Defendant terminated her because it believed that she would

file a workers' compensation claim and that her retaliatory violated 85 O.S. § 5. Section 5 states:

No person, firm, partnership or corporation may discharge any employee because the employee has in good faith filed a claim, or has retained a lawyer to represent him in said claim, instituted or caused to be instituted, in good faith, any proceeding under the provisions of this title, or has testified or is about to testify in any such proceeding.

To establish a prima facie case of retaliatory discharge under section 5, a discharged employee must show: (1) employment; (2) on the job injury; (3) receipt of treatment which put the employer on notice that treatment had been rendered for a work-related injury, or that the employee in good faith instituted or caused to be instituted proceedings under the [Workers' Compensation] Act; and (4) consequent termination of employment. *Buckner v. General Motors Corp.*, 760 P.2d 803, 806 (Okla. 1988).

Defendant concedes that Plaintiff has shown the first three elements. *Def.'s Br.* 19. Defendant argues, however, that Plaintiff has failed to establish the consequent termination element of the prima facie case. "Whether there was consequent termination is dependent upon the employee producing evidence as would give rise to a legal inference the discharge was significantly motivated by retaliation for the employee exercising statutory rights." *Wallace v. Halliburton Co.*, 850 P.2d 1056, 1059 (Okla. 1993) (citing *Thompson v. Medley Material Handling, Inc.* 732 P.2d 461, 463 (Okla. 1987)).

Several factors can create an inference that a termination was motivated by retaliation. These factors include the time lapse between the employer's notice of the claim or of the employee's injury and the termination and the manner in which supervisory personnel react, and have reacted, to workers' compensation claims. *Id.* at 1059. Other factors include employer pressure on employees not to file workers' compensation claims, references to employees' claims by supervisors or other

personnel, and a pattern of terminating employees who file workers' compensation claims. *Id.* at 1059; *Taylor v. Cache Creek Nursing Centers*, 891 P.2d 607, 610 (Okla.App. 1994).

Plaintiff attempts to rely on the timing of her discharge, the simultaneous termination of Lu Ann Matlock from the radiology department, and the belief of Sue Ann Manuel that neither Plaintiff nor Matlock were actually injured. *Resp. Br.* at 25. As an initial matter, Plaintiff does not explain how Manuel's disbelief of her injury actually creates an inference that she was terminated for filing a workers' compensation claim when Manuel lacked the power to terminate her. Plaintiff also fails to cite any authority for such a proposition. Evidence of Matlock's termination and of the timing of Plaintiff termination also fail to support an inference of retaliatory motive. Defendant's treatment of Matlock does not show a pattern of wrongfully discharging workers who file claims because Plaintiff has not demonstrated to the Court that Defendant wrongfully terminated or otherwise treated Matlock poorly because of her workers' compensation status. Plaintiff has also failed to produce any evidence of negative comments by her supervisors or others concerning her workers compensation status. In addition, Plaintiff has failed to produce evidence of adverse reactions to her status other than Manuel's testimony indicating doubt about the existence of her injury. Finally, the time lapse between a defendant's notice of a claim or of an injury and a plaintiff's discharge does not alone establish consequent termination. *See e.g. Taylor v. Cache Creek Nursing Centers*, 891 P.2d 607, 610 (Okla.App. 1994) (ruling that legal inference not created solely by defendant's discharge of plaintiff upon plaintiff's return from two week leave because of injury). Plaintiff has not produced evidence of a consequent discharge and therefore has not made a prima facie case of retaliatory discharge under 85 O.S. § 5. Summary Judgment is appropriate on Plaintiff's retaliatory discharge claim.

Plaintiff's Intentional and Negligent Infliction of Emotional Distress Claims

Finally, Plaintiff alleges that Defendant's conduct was so extreme that it should be liable for intentional or negligent infliction of emotional distress under Oklahoma law. In Oklahoma, Section 46 of the Restatement (Second) of Torts sets out the standard for intentional infliction of emotional distress. *Eddy v. Brown*, 715 P.2d 74, 76 (Okla. 1986); *Breeden v. League Serv. Corp.*, 575 P.2d 1374, 1377 (Okla. 1978). The applicable part of section 46 states, "(1) One who by extreme or outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." *Eddy*, 715 P.2d at 76 (citing Restatement (Second) of Torts § 46 (1965)). The trial court must initially determine if reasonable people would disagree on whether a defendant's conduct was sufficiently extreme and outrageous. *Id.* at 76. While courts should view each alleged episode of conduct in light of the environment in which it takes place, unreasonable conduct which is "neither beyond all possible bounds of decency in the setting in which it occurred nor ...can be regarded as utterly intolerable in a civilized community" is not actionable under this tort. *Id.* at 77. Here, the Plaintiff actually attempts to base her claim in large measure upon Defendant's "attitude" rather than Defendant's actual conduct. The Court finds that the Defendant's conduct was not so severe or extreme that it meets the level set by section 46. Plaintiff's intentional infliction of emotional distress claim must fail.

Plaintiff also alleges negligent infliction of emotional distress. As Defendant correctly points out, however, there is no independent tort of negligent infliction of emotional distress in Oklahoma. *Lockhart v. Loosen*, 943 P.2d 1074, 1081 (Okla. 1997). Thus, summary judgment is appropriate on

Plaintiff's intentional and negligent infliction of emotional distress claims.

Conclusion

For the foregoing reasons, the Court GRANTS Defendant's Motion for Summary Judgment as to each of Plaintiff's claims.

ORDERED this 24 day of June, 1998.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 23 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARY E. EVANS,

PLAINTIFF,

vs.

KENNETH S. APFEL,
Commissioner, SOCIAL SECURITY
ADMINISTRATION,

DEFENDANT.

CASE No. 97-CV-791-M

ENTERED ON DOCKET

DATE JUN 25 1998

ORDER

Before the Court for consideration is Defendant's MOTION TO REMAND FOR FURTHER ADMINISTRATIVE PROCEEDINGS [Dkt. 14]. No response to the motion has been filed by Plaintiff. Based upon Defendant's motion, and the lack of response by Plaintiff, the Court hereby GRANTS Defendant's motion and ORDERS THIS CASE REMANDED to Defendant for further administrative action pursuant to sentence four (4) of § 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

SO ORDERED this 23rd day of JUNE, 1998.

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

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

FILED
JUN 5 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARY E. EVANS,
SSN: 447-42-2861,

Plaintiff,

v.

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

Defendant.

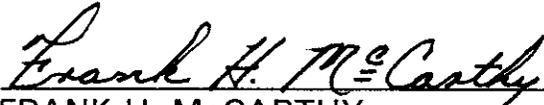
CASE NO. 97-CV-791-M

ENTERED ON DOCKET

DATE JUN 25 1998

JUDGMENT

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


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

Jan

FILED

JUN 24 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

KAREN NELSON IRREVOCABLE TRUST, by)
Trustees, BEVERLY VOGEL and MIKE)
WILLIAMSON,)

Plaintiff,)

vs.)

MASSACHUSETTS MUTUAL LIFE)
INSURANCE COMPANY, a foreign)
corporation,)

Defendants.)

Case No. 95-C-904-E ✓

ENTERED ON DOCKET

DATE JUN 24 1998

STIPULATION FOR DISMISSAL WITH PREJUDICE

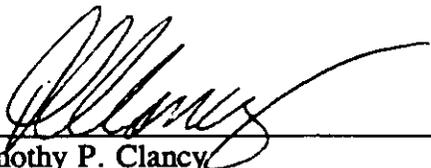
COME NOW the attorneys for Plaintiffs, Karen Nelson Irrevocable Trust, by trustees, Beverly Vogel and Mike Williams, and the attorneys for the Defendant, Massachusetts Mutual Life Insurance Company, and hereby stipulate and agree that the above captioned cause may, upon Order of the Court, be dismissed with prejudice to further litigation pertaining to all matters involved herein against Defendant, Massachusetts Mutual Life Insurance Company, and the said parties hereby request the Court to dismiss said action against Defendant, Massachusetts Mutual Life Insurance Company with prejudice pursuant to this Stipulation.

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STOOPS, SMITH & CLANCY

By

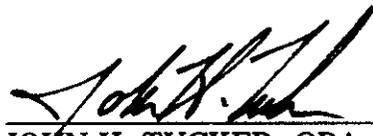


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Attorneys for Defendant, Massachusetts
Mutual Life Insurance Company

FILED

JUN 23 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

THE NORDAM GROUP, INC., a)
Delaware corporation,)
)
Plaintiff,)
)
v.)
)
AVAERO, a Delaware)
partnership,)
)
Defendant.)

Case No. 98-CV-0054-B

ENTERED ON DOCKET

DATE JUN 24 1998

ORDER

The Court, having considered the JOINT MOTION FOR DISMISSAL WITH FULL PREJUDICE filed by all the parties in this action, and being fully advised, hereby DISMISSES all claims between Plaintiff and Defendant with prejudice and without fees or costs to any party.

Entered

Dated: June 23rd


U. S. District Judge

FILED

JUN 23 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

Mary Big Elk and Sam McClane,)
)
 Plaintiffs,)
)
 v.)
)
 Donna Kastning, et al.,)
)
 Defendants.)

Case No. 96-C-87-B

ENTERED ON DOCKET
DATE JUN 24 1998

J U D G M E N T

In accordance with the Order granting summary judgment entered and filed on January 30, 1997, Judgment is hereby entered in favor of Defendant District Attorney of Osage County, Larry Stuart, and against the Plaintiffs, Mary Big Elk and Sam McClane. Each party is to pay their own attorneys' fees and costs.

DATED this 23rd day of June, 1998.


THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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98C
6/17/98

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

FILED

JUN 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

COUNCIL OAKS LEARNING CAMPUS,)
INC.)

Plaintiff,)

vs.)

Case No. 98-CV-0003C (M) ✓

AETNA CASUALTY & SURETY)
COMPANY OF AMERICA; THE)
STANDARD FIRE INSURANCE)
COMPANY; FEDERAL INSURANCE)
COMPANY; CAPITOL INDEMNITY)
CORPORATION)

ENTERED ON DOCKET

DATE JUN 24 1998

Defendants.)

and)

FARMINGTON CASUALTY COMPANY)

Additional Defendant)

STIPULATION OF DISMISSAL

IT IS HEREBY STIPULATED, pursuant to FED.R.Civ.P.41(a)(1), by and between Capitol Indemnity Corporation and Council Oaks Learning Campus, Inc., by and through their undersigned attorneys, that the above-styled action shall be dismissed with prejudice and on the merits as to Capitol Indemnity Corporation, but without costs or attorney fees to either of the parties to this Dismissal, and that judgment of dismissal with prejudice and on the merits may be entered hereon without further notice.

Date: 6/12/98

MARC F. CONLEY, P.C.

SECRET, HILL & FOLLUO

By: Marc F. Conley
MARC F. CONLEY, OBA #1845
Attorney for Plaintiff

By: Roger N. Butler, Jr.
ROGER N. BUTLER, JR., OBA #13668
Attorney for Capitol Indemnity Corporation

SO ORDERED, this 22nd day of June, 1998.

H. Dale Cook
The Honorable H. Dale Cook

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 22 1998

FLORA MAE MILLS,

Petitioner,

vs.

JAMES SAFFLE, Director, DEPARTMENT OF
CORRECTIONS, STATE OF OKLAHOMA,

Respondent.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-C-919K(J)

ENTERED ON DOCKET

DATE

6-23-98

REPORT AND RECOMMENDATION

Petitioner filed a Petition for a Writ of Habeas Corpus on October 7, 1996. [Doc. No. 1-1]. Petitioner is represented by counsel. Petitioner asserts that she did not receive effective assistance of counsel because her trial counsel did not offer a defense based on insanity. Respondent filed its Response to the Petition on December 20, 1996. [Doc. No. 6-1]. Petitioner filed a Reply brief on January 6, 1997. [Doc. No. 8-1]. The undersigned United States Magistrate Judge has reviewed Petitioner's Petition, the briefs filed by the parties, and the trial transcript. The United States Magistrate Judge recommends that Petitioner's Petition for a Writ of Habeas Corpus be **DENIED**.

I. FACTUAL BACKGROUND

Petitioner was tried for the murder of Hardy Edward Young. The State of Oklahoma asserted that Petitioner met Mr. Young, who was 73 years old, in October of 1986. Mr. Young became a boarder at Petitioner's house.^{1/}

^{1/} The State asserted that Mr. Young paid \$900.00 per month for room, board, and laundry.

The State noted that Petitioner claimed Mr. Young sexually attacked her for over one month until, on December 4, 1986, Petitioner decided she could no longer tolerate the attacks. The State asserted that Petitioner's professed reason for not calling the police during the month in which she was attacked was because Mr. Young told Petitioner that he was a member of the Mafia and that he would have her killed.

The State asserted that on November 21, 1986, Petitioner and Mr. Young went to Sooner Federal Savings and Loan where Mr. Young introduced Petitioner as his wife and put Petitioner's name on his checking account. The State additionally asserted that Mr. Young purchased an annuity account in mid-1986, and decided in late November to withdraw the amounts in the annuity even though he knew that there would be penalties. The State noted that on December 3, 1986, Petitioner's name was put on the car title to Mr. Young's car.

On December 4, 1986, Petitioner called 911, requesting a police car because "he is going to kill me." The officer who responded to the call found Mr. Young, in a "sitting or slouching" position in the kitchen of Petitioner's house, dead from multiple gun shot wounds. According to the State, the evidence indicated that each of the wounds entered Mr. Young's body in a downward direction.

II. PROCEDURAL HISTORY

After the conclusion of a jury trial on May 23, 1989, Petitioner was found guilty of First Degree Murder. Petitioner was sentenced to life in prison.

Petitioner appealed the sentence. On January 11, 1993, the Oklahoma Court of Criminal Appeals noted that on November 20, 1991, the Criminal Court of Appeals

had reversed the decision of the trial court and had remanded for a new hearing, and the state filed a petition for rehearing. The petition for rehearing was granted, and the appellate court remanded the case to the trial court for an evidentiary hearing to determine which party requested a challenged jury instruction. The trial court concluded that the jury instruction was requested by Petitioner. In the January 1993 opinion, the Oklahoma Court noted that Petitioner could not benefit from an instruction requested by Petitioner, and the court withdrew the previous reversal. The Oklahoma Court of Criminal Appeals affirmed the conviction for Murder in the First Degree.

The court additionally noted that Petitioner asserted error based on the denial of Petitioner's petition to determine sanity and for the suspension of the pronouncement of judgment and sentence. The court noted that after the jury verdict but prior to sentencing, Petitioner filed a petition to determine sanity alleging that her mental condition had deteriorated after the trial, and that she was currently insane. The trial court held a hearing on June 29, 1989, and concluded that Petitioner was sane. The appellate court noted, based on the transcript, that the trial court believed either that the insanity issue should have been raised earlier or that the trial court did not believe the testimony of the Petitioner's doctor. The appellate court concluded that the failure of the trial court to submit the issue of insanity to a jury was error. The court affirmed the judgment (finding Petitioner guilty), but vacated the sentence. The court remanded for the determination of Petitioner's sanity prior to sentencing.

By Order dated December 19, 1995, the Oklahoma Court of Criminal Appeals noted that on remand, the issue of sanity was tried by the trial court on December 5,

1994, and Petitioner was determined incompetent. According to the appellate court, Petitioner spent time in Eastern State Hospital and, after being found competent, was resentenced on January 27, 1995, to life in prison. Petitioner asserted in her first post-conviction habeas petition that her conviction should be vacated because Petitioner was found incompetent as of the date of the alleged murder and was incompetent for the five years after that date. Petitioner asserted that her "trial counsel was ineffective for failing to offer evidence for the defense of insanity despite her attorneys, prior to trial, filing a notice of an insanity defense, and that there was a doctor willing to testify that Petitioner was insane at the time of the commission of the crime." [Doc. No. 1-1], Order of the Oklahoma Court of Criminal Appeals, dated December 19, 1995, at 3. The trial court concluded that Petitioner failed to overcome the first hurdle in Strickland in establishing that her trial counsel was ineffective.

The trial court found that the decision made by trial counsel was to present the defense of self-defense, rather than a defense of insanity; that this was a tactical decision made by trial counsel and the trial court would not use twenty-twenty hindsight to review the decision.

After a thorough consideration of the record before us, we find no disagreement with the Trial Court's findings and conclusions.

Id. at 3-4. The decision of the trial court was affirmed by the Court of Criminal Appeals.

III. EXHAUSTION AND EVIDENTIARY HEARING

As a preliminary matter, a court must determine whether a Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455

U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by establishing that either (a) the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) the petitioner had no available means for pursuing a review of a conviction in state court at the time of the filing of the federal petition. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), *cert. denied*, 475 U.S. 1020 (1986).

Respondent acknowledges that the issue which Petitioner presents to this Court was previously presented by Petitioner to the state courts in Oklahoma. To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). "[E]xhaustion of state remedies is not required where the state's highest court has recently decided the precise legal issue that petitioner seeks to raise on his federal habeas petition." Goodwin v. State of Oklahoma, 923 F.2d 156, 157 (10th Cir. 1991). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (*per curiam*). The Magistrate Judge concludes that Petitioner has exhausted her claim of ineffective assistance of counsel.

The granting of an evidentiary hearing is discretionary with the court. Because the issues raised by Petitioner can be resolved on the basis of the record, the

Magistrate Judge declines to hold an evidentiary hearing. See Townsend v. Sain, 372 U.S. 293, 318 (1963), *overruled in part* by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

IV. RECOMMENDATION REGARDING ALLEGED ERROR

Ineffective Assistance of Trial Counsel

The sole issue asserted by Petitioner is that she received ineffective assistance of counsel during her trial because her trial counsel failed to assert a defense based on insanity.^{2/} Petitioner asserts that the issue of her mental state was raised for the first time during the sentencing phase of her trial and that the evidence led to a finding that a new trial was required with respect to sentencing. Petitioner states that the issue of her sanity was well-known to her defense counsel at the time of trial but that her defense counsel did not assert a defense at trial based on Petitioner's mental status. Petitioner notes, in her reply brief, that during trial, her counsel raised the defense of self-defense, but did not raise the issue of insanity. Petitioner submits no documents attesting to her mental state either at time of trial, subsequent to trial, or currently.

Respondent asserts that the choice of Petitioner's trial counsel not to assert an insanity defense and instead to assert self defense was a trial strategy choice. Respondent notes that the record contains sufficient evidence to support the assertion

^{2/} Petitioner was subsequently determined "incompetent" for the purpose of sentencing. Petitioner does not assert any error related to her competence at trial and does not assert that the trial was improper because she was not competent. Petitioner's sole alleged error is that her trial counsel was ineffective due to the failure to assert a defense based on mental insanity.

by Petitioner of self defense and that trial counsel adequately represented Petitioner.

To establish ineffective assistance of counsel, Petitioner must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); Osborn v. Shillinger, 997 F.2d 1324, 1328 (10th Cir. 1993). Petitioner can establish the first prong by showing that counsel performed below the level expected from a reasonably competent attorney in criminal cases. Strickland, 466 U.S. at 687-88.^{3/} To establish the second prong, Petitioner must show that this deficient performance prejudiced the defense, to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. See also Lockhart v. Fretwell, 506 U.S. 364, 113 S. Ct. 838, 842-44 (1993) (counsel's unprofessional errors must cause a trial to be "fundamentally unfair or unreliable").

In this case, Petitioner was represented at trial by two attorneys. The record reflects that the attorneys actively represented Petitioner. The attorneys cross-examined, objected, and presented evidence. Evidence was presented indicating that Petitioner was scared of the decedent, that Petitioner was nervous and upset during the time prior to the murder, and that Petitioner told others that the decedent had

^{3/} "The proper standard for measuring attorney performance is reasonably effective assistance." Gillette v. Tansy, 17 F.3d 308, 310-311 (10th Cir. 1994) (quoting Laycock v. New Mexico, 880 F.2d 1184, 1187 (10th Cir. 1989)). In doing so, a court must "judge . . . [a] counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, at 690. There is a "strong presumption [however,] that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 695. Moreover, review of counsel's performance must be highly deferential. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689.

threatened to kill her and that the decedent was a member of the mafia. In addition, the evidence indicated that Petitioner was a competent businesswoman who adequately handled her business and finances. The record contains sufficient support for a defense based on self defense. In addition, the testimony regarding Petitioner's competence at her business supports the decision to pursue the defense of self defense as opposed to mental insanity.

One of Petitioner's former husbands testified that Petitioner was a good and non-violent person. According to him, Petitioner was in fear of the decedent. [R. at 146]. He additionally stated that he talked to Petitioner on the phone in November of 1986 and knew that Petitioner was under duress. [R. at 146]. Petitioner was described as a competent business woman. [R. at 153].

One of Petitioner's friends testified that Petitioner was a very timid person. According to him, when he tried to call Petitioner in August of 1986 she would talk to him in a very low voice and say that she would have to call him back because she could not talk. [R. at 164-65].

A prior husband of Petitioner, who was married to Petitioner for ten years testified that Petitioner told him that the decedent had threatened and sexually abused Petitioner and that the decedent was a member of the mafia. [R. at 185]. This individual observed Petitioner with the decedent and concluded that Petitioner was definitely scared of the decedent. [R. at 195]. In addition, a lady testified that she knew the decedent and that he was a violent man. [R. at 216].

Petitioner provides nothing to the Court to support her argument of mental insanity except trial court orders finding, based on the presentation of evidence, that Petitioner was not competent at the time of her sentencing. Petitioner has not submitted additional materials to bolster her proposed mental insanity defense.

After reviewing the record and the arguments asserted by Petitioner, the Magistrate Judge concludes that Petitioner was not deprived of her constitutional right to effective assistance of counsel. The Magistrate Judge chooses not to second-guess the decisions made by Petitioner's counsel. The record reveals that Petitioner's counsel was adequate, and that Petitioner cannot satisfy either prong of the Strickland test.

CONCLUSION

The United States Magistrate Judge recommends that Petitioner's Petition for a Writ of Habeas Corpus be **DENIED**.

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 22 day of June 1998.


Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

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

23 Day of June, 1998.
C. P. Kelly, Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 19 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT HARRELL,)
)
)
 Plaintiff,)
)
 v.)
)
)
 KENNETH S. APFEL,)
)
 Commissioner of Social Security)
 Administration,)
)
)
 Defendant.)

Case No. 96-C-884-B (J) ✓

ENTERED ON DOCKET

DATE 6-23-98

ORDER

On May 18, 1998, this Court reversed the Commissioner's decision denying plaintiff's claim for Social Security disability benefits and remanded the case to the Commissioner. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney fees under the EAJA, 28 U.S.C. § 2412(d), filed on or around June 12, 1998, the parties have stipulated that an award in the amount of \$2,119.50 for attorney fees and \$30.50 for expenses for all work done before the district court is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees of \$2,119.50 and expenses of \$30.50 for a total award of \$2,150.00 under the Equal Access To Justice Act.


THOMAS R. BRETT
United States District Court Judge

FILED

JUN 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

THOMAS R. ALLISON,)
)
Plaintiff,)
)
vs.)
)
STATE FARM FIRE AND CASUALTY)
COMPANY,)
)
Defendant.)

Case No. 97-CV-904-B (J)

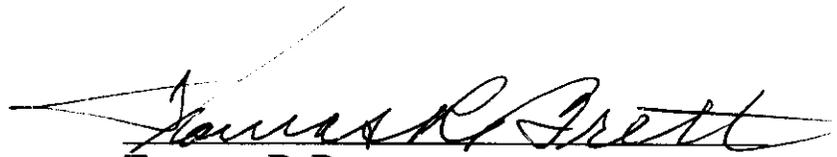
ENTERED ON DOCKET
DATE JUN 23 1998

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 22nd day of June, 1998.



THOMAS R. BRETT,
SENIOR UNITED STATES DISTRICT JUDGE

58

clm

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

F I L E D

JUN 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GEORGE L. GRAYSON,)
an individual,)

Plaintiff,)

vs.)

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

Defendants.)

No. 97-CV-769-C

ENTERED ON DOCKET
DATE JUN 23 1998

JUDGMENT

This matter came before the Court for consideration on the motion of summary judgment filed by defendant, City of Tulsa, on plaintiff George L. Grayson's cause of action for deprivation of civil rights, pursuant to 42 U.S.C. § 1983, false imprisonment, and intentional infliction of emotional distress. The issues having been duly considered by the Court, and a decision having been rendered in favor of defendant City of Tulsa,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment is entered for the defendant City of Tulsa and against plaintiff George L. Grayson.

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



H. DALE COOK
Senior United States District Judge

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

JUN 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VOICE SYSTEMS TECHNOLOGY,)
Inc., an Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
WORLD ACCESS)
COMMUNICATIONS)
CORPORATION, a Florida)
corporation,)
)
Defendant.)

Case No. 98-CV-0320-C(J) ✓

ENTERED ON DOCKET

DATE JUN 23 1998

AGREED ORDER OF TRANSFER

Now on this 18th day of June, 1998, comes on for consideration Plaintiff's Response Confessing Defendant's Motion to Transfer, and the agreement of the parties through counsel to enter an order transferring and consolidating the instant case with Case Number 1001(Civ - Ungaro - Benages) in the United States District Court, Southern District of Florida, Miami Division, styled World Access Communications Corp., Plaintiff vs. Voice Systems Technology, Inc., d/b/a Boston Communications Group, Defendant.

This Court finds that the balance of Defendant's Motion to Dismiss or Transfer filed May 8, 1998, will be rendered moot by such transfer.

(4)

This Court finds that good grounds exist for transferring this case forthwith.

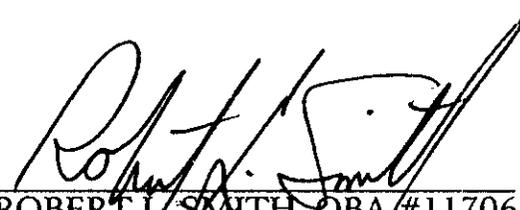
IT IS SO ORDERED.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

FREESE MARCH & BURNS, P.A.


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4510 East 31st Street
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Attorneys for Plaintiff


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(918) 587-4710

Attorney for Defendant

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

FILED

JUN 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THOMAS R. ALLISON,

Plaintiff,

vs.

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant.

Case No. 97-CV-904 B (J)

ENTERED ON DOCKET

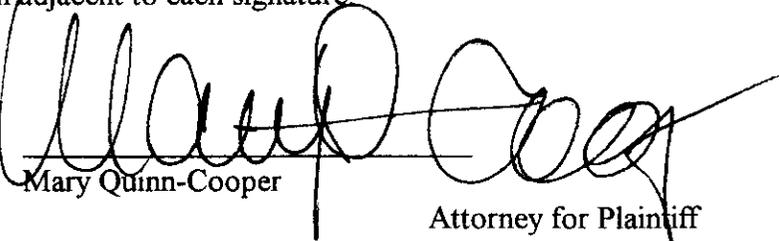
DATE JUN 23 1998

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to FED.R.CIV.P. 41, the parties, and each of them, by and through their respective counsel of record, herewith stipulate and agree to the dismissal with prejudice of said cause, including all complaints, counterclaims, cross complaints and causes of action of any type by any party against any or all of the other parties. Each party shall bear his or its own costs, expenses, and attorney fees without assessment against any other party.

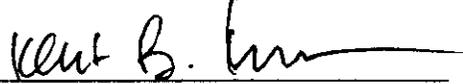
Executed the respective dates shown adjacent to each signature

Date: June 16, 1998



Mary Quinn-Cooper
Attorney for Plaintiff

Date: June 16, 1998



K. Bolling Rainey

Attorney for Defendant

Mary Quinn-Cooper
P.O. Box 21100
Tulsa, OK 74121
MA1392\0001\PLEADING\STIPDIS

clb

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

FILED

JUN 19 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THE ESTATE OF DON DOUGLAS IWANSKI,)
deceased,)

Plaintiff,)

vs.)

LARRY FIELDS, Director of the Department)
of Corrections, et. al.,)

Defendants.)

Case No. 97-CV-103-B

ENTERED ON DOCKET

DATE JUN 23 1998

JUDGMENT

This matter having come on for hearing on Defendants' Motion for Summary Judgment, the Honorable Thomas R. Brett presiding, and the issues having been duly decided by separate order entered herein,

IT IS THEREFORE ORDERED AND ADJUDGED that the Plaintiff take nothing, that the action be dismissed on the merits, and that each party herein bear their own costs and attorney's fees.

DATED THIS 19th DAY OF JUNE, 1998.


THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

JUN 19 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THE ESTATE OF DON DOUGLAS IWANSKI,)
deceased,)
)
Plaintiff,)
)
vs.)
)
LARRY FIELDS, Director of the Department)
of Corrections, et al.,)
)
Defendants.)

Case No. 97-CV-103-B

ENTERED ON DOCKET

DATE JUN 23 1998

ORDER

Comes on for consideration Defendants' First and Second Motions for Summary Judgment filed November 7, 1997 and April 20, 1998 (Docket #'s 32 and 53) and the Court, being fully advised, finds as follows:

STATEMENT OF CASE

Judy Gail Poindexter Iwanski filed this action under 42 U.S.C. § 1983 on behalf of the estate of her son, Don Douglas Iwanski ("Iwanski"), who was incarcerated at the Northeast Oklahoma Correctional Center ("NEOCC") in Vinita from December 14, 1994 until his death on February 4, 1995. Kevin White ("White"), also an inmate at NEOCC, was convicted of murdering Iwanski by striking him in the head several times with a metal pipe which allegedly came from a bunk bed at NEOCC. Plaintiff names Larry Fields ("Fields"), former director of the Oklahoma Department of Corrections ("DOC"); John Middleton ("Middleton"), warden of NEOCC; Howard Ray ("Ray"), deputy warden of NEOCC; Charles Gallipeau ("Gallipeau"), chief of security for NEOCC; Troy Alexander ("Alexander"), unit manager for NEOCC; and Randall Burke ("Burke"), a correctional officer at NEOCC, as defendants in their official and individual

capacities.

Essentially, Plaintiff argues that Defendants violated Iwanski's Eighth Amendment right of freedom from cruel and unusual punishment and failed to provide appropriate medical care following the assault. Plaintiff further contends that Defendants failed to take reasonable actions to prevent Iwanski's murder at the hands of a fellow inmate. Plaintiff also brings a claim against the supervisory personnel alleging they failed to adequately supervise correctional personnel. Plaintiff seeks relief in the form of actual and punitive damages, as well as costs and attorney fees.

**STATEMENT OF UNDISPUTED MATERIAL FACTS
IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT¹**

Pursuant to N.D. LR 56.1A., Defendants submitted a statement of undisputed material facts. This Court incorporates those undisputed material facts which the Court determined are supported by the record submitted in support thereof and lists additional undisputed facts which aid in understanding the circumstances surrounding the incident which gave rise to this action as follows:

1. Iwanski and White were inmates confined at NEOCC, a minimum security facility operated by the DOC. Both inmates were classified minimum security.
2. Iwanski had previously been incarcerated with DOC for approximately two years. Both inmates were transferred into NEOCC from other facilities.
3. On or about February 4, 1995, Burke was assigned to drive the bus to transport inmates

¹Undisputed facts have been modified where the Court determined the reference to the record does not fully support the fact asserted as stated. Plaintiff wholly failed to comply with the requirements of N.D. LR 56.1B., as more fully discussed at page 9 of this Order.

from Building 14; the housing unit in which Iwanski lived, to the dining hall and back. The dining hall was shared by inmates from Building 14 and Adams Hall, the housing unit in which White lived. Iwanski did not go to the dining hall that evening. At approximately 6:00 p.m., inmates boarded the bus to return to Building 14. White entered the bus and Burke questioned whether White was housed in Building 14. White replied by giving his name, DOC inmate number and answered "yes" he was housed in Building 14. In fact, he had been transferred to Building 10 and then to Adams Hall, the Eastern State Hospital Administration building, for reasons unrelated to Iwanski. Burke knew White and knew he had previously been housed in Building 14. Burke asked White to remain on the bus when they arrived at Building 14 in order to confirm that White was housed there.

4. Burke did not notice anything strange or unusual about White's behavior nor did Burke detect the odor of alcohol.

5. At approximately 6:05 p.m., the bus full of inmates arrived at Building 14. All the inmates exited the bus. Against Burke's previous order, White exited the bus, and Burke lost sight of him.

6. Burke exited the bus and entered the building. Shortly thereafter, Burke heard inmates yelling "man down" and immediately went to the area and discovered Iwanski injured, lying on his bunk. He was bleeding heavily about the head and making gurgling sounds. One of the officers called for emergency help. Burke, with help from other correctional officers, monitored the scene, checked on the other inmates, and prepared Iwanski for transport to the hospital.

7. The ambulance arrived at 1813 hours (6:13 p.m.). Burke assisted in getting Iwanski to the ambulance and performed CPR along with inmate Price while in route to the Craig County

General Hospital. Iwanski was pronounced dead at 1840 hours (6:40 p.m.).

8. Numerous inmates apparently witnessed the assault and/or its immediate aftermath and also led prison officials to the weapon, a steel pipe approximately twenty-five (25) inches in length, one and one-half (1 ½) inches in width and weighing about four (4) pounds, which White had discarded in a new latrine at the front of the building following the attack.

9. White was found guilty of Iwanski's murder and sentenced to death. After the assault, it was determined that the attack was provoked by a dispute over gambling or drugs.

10. DOC and NEOCC have procedures by which an inmate in fear of physical harm at the hands of other inmates may request protection. Those procedures include seeking "separates" from one or more inmates and/or protective custody.

11. Iwanski took no action with the DOC seeking protective custody or "separates" from individual inmates.

12. Defendants were not aware of any dispute between Iwanski or other inmates at the time of the altercation. Defendants had no indication from Iwanski or any other source that Iwanski was in danger of any physical harm. There were no unusual circumstances or events that would have alerted Defendants or any prison official that Iwanski was in danger.

13. Iwanski's assigned case manager, Virginia Morris, had no knowledge or indication that Iwanski was in danger. She was unaware of any dispute between Iwanski and other inmates. She had used protective measures for inmates in the past when warranted.

14. Although Iwanski's mother has testified in her deposition that her son told her he was in danger, she did not notify nor did she ever attempt to notify any DOC employee to convey this information. No family member or friends of Iwanski notified any DOC employee that Iwanski

was in fear for his life.

15. The DOC has established operational policies and procedures for the agency as a whole and issues sets of manuals that contain those policies and procedures for the overall operations of a correctional facility. In 1995, the entire Oklahoma DOC was accredited by the American Correctional Association (ACA). The ACA is a professional organization which reviews states' correctional standards and compliance with standards which have been set by the ACA. Part of the accreditation process includes reviews of department operating policies and procedures.

16. Additionally, the DOC conducts a yearly review of all policies and procedures to review, update and revise the policies as necessary. The policies are reviewed and comments and suggestions are recommended. The executive staff of DOC then reviews the policies as well as the recommended changes. The policy then goes back to the responsible division for final review. It then comes back to executive staff and to the Director for final approval.

17. In addition to the DOC operations and procedures manual, the individual facilities implement a field manual for that particular facility based upon the requirements and guidelines of the DOC manual. For the field manual, each facility takes departmental policies and "operationalizes" them to fit the needs of that institution. For example, some facilities might have a farm unit while others do not. The field manual would reflect this individual facility distinction. The NEOCC manual is, in essence, a transparency of the DOC operations and procedure manual, with the exception of a few specific rules or regulations peculiar to NEOCC. In February 1995, NEOCC was in the process of compiling their field manual. When NEOCC was opened in December, 1994, the facility was operating under the DOC operations manual and field operations

memorandum.

18. DOC requires its correctional officers to complete a six-week training program at the Center for Correctional Officer Studies which includes CPR training and emergency first aid training. There is also a yearly requirement of an additional 40 hours of training and part of the annual training includes training on various procedures of the facility and the agency. Managers of DOC must also attend yearly management training.

19. In order to ensure that employees receive their training, the DOC has a training department and each facility has a training officer who works jointly with the agency training department to ensure that training takes place.

20. DOC and NEOCC have rules and regulations concerning inmate behavior. Failure of an inmate to follow the rules and regulations could result in disciplinary charges being filed against the inmate. By DOC policy, gambling and possession and use of alcohol and drugs are prohibited. Inmates also remain subject to the laws of the state in which they are incarcerated.

21. In order to inform the inmates of policies and procedures of DOC and NEOCC, the inmates receive an orientation concerning the rules and regulations of the departments. The inmates are also informed of the disciplinary process.

22. In order to control contraband, it was the policy of NEOCC to conduct random shakedown. Inmates were subject to searches at any time. They are also subject to random or suspect urinalysis testing, room inspections, and physical body searches. Searches are done on a routine basis at random times. Random searches and shakedowns of a unit, common areas and bed searches are performed. Burke performed random shakedowns of inmates' living quarters, lockers and beds.

23. Correctional officers of NEOCC also performed "walk throughs" of the units to monitor inmate conduct and behavior. "Walk throughs" of the unit is a continuous process to tour the unit and see what activity is going on and to monitor inmate behavior. During a normal shift, Burke would make several walks of the unit to check the building and make sure everything was okay.

24. Burke was not aware of any inmate alcohol abuse, illegal drugs, gambling or possession of weapons at the time of the assault. If such action became known to Burke, he would stop the activity and take disciplinary action against the inmates. Defendants Alexander, Galipeau and Middleton were not aware of any inmate gambling and were not aware of any security problems at the facility.

25. In order to ensure that the DOC policies and procedures were being followed throughout the agency, Fields directed periodic audit teams to observe the running of an institution regarding policy compliance; the Department remained ACA accredited; there were investigations done from time to time; and, there were on-site personal visits by himself and his administrators. Fields states he personally conducted an on-site investigation and visit to NEOCC. Fields had a chain of command as to delegation of certain duties of overlooking specific facilities. Fields had several regional directors who were assigned to specific facilities to advise Fields of the activities of a particular facility. The wardens of a particular institution reported to their assigned regional director.

26. In order to ensure that policies and procedures are followed by NEOCC, Middleton, Ray, and Galipeau made periodic walk throughs of all areas of the facility to observe and interact in the form of asking questions of staff, to determine how they handle certain matters and to

provide monitoring compliance with established procedures. They also had daily morning briefings and every incident report was reviewed and discussed. Whatever issue or problems came up would be discussed and they would critique if any deficiencies were noted.

27. Ray would daily walk the units, making sure people were doing their particular job. His policy was to go into the dormitories and watch the officers as they conducted counts and/or shakedowns to ensure these were being done. Ray also would review incident reports to ensure that shakedowns were being done. Ray's normal working hours at the facility were usually from 6:30-7:00 a.m. and he sometimes wouldn't leave until 7:00-8:00 p.m. at night, sometimes 10:00.

28. Galipeau's daily routine would be to spend four hours in and out of all the housing units, walking the grounds looking for security problems and generally touring the facility. He would go into the units and tell the correctional officers to interact with the inmates.

29. In order to ensure officers were following procedures on his unit, Alexander during any given shift would walk the unit probably ten different times.

30. Inmates can also communicate requests to the staff, including the warden, when the inmate wants to report or complain that policy and procedure is not being followed. In turn, the facility reviews the request, investigates and provides a written response.

31. Another way of ensuring that staff was following procedures, from time to time, either the deputy warden or warden might direct that there would be an inspection or an audit of a specific area or function of the facility in order to assess level of compliance with policies.

32. In February, 1995, NEOCC had been in operation for approximately two months. The fatal assault on Iwanski was the first and the only fatal assault of an inmate at NEOCC.

33. No employee of NEOCC received any employment discipline as a result of the subject

assault.

34. Both Iwanski and White were serving sentences, at least in part, for assault and battery and therefore had constructive and actual knowledge that this constituted prohibited behavior under the laws of the state of Oklahoma.

Defendants have supported their statement of undisputed facts with attached evidentiary material, referring "with particularity to those portions of the record before the court upon which movant relies," as required by N.D. LR 56 1A.

In response to Defendants' statement of uncontroverted facts, Plaintiff merely presents a list of facts claimed to be disputed, wholly failing to cite to evidence in the record to sustain a material factual dispute. A mere recitation that a fact is controverted, without supporting authority, is not sufficient to create a controverted fact. N.D. LR 56.1B., provides in pertinent part:

"The response brief to a motion for summary judgment ...shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the number of the movant's fact that is disputed. All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party."

Plaintiff has wholly failed to comply with N.D. LR 56.1B.

The local rule was promulgated to allow the Court and the parties to efficiently determine what material issues of fact remain to be determined by the trier of fact at the conclusion of discovery. If Plaintiff will not or cannot articulate and provide timely controverted evidentiary support for such issues of fact on the eve of trial, this Court has an obligation under Fed. R. Civ. P. 56 to summarily dispose of unwarranted claims.

Recognizing that this Court and the parties are best served when matters are decided on their merits, the Court has independently reviewed the statement of undisputed facts submitted by Defendants and finds them supported by the record. In reaching a decision on the merits, the Court has also considered Plaintiff's evidentiary matter attached to the response brief, for the purpose of determining what, if any, material fact issues remain. The Court concludes that Defendants are entitled to entry of summary judgment under the uncontroverted facts presented by the record.

SUMMARY JUDGMENT STANDARD

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Winton Third Oil & Gas v. FDIC*, 805 F.2d 342 (10th Cir. 1986). In *Celotex*, the court stated: "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." 477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Conaway v. Smith*, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. *Norton v. Liddel*, 620 F.2d 1375,

1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

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." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."

* * *

A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

ARGUMENTS AND AUTHORITY

Defendants' submit the following propositions in their motions for summary judgment: (I) Plaintiff's civil rights claim against Defendants in their official capacity must be dismissed; (II) Defendants are protected by qualified immunity; (III) Plaintiff's Eighth Amendment rights were not violated; and, (IV) the undisputed facts fail to show supervisory liability.

Proposition I: Official Capacity

Defendants argue that Plaintiff's civil rights claim against them in their official capacity must be dismissed because the Eleventh Amendment provides the states with immunity from actions brought in federal courts unless the state has waived its immunity. Defendants correctly assert that suits filed against state officials in their official capacity are not considered suits against

the individual officer but rather are suits against the office. *Will v. Michigan Dep't of State Police, et al.*, 491 U.S. 58, 71 (1989); *Kentucky v. Graham*, 473 U.S. 159, 165 (1985).

Defendants further assert that the state of Oklahoma has not waived its Eleventh Amendment immunity. The State of Oklahoma has waived its sovereign immunity from liability of the torts of its employees only as set forth in The Governmental Tort Claims Act. *Okl. Stat.* tit. 51 §§ 151, et seq. (1992 & Supp. 1994). However, the act clearly states that the state reserves its Eleventh Amendment immunity. *Okl. Stat.* tit. 51, § 152.1 B. (1992).

Plaintiff, who brings this action under U.S.C. 42 § 1983, argues that suits against government officials in their official capacities are appropriate if the custom or policy of the agency in question played a role in violating a federal law. Plaintiff relies on *Hafer v. Melo*, 502 U.S. 21 (1991), to support this proposition. *Hafer*, which involved a suit against a state official in her personal, not official, capacity, is not dispositive here because its reference to the "custom or policy" of the agency derives from *Monell v. Dep't of Social Services of the City of New York*, 436 U.S. 658 (1978). The defendant in *Monell*, however, was an agency of a municipality, and the court concluded that municipal corporations were "persons" subject to suit under § 1983. *Id.* at 2034.

Plaintiff has offered no legal authority for the proposition that the states are also "persons" who can be sued for nonprospective relief under § 1983. "Relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant." *Papasan v. Allain*, 478 U.S. 265, 278 (1986). Nor has Plaintiff advanced any argument that Congress intended to abrogate the states' Eleventh Amendment immunity when it passed § 1983.

“Congress may abrogate the States’ constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.” *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989) (quoting *Atascadero State Hospital v. Scanlon* 473 U.S. 234, 242 (1982)). No such language is apparent in § 1983.

Plaintiff argues that certain DOC and NEOCC policies or customs, or the lack thereof, are sufficient to establish a genuine issue of material fact as to Defendants’ official capacity liability. This argument is not persuasive, given the existing state of the law with respect to the states’ sovereign immunity. Based on the foregoing, Defendants’ motions for summary judgment with respect to Defendants’ official-capacity liability should be GRANTED.

Proposition II: Qualified Immunity

Defendants also move for summary judgment on the theory that they are protected by qualified immunity. Government officials performing discretionary functions are protected by qualified immunity unless their conduct violates “clearly established statutory or constitutional rights of which a reasonable person would have known.” *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 645 (10th Cir. 1988). Motions for summary judgment founded upon qualified immunity must be analyzed under a two-part framework. The Court must determine “whether the plaintiff has asserted a violation of a constitutional or statutory right,” and then must decide whether that right was clearly established such that a reasonable person in the defendant’s position would have known the conduct violated the right. *Davis v. Gracey*, 111 F.3d 1472, 1477 (10th Cir. 1997) (citing *Garramone v. Romo*, 94 F.3d 1446, 1449 (10th Cir. 1996)).

Plaintiff cites *Farmer v. Brennan*, 511 U.S. 825, 933 (1994) to the effect that “prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners,” as

proof that Iwanski had a clearly established right under the Eighth Amendment to be protected from White when the attack occurred in February, 1995. Defendants' position is that the "contours" of this right were not sufficiently clear that a reasonable person in a Defendant's position would have realized he was violating the right.

This Court concludes that Iwanski had a right to protection, but that Defendants acted reasonably in view of all the circumstances to provide that protection. "If the law was clearly established, the immunity defense should ordinarily fail, since a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982).

Defendants state that "[e]ven defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard." Quoting *Davis v. Scherer*, 468 U.S. 183, 190 (1984). "Whether an official may prevail in his qualified immunity defense depends upon the 'objective reasonableness of [his] conduct as measured by reference to clearly established law.' *Id.* at 191. Defendants essentially contend that their conduct meets the "objectively reasonable" test. Among the undisputed facts Defendants provide to support this argument are depositions indicating: (1) neither they nor any other officials with the DOC or NEOCC were aware that Iwanski was in any danger of being attacked, (2) Iwanski took no action with the DOC seeking protective custody, (3) White's attack on Iwanski was sudden and unannounced, (4) the NEOCC is a minimum security facility and both Iwanski and White were classified as minimum security inmates, (5) DOC has established policies and procedures for the agency's operation and issues manuals containing those policies and procedures for the operation of a correctional facility

and, (6) when NEOCC opened, it was operating under the DOC operations manual and field memorandum.

Plaintiff disputes these facts with statements made during depositions indicating: (1) NEOCC had no field operations manual in place when Iwanski was transferred there, (2) neither the DOC nor the NEOCC had any regulations expressly prohibiting the use of metal pipes as weapons, (3) neither the staff nor the prisoners at NEOCC were familiar with the DOC regulations allegedly in force at the facility when Iwanski was killed and, (4) NEOCC had no facilities in February, 1995 to house prisoners who believed they were in danger. Plaintiff contends that these and other statements provided in the record indicate that Defendants' conduct was not "objectively reasonable" and that summary judgment therefore should be denied.

The Court finds Defendants are entitled to summary judgment on the issue of qualified immunity for the reason that their conduct under the circumstances was "objectively reasonable". Plaintiff has wholly failed to establish that any prison official was ever advised by Iwanski or anyone else that he feared for his safety. The only testimony from anyone regarding this is from Iwanski's mother, who claims to have been told by her son he feared for his safety during a visitation on the day of his death. Although present at the prison at the time this information was given to her, the mother did not advise or make inquiry of prison officials nor did she attempt to contact anyone outside the prison to determine whether anything could be done for her son. At some earlier date in January, 1995, Iwanski's mother had supplied a money order to another inmate on her son's behalf for what she believed to be a gambling debt yet there is no evidence that she advised or conferred with anyone at the prison regarding what policies were in place to prevent the illegal activity which she alleges led to her son's death. There is no evidence that the

named Defendants herein knew of this activity. Further, there is no indication that correction officer Burke should have been alerted by his observation of White, in what he suspected to be the wrong area, to the fact that White intended to commit an act of violence toward another inmate. White was dressed in the color required to be worn by the inmates of that unit and inmate unit transfers were not unusual events. Nor would it arouse suspicion for an inmate to be wearing a coat in early February in Northeastern Oklahoma under which he may have something concealed. Additionally, while a metal pipe can be a dangerous weapon capable of killing, so can many other articles present at a construction site housing minimum security prisoners.

Viewing all the evidence and inferences in a light most favorable to Plaintiff, summary judgment is appropriate as to this claim and Defendants' motions should be GRANTED.

Proposition III: Eighth Amendment

Plaintiff alleges Defendants violated Iwanski's Eighth Amendment rights by failing to adequately protect him from White's assault and by failing to provide appropriate medical care following the assault. Defendants assert that the undisputed facts fail to establish that Iwanski's Eighth Amendment rights were violated. Defendants' statement of undisputed facts includes references to the record indicating that Defendants were unaware of any threat to Iwanski, that NEOCC was operating under the DOC operations manual when it opened in December, 1994, that correctional officers must complete six weeks of training before they are assigned to a facility and must also undergo additional training on a yearly basis. Defendants also provide references to the record indicating that officials at NEOCC conducted random shakedowns and searches of inmates, that NEOCC administrators walked through the facility regularly to ensure that certain policies and procedures were followed, and that NEOCC inmates are informed of the DOC's and

the facility's rules and regulations.

The statement of disputed facts contained in Plaintiff's response, again, contains no references to the record disputing Defendants' claims. Plaintiff's brief, however, does contain references to the record which attempt to raise genuine disputes with respect to both the assault and medical care allegations. For example, Plaintiff's affiant Ricky Price (Price), who was also incarcerated at NEOCC at the time, states that he received no orientation regarding NEOCC policies when he was transferred to the facility in December 1994. This contradicts a statement provided by Middleton in his deposition indicating that inmates receive an orientation regarding the rules and procedures of the DOC and of the individual facility. It does not however establish whether Iwanski had received this orientation at this or any other facility. There is no evidence that Iwanski was unaware of rules and regulations which would have allowed him to seek protection.

Price also states that inmates at NEOCC had "free access to pipes, bricks, nails and other construction material . . ." when he was incarcerated at the facility. Price states that NEOCC had no established policies and procedures between December, 1994, and February, 1995, that correctional officers and officials at the facility had insufficient medical training, and that there were no medical personnel on duty at NEOCC when White attacked Iwanski. Burke testified that he had training in CPR and first aid at the academy. It was Burke who worked along with Price to administer CPR and emergency care on the way to the hospital and Price does not question the care provided by Burke in that situation.

Price also states that correctional officers and officials at the facility offered no immediate medical assistance to Iwanski after the attack and that approximately 45 minutes expired between

the time of the attack and the arrival of an ambulance. Plaintiff has not established Price as an expert in the medical field in which he attempts to provide testimony. The Court has nothing before it to show to what extent Price was trained by the military as a medic and if that training went beyond the CPR which he helped administer to Iwanski. Further, even if this Court accepts Price's statement that 45 minutes expired before professional medical aid was provided to Iwanski, which contradicts all other documentary evidence and oral testimony in the case, 45 minutes does not in itself support a claim of deliberate indifference in furnishing medical treatment under the Eighth Amendment. *Wilson v. Seiter*, 501 U.S. 294, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991); *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); and *Caldwell v. District of Columbia*, 901 F.Supp. 7 (D.D.C. 1995). Nor has Plaintiff established that Price is competent to offer expert testimony about whether Iwanski would have survived, had medical assistance been different following the attack. Fed.R.Civ.P. 702. The attack on Iwanski, which consisted of at least six blows directly to the head, apparently came when he was sleeping or at least unsuspecting of what was about to transpire. When found, Iwanski was lying with considerable blood on his face, making only gurgling sounds. There is no competent evidence in the record that any particular timely medical care would have saved Iwanski's life.

Plaintiff's response also refers to statements made by DOC and NEOCC officials indicating that NEOCC did not have a local policy manual in place in February, 1995, that officials at NEOCC received no training regarding any local rules governing the facility's operation, and that officials did not secure the steel pipes that were removed from the bunk beds, one of which White allegedly used in the assault on Iwanski.

Plaintiff fails to recognize that the technical incompleteness of the NEOCC field manual at

the time this facility was opened did not leave the facility without appropriate policies and procedures. Plaintiff overstates the importance of the field manual and understates the importance of the DOC operations and field manuals under which the facility was operating. The staff had been trained under DOC policies and procedures. The NEOCC field manual, when completed, was a virtual transparency of the DOC manual which appropriately dealt with the issues and conduct involved.

“[A] prison official may be liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.” *Farmer*, 511 U.S. at 847. A prison official’s knowledge of a substantial risk may be inferred from circumstantial evidence. *Id.*, at 842. “[A] fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.” *Id.*

The Court concludes there were no conditions or circumstances at NEOCC, known to prison officials, or of which they should have been aware, that Iwanski’s personal safety or life was in danger. Therefore, Defendants’ motions for summary judgment with regard to both the assault and medical care issues regarding the Eighth Amendment claim, should be GRANTED.

Proposition IV: Supervisory Liability

The supervisory Defendants contend that they are entitled to summary judgment because the undisputed facts show no supervisory liability. Again, Defendants rely on those undisputed facts indicating DOC policies governed the operation of NEOCC when Iwanski was killed. Defendants’ statement of undisputed facts also indicates that the DOC received an accreditation from the American Correctional Association in 1995 and that DOC conducts a yearly review of its

policies and procedures, updating and revising them as necessary. None of these facts are disputed by Plaintiff.

Plaintiff asserts Defendant Fields failed to ensure that a local field operations manual was enacted for NEOCC when Iwanski and White were transferred there, and that the DOC policy governing the facility was inadequate because it failed to restrict an inmate's possession of a steel pipe. Plaintiff asserts Defendant Middleton is liable because he failed to establish operation procedures at NEOCC. Specifically, Plaintiff asserts that NEOCC had no regulations prohibiting inmates' possession of "green money," drugs or alcohol, nor regulations prohibiting gambling, activities which Plaintiff contends played a role in Iwanski's murder. In sum, Plaintiff asserts that the policies implemented by Fields and Middleton were so inadequate that they amounted to a deprivation of Iwanski's Eighth Amendment rights. The evidence in the record does not support this assertion.

"[A] supervisor may be held liable if there exists either (1) his personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Thompkins v. Belt*, 828 F.2d 298, 304 (5th Cir. 1987). "Supervisory liability exists even without overt personal participation in the offensive act if supervisory officials implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation." *Id.*

Defendants argue that Plaintiff has failed to show that any DOC policy amounts to a repudiation of a constitutional right. Defendants characterize Plaintiff's argument as an allegation that Defendants deviated from the DOC policy, resulting in a constitutional violation. Plaintiff, however, appears to argue that the policies implemented by Fields and Middleton were sufficiently

deficient to find Fields and Middleton liable.

Plaintiff further asserts that Defendants Ray, Alexander, and Gallipeau were personally involved in violating Iwanski's Eighth Amendment rights. Plaintiff contends Ray failed to ensure that correctional officers were knowledgeable about NEOCC's policies and procedures, failed to ensure the staff received adequate medical training and failed to ensure the staff was sufficiently trained to cope with emergencies. The evidence does not support these assertions. There is no specific policy to which Plaintiff refers which directly caused or encouraged the apparent sudden unprovoked attack. Further, there is no competent medical evidence in the record to establish that the emergency care provided to Iwanski was improper or that other appropriate care would have saved or prolonged his life. Burke and other staff were trained in CPR and first aid at the academy. Both inmates were well aware that Oklahoma law prohibits assault and battery because both inmates were serving time for that offense.

Plaintiff asserts that Alexander and Gallipeau took no action to secure the pipes that had been removed from the bunk beds and failed to ensure that correctional officers properly supervised the inmates at NEOCC. These bald assertions, when viewed in light of the uncontroverted facts herein, do not provide a legally sufficient link to create an inference of proximate cause for Iwanski's death.

In conclusion, viewing all the evidence and inferences in a light most favorable to the nonmovant, and for reasons previously stated herein, Defendants are granted summary judgment.

IT IS THEREFORE ORDERED that Defendants' Motions for Summary Judgment are hereby **GRANTED**.

DONE THIS 19th DAY OF JUNE, 1998.


THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED
JUN 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FRAN AGUILERA,)
)
Plaintiff,)
)
vs.)
)
KWIKSET CORPORATION,)
a California corporation,)
)
Defendant.)

No. 96-C-1143-H

ENTERED ON DOCKET

DATE 6-22-98

ORDER

This matter comes before the Court on a motion for summary judgment by Defendant Kwikset Corporation ("Kwikset") (Docket #15). Plaintiff Fran Aguilera brought this action under Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. § 2000e, et seq. ("Title VII"), the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 et seq. ("ADEA"), the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. ("ADA"), and the Oklahoma anti-discrimination statute, Okla. Stat. tit. 25, §§ 1301 et seq., alleging that Defendant, her former employer, discriminated against her on the basis of her gender, her age, and her disability. Plaintiff also asserts causes of action for retaliation, constructive discharge, and for intentional infliction of emotional distress.

Specifically, in Count One, Plaintiff asserts that Defendant violated Title VII by intentionally discriminating against her on the basis of sex. In Count Two, Plaintiff asserts that Defendant violated the ADEA by discriminating against her on the basis of her age. In Count Three, Plaintiff claims that Defendant discriminated against her on the basis her disability in violation of the ADA. In Count Four, Plaintiff asserts that Defendant retaliated against her in violation of Title VII when it demoted her after she filed a complaint of discrimination. In Count Five, Plaintiff claims that Defendant violated the ADEA by retaliating against her by demoting her after she filed a complaint of age discrimination. In Count Six, Plaintiff asserts that

Defendant violated the ADA by retaliating against her by demoting her for filing a complaint of discrimination for disability discrimination. In Count Seven, Plaintiff contends that Defendant violated Oklahoma law by discriminating against her to such an extent that she was forced to resign. In Count Eight, Plaintiff claims that Defendant violated Oklahoma public policy when it retaliated against her because of her opposition to disability discrimination. In Count Nine, Plaintiff asserts that Defendant is liable for the intentional infliction of emotional distress due to its treatment of her. Plaintiff seeks declaratory and injunctive relief as well as compensatory and punitive damages.¹

I

The following facts are uncontroverted for the purposes of this motion. Plaintiff Fran Aguilera was employed by Defendant for sixteen and one-half years before she allegedly was constructively discharged in February 1996.

In October 1993, Plaintiff was promoted to the position of "lead" over the latch department. In August 1995, Plaintiff was transferred from her lead position to that of a production worker. Defendant asserts that Steve Bullock, Defendant's Business Team Manager at the time, made the decision to transfer Plaintiff because she was a poor employee who too often was absent from work. Defendant further asserts that Mr. Bullock made this decision alone. Plaintiff claims she was demoted due to discrimination.

Although Plaintiff was demoted from her lead position, Plaintiff was paid as though she were still a lead until early 1996. At that time, Joe Biggs, the plant manager, Mr. Earl Meadows, Defendant's controller, and Wayne Murray, the business team manager, met to decide whether to reclassify Plaintiff's position to decrease her pay to bring it into line with the wages of other production workers. Defendant contends that Mr. Biggs, Mr. Meadows, and Mr. Murray

¹ A hearing was held in this matter on November 12, 1997. Plaintiff requested at the hearing that the Court dismiss the state claim for intentional infliction of emotional distress. Accordingly, Plaintiff Count Nine of Plaintiff's claim is dismissed.

considered the decrease in pay because other employees had lodged complaints against Plaintiff, contending that she was sharing confidences and counseling employees on personal matters.

Defendant contends that Plaintiff had been warned against such counseling. Mr. Murray claims that Plaintiff's intent to file an EEOC charge was never discussed at this meeting. Mr. Murray further asserts he did not know that Plaintiff planned to file any charge or that she had met with an attorney. Based upon Plaintiff's absenteeism, her poor overall performance as lead, and the complaints, Plaintiff's pay was decreased. Defendant contends that only Mr. Murray, Mr. Biggs, and Mr. Meadows were involved in the decision to reclassify Plaintiff's position.

Plaintiff's performance was reviewed on February 9, 1996. Plaintiff was rated unacceptable in the areas of dependability and cooperation. Plaintiff resigned within the month.

Plaintiff alleges that she endured harassment and disparate treatment throughout her employment with Defendant based upon her age, gender, and her problems resulting from a knee injury, which she claims is a disability. Plaintiff contends that she was treated differently ever since she filed a workers' compensation claim in 1986, even though she was promoted to the lead position seven years after she injured her knee. Plaintiff claims that Defendant refused to provide her a handicap parking space or to allow her to use her cane at work for seven years after her surgery or for two years after the Americans with Disabilities Act was passed. Plaintiff states that Defendant provided a material handler for her but did not replace the handler when that person quit in March 1995, even though other leads had material handlers. Plaintiff also contends that Wanda Gantz, her immediate supervisor, removed the chair at her desk that she needed to use because of her knee. Plaintiff contends that Ms. Gantz thought it was funny when another employee placed a handicapped sticker on the employee's machine. Plaintiff contends that Ms. Gantz fired a temporary employee who had epilepsy before the employee reached permanent status to avoid problems under the ADA and because Ms. Gantz did not need "cripples" in her department who could not work on their feet. Plaintiff states that Ms. Gantz

referred to her as a "cripple." Plaintiff asserts that Marty Doyle, a plant manager, told Plaintiff each year that he should enter her in a local annual run. Plaintiff alleges the condition of her leg began to deteriorate when her chair and handler were taken away.

Plaintiff also contends that Ms. Gantz treated Mr. Means more favorably, and once commented that she preferred the leads to be young, attractive men. Plaintiff contends that Ms. Gantz gave Mr. Means a nicer Christmas present, and a nicer birthday celebration at work. Plaintiff also states that Ms. Gantz instructed other employees not to approach Plaintiff with problems but instead to ask Ms. Gantz or Mr. Means for assistance. Plaintiff alleges that Mr. Marlow, the head of Plaintiff's department, told her that women were too emotional to be promoted, hormonal, "dizzy," and not as bright or capable as men. Plaintiff contends that Defendant failed to promote her to other positions after she became lead but instead promoted unqualified men. Plaintiff asserts that Defendant would not allow her to attend training as it allowed the other leads. Male leads were allowed to sit at their desks while Plaintiff was criticized for the same conduct. Further, Plaintiff contends that male leads were allowed material handlers while she was not.

Plaintiff asserts that Ms. Gantz told her that she needed to color her gray hair. Allegedly, Ms. Gantz told Plaintiff that she must be suffering from hot flashes if Plaintiff ever complained of the heat. Plaintiff also contends that Mr. Marlow told her she was "older than dirt" and "older than God."

Plaintiff contends that Ms. Gantz once told her that she felt like slapping her, that she could not stand her, and that she would like to catch her outside work so that she could demonstrate her dislike for her. Plaintiff asserts that Ms. Gantz screamed at her, slammed doors in her face, and called her a "bitch."

According to Plaintiff, Ms. Gantz knew that Plaintiff was speaking to an attorney and that she planned to file an EEOC charge. Plaintiff's EEOC charge is dated April 9, 1996.

However, Plaintiff completed a "Mail In Information Sheet," an EEOC form on which she detailed her complaint, on January 27, 1996.

Plaintiff asserts that she did not miss an excessive amount of work, and that she was not reprimanded for excessive absenteeism under Defendant's policies. Plaintiff states that she believes that Defendant initiated her February 9, 1996 review in which she received a poor evaluation because of her consultation with the EEOC. Plaintiff admits that she received one or two write-ups during her employment, but Plaintiff contends her write-ups in April 1995 were "bogus," and that she received no verbal or written warning of her pending demotion as Defendant's policies required.

Plaintiff asserts that she quit her job as a result of Defendant's actions and upon the recommendation of her doctor. Plaintiff acknowledges that there are many jobs that she cannot perform because of her disability. However, Plaintiff asserts that she could perform the position of lead with accommodation.

II

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

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

477 U.S. at 322.

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

otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

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

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

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

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

III

A plaintiff claiming discrimination may offer direct evidence to prove discriminatory animus on the part of her employer. In the absence of direct evidence, a plaintiff claiming discrimination should proceed in accordance with the rules announced in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). Under McDonnell Douglas, a plaintiff must first establish a prima facie case. The prima facie case is a flexible standard that may be modified to

relate to different factual situations. Randle v. City of Aurora, 69 F.3d 441, 451 n.13 (10th Cir. 1995).

Once the plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. Once a defendant meets its burden of production by offering a legitimate rationale in support of its employment decision, the burden shifts back to the plaintiff to show that the defendant's proffered reasons were a pretext for discrimination. McDonnell Douglas, 411 U.S. at 804-05. A plaintiff can meet her burden by "showing either that a discriminatory reason more likely motivated the employer or . . . that the employer's proffered explanation is unworthy of credence." Tomsic v. State Farm Mutual Auto. Ins. Co., 85 F.3d 1472, 1478 (10th Cir. 1996) (quoting Cone v. Longmont United Hosp. Ass'n., 14 F.3d 526, 530 (10th Cir. 1994)) (internal quotations omitted).

IV

The Court will address each of Plaintiff's theories in turn.

A. Retaliation

Plaintiff claims that she was demoted because she filed a charge of discrimination with the EEOC. At the hearing held on November 12, 1997, Plaintiff conceded that her only evidence in support of her retaliation claims was the suspicious timing of her demotion in relation to her charge of discrimination, other than her general claim that she was treated unfavorably at work due to her disability. To establish a prima facie case of retaliation, a plaintiff must show that (1) she engaged in a protected activity; (2) she suffered an adverse employment action contemporaneous with or subsequent to such opposition; and (3) there is a causal connection between the protected activity and the adverse employment action. Cole v. Ruidoso Mun. Schools, 43 F.3d 1373, 1381 (10th Cir. 1994); Morgan v. Hilti, Inc., 108 F.3d 1319, 1324 (10th Cir. 1997). The Court concludes that Plaintiff has failed to identify any evidence whatsoever demonstrating a causal connection between her termination and the protected activity. Lowe v.

Angelo's Italian Foods, Inc., 87 F.3d 1170, 1176 (10th Cir. 1996). Accordingly, Plaintiff's retaliation claims under Counts Four, Five, and Six are dismissed.²

B. Title VII

Plaintiff alleges that Defendant created a hostile work environment and that men received training and promotions that she did not receive because of her gender. Plaintiff also contends that her immediate supervisor, Wanda Gantz, treated Darrell Means, also a lead, better than she treated Plaintiff. Plaintiff offers comments by her supervisors as direct evidence of discrimination on the basis of gender. Plaintiff alleges that Ms. Gantz stated that she would prefer young, good-looking men in the job of lead -- the job Plaintiff held before her demotion. Further, Plaintiff alleges that Mr. Marlow told her that women were too emotional to be promoted, hormonal, "dizzy," and not as bright or capable as men. Plaintiff asserts that such remarks were frequent.

Defendant contends that these remarks, assuming they were made, amount to nothing more than isolated stray remarks, unrelated to any employment action by Defendant. Cone v. Longmont United Hosp. Assn., 14 F.3d 526, 531 (10th Cir. 1994). Further, Defendant contends that the persons to whom these alleged remarks have been attributed were not decision makers.

1. Disparate Treatment

To the extent that Plaintiff's claim is one of disparate treatment, the Court finds that these remarks, assuming for the purposes of this motion that Ms. Gantz and Mr. Marlow made them, are not evidence of discriminatory animus because they are nothing more than stray remarks. Cone, 14 F.3d at 530. Plaintiff offers no evidence other than her own allegations that such remarks were made with any frequency. Plaintiff also has not demonstrated that any of the alleged remarks were related to Defendant's decision to transfer her to a production position or to eventually demote her. Id.

² Plaintiff's retaliation claims were dismissed at the hearing held on November 12, 1997.

In the absence of direct evidence, Plaintiff may proceed in accordance with the McDonnell Douglas framework. A plaintiff proves a prima facie case of sex discrimination under Title VII by proving that (1) she was within a protected class; (2) she was qualified for the job or she was entitled to terms and conditions of employment; (3) that, despite her qualifications, she was denied these terms or conditions, and (4) similarly-situated employees outside the protected class enjoyed favorable treatment regarding such terms and conditions of employment. Torre v. Federated Mutual Ins. Co., 897 F. Supp. 1332, 1371 (D. Kan. 1995), abrogated on other grounds, 100 F.3d 818 (1996); Lowe v. Angelo's Italian Foods, Inc., 87 F.3d 1170, 1174-75 (10th Cir. 1996).

In the instant case, Plaintiff claims that other leads received training when she did not, that Mr. Means was allowed more overtime hours than she was, that Ms. Gantz gave Mr. Means a birthday party and a nicer Christmas present, and that Ms. Gantz generally treated Mr. Means better than she treated her. Plaintiff also claims that men received promotions while she did not. The Court does not accept comparisons of presents and parties as constituting disparate treatment under Title VII. While such discrepancies, if true, may cause tension among supervisors and employees, the Court concludes that Title VII was not meant to rectify all perceived wrongs in the workplace. Therefore, the Court considers Plaintiff's Title VII gender discrimination claim in terms of her contention that Defendant failed to provide training and overtime on an equal basis and that unqualified males were promoted while she was not.

Defendant contends that Plaintiff has failed to establish her prima facie case of discrimination because she is unable to prove that she was qualified for the position of lead because of her excessive absenteeism and co-employee problems. In MacDonald v. Eastern Wyoming Mental Health Center, 941 F.2d 1115, 1119 (10th Cir. 1991), the Tenth Circuit held that it is improper to consider a defendant's proffered reasons for discharge in considering whether a plaintiff has set forth a prima facie case. To do so forces a plaintiff to disprove the

reasons for discharge just to establish a prima facie case. Under the McDonnell Douglas burden shifting paradigm, a plaintiff is required to prove not that a defendant's proffered reasons for the discharge are false, but that those reasons are merely a pretext for discrimination.

Short-circuiting the analysis at the prima facie case state frustrates a plaintiff's ability to establish that the defendant's proffered reasons were pretextual and/or that age was the determining factor; if a plaintiff's failure to overcome the reasons offered by the defendant for discharge defeats the plaintiff's prima facie case, the court is then not required to consider plaintiff's evidence on these critical issues.

Id. at 1119. Instead,

a plaintiff may make out a prima facie case of discrimination in a discharge case by credible evidence that she continued to possess the objective qualifications she held when she was hired, or by her own testimony that her work was satisfactory, even when disputed by her employer, or by evidence that she had held her position for a significant amount of time.

Id. at 1122 (citations omitted). Therefore, under this authority, the Court must disregard for the moment Defendant's allegations that Plaintiff's job performance had declined. For the purposes of establishing a prima facie case, the Court observes that it is uncontroverted that Plaintiff held her position for nearly two years. Further, Plaintiff alleges she was performing satisfactorily and received only two write-ups during her employment. The Court finds that such evidence is sufficient for Plaintiff to establish the second element of her prima facie case under the Tenth Circuit's analysis in MacDonald.

With respect to the third element of Plaintiff's case, that she was subject to adverse employment action on the basis of gender, the Court concludes that Plaintiff has not stated a prima facie case with respect to the issue of disparate treatment in training. Plaintiff has offered no specific allegations or examples of training which males received but she was denied. Plaintiff has not identified the males who allegedly received better training. Therefore, Plaintiff has failed to demonstrate that any employees outside the protected class were treated better than she was in respect to training.

The Court finds that Plaintiff's claim of disparate treatment based upon promotion opportunities also fails. Plaintiff has not articulated a prima facie case on this issue because she has not identified the employees who received the promotions that she claims were denied her on the basis of her gender.³

The Court also concludes that Plaintiff has failed to establish a prima facie case of disparate treatment regarding Mr. Means' overtime hours. Defendant contends that Mr. Means holds the position of lead over two departments. As a result, Mr. Means necessarily worked more overtime hours than did Plaintiff. Accordingly, Plaintiff has not proved that she and Mr. Means are similarly-situated for the purposes of a disparate treatment analysis. Even assuming that Plaintiff had established a prima facie case on this issue, the burden shifts to Defendant to articulate a reason for its employment action. Defendant's statement that Mr. Means worked more overtime because he supervised two departments compared to Plaintiff's one constitutes a legitimate, nondiscriminatory business reason for its treatment of the two employees. Plaintiff has offered no evidence whatsoever to rebut Defendant's stated reason or to call it into doubt to demonstrate pretext. Therefore, Plaintiff has raised no triable issue of fact with respect to the issue of disparate treatment on the basis of gender.

2. Hostile Work Environment

Plaintiff claims that she was the victim of a hostile work environment based on her gender. Title VII is violated "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' ... that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. . . ." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65,

³ In her brief in response to summary judgment, Plaintiff claims that Mr. Means was promoted to the position of lead before she was promoted to that position despite the fact that she had more seniority than he did. The Court finds that Plaintiff's bare allegation, devoid any specific facts supporting her contentions, is insufficient to satisfy the requirements of her prima facie case.

67 (1986)). However, the conduct at issue must create "an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive." Harris at 21. Isolated instances of discriminatory comments or slurs are not actionable. See Hicks v. Gates Rubber Co., 833 F.2d 1406, 1414 (10th Cir.1987).

The Court concludes that Plaintiff has failed to present sufficient evidence to demonstrate that genuine issues of material fact exist on the issue of whether Defendant maintained a hostile work environment based upon sex. The Court concludes that there is no evidence that the comments in question here were anything more than stray comments. Plaintiff has failed to demonstrate that the work place was permeated with "discriminatory intimidation, ridicule, and insult." Harris, 510 U.S. at 21 (citation and internal quotation marks omitted).

For these reasons, Plaintiff's Title VII claim under Count One based upon gender discrimination is hereby dismissed.

C. Age Discrimination

Plaintiff's contentions regarding age discrimination are similar to her Title VII claims. Plaintiff asserts Defendant created and maintained a hostile work environment based upon age and that she was treated differently because of her age.

The Court concludes that, as in Plaintiff's hostile work environment claims based upon her gender, Plaintiff has failed to demonstrate that the alleged remarks by Ms. Gantz and Mr. Marlow created a workplace permeated with discriminatory insult. Based upon the record presented by Plaintiff, the Court finds such remarks were isolated and sporadic given Plaintiff's nearly seventeen year tenure of employment with Defendant, and insufficient to rise to the level of a hostile work environment. Id.

As to her disparate treatment claims based upon age, Plaintiff asserts that she has submitted direct evidence of animus based upon age -- Ms. Gantz' and Mr. Marlow's remarks regarding her age. However, the Court finds these remarks do not amount to direct evidence of

age discrimination. The only remarks attributable to Ms. Gantz -- that Plaintiff should touch up her grey hair and that she might be having hot flashes -- are ambiguous and stray. Mr. Marlow's remarks also are infrequent, stray, and insufficient to constitute direct evidence of age discrimination. Again, Plaintiff has failed to demonstrate the nexus between such remarks and the employment actions she challenges here. While the comments are clearly in poor taste, they do not amount to evidence of age bias under federal law.

In the absence of direct evidence, Plaintiff may proceed in accordance with the McDonnell Douglas framework. To set forth a prima facie case, Plaintiff must establish that: (1) she was within the protected age group; (2) she was doing satisfactory work; (3) she was treated less favorably than a younger person. Gonzagowski v. Widnall, 115 F.3d 744, 749 (10th Cir. 1997). The Court concludes that Plaintiff has failed to establish a prima facie case of age discrimination. Plaintiff presents no evidence that she was treated less favorably than younger, similarly-situated employees. She cites no incidents where younger employees enjoyed benefits that she did not. Instead, Plaintiff only makes broad allegations that Defendant discriminated against her on the basis of her age. The Court finds such allegations are not supported by the record and insufficient to create a genuine issue of material fact. See Murray v. City of Sapulpa, 45 F.3d 1417, 1421-22 (10th Cir. 1995) (finding that plaintiff's allegations that he was treated differently than similarly-situated employee insufficient to survive summary judgment). Accordingly, the Court finds that Plaintiff has failed to establish a prima facie case of age discrimination because she demonstrates no situation where younger employees received more favorable treatment than she received.

Even assuming that Plaintiff had established a prima facie case that she had been demoted or reclassified on the basis of her age, Defendant contends that it had a legitimate basis for its actions. Defendant states that it demoted Plaintiff and reclassified her position based upon her attendance, her poor performance as a lead, and because she was counseling employees on

personal matters while revealing personal confidences. Plaintiff offers absolutely no evidence to rebut Defendant's stated reason for its actions. Plaintiff claims that she was not reprimanded for excessive absences under Defendant's policy. The Court, for purposes of Plaintiff's age claim, cannot credit Plaintiff's contention that she was not absent excessively, because, in support of her ADA claim, Plaintiff admits that her frequent absences were due to Defendant's failure to accommodate her. Moreover, Plaintiff offers nothing to rebut Defendant's allegations that she disrupted the workforce through her counseling. Instead, she seems to indicate that Defendant sought to have employees avoid her because of its discriminatory animus toward her. Plaintiff's mere conclusory statements that attempt to cast doubt on Defendant's business decision do not constitute evidence by which a factfinder could infer that Defendant's acts are pretextual. See Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 530 (10th Cir. 1994) (conclusory allegations will not suffice to create a material issue of fact to defeat summary judgment). Mere allegations are no substitute for concrete evidence -- such as affidavits, deposition testimony or other such evidence -- that demonstrates a defendant's stated reasons are unworthy of belief. Accordingly, the Court finds that Plaintiff has not met her burden to establish that Defendant's reasons are pretextual or otherwise lack credibility and Plaintiff's age discrimination claim under Count Two is hereby dismissed.

D. Constructive Discharge

Plaintiff claims that Defendant reclassified her position, permanently demoting her in retaliation for her filing a charge of discrimination. Plaintiff claims that Defendant's conduct compelled her to resign from her job, amounting to a constructive discharge.⁴

⁴ Defendant contends that its decision to initially reassign Plaintiff to a production position is not actionable because it does not constitute an ultimate employment decision. The Court finds that Defendant's decision to make Plaintiff's transfer permanent, accompanied by a decrease in pay, was an ultimate employment decision that could form the basis for a constructive discharge.

In order to prevail on a constructive discharge theory, Plaintiff must prove that the employer, by its unlawful acts, made working conditions so intolerable that a reasonable person in her position would feel forced to resign. Sprague v. Thorn Americas, Inc., 129 F.3d 1355, 1367 (10th Cir. 1997). In Reynolds v. School Dist. No. 1, Denver, Colo., 69 F.3d 1523, 1534 (10th Cir. 1995), the Tenth Circuit held that Plaintiff must show that she "was forced to quit due to [sex, age, or disability]-based, intolerable working conditions." Id. Plaintiff must prove that the "employer by its illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign." Mitchell v. Mobil Oil Corp., 896 F.2d 463, 467 (10th Cir. 1990). In Bolden v. PRC, 43 F.3d 545 (10th Cir. 1994), the plaintiff was subjected to derogatory, abusive comments in the workplace. Nonetheless, the Tenth Circuit held that such comments were insufficient to prove constructive discharge. Id.

In the instant case, the Court concludes that Plaintiff has failed to demonstrate that Defendant's actions were so intolerable that a reasonable person would be forced to quit. Plaintiff was reclassified from her position of lead in early 1996 and resigned in February, 1996. The Court notes that Plaintiff does not contend that her working conditions within this fairly short time frame were such that she was left no choice but to resign. Instead, Plaintiff contends it is the reclassification that caused her to leave her job. The Court concludes that such evidence is insufficient to prove that her work conditions were "intolerable" as required under Tenth Circuit authority. Further, the Court concludes that Plaintiff has failed to prove that Defendant's actions were "unlawful." Id. at 552. Plaintiff's claim that she was reclassified to a lower grade in retaliation for filing an EEOC charge has failed to survive summary judgment. Moreover, Plaintiff has presented no evidence of pretext to cast doubt on Defendant's explanation that Plaintiff was reclassified due to high absenteeism and problems with other employees. For these reasons, Plaintiff's claim of constructive discharge is hereby dismissed.

E. Disability

Plaintiff claims that she suffers from a disability, Pl. Compl. § 7, resulting from a 1986 work-related injury in which she broke her kneecap. Plaintiff claims her use of that leg has been diminished since the accident. Further, Plaintiff claims she has osteoarthritis that has been aggravated by the diminishment of her leg.⁵

Plaintiff states that she is disabled in the major life activity of walking and standing because she cannot walk or stand as others in the general population. Plaintiff claims that Defendant harassed her because of her disability and discriminated against her on the basis of her disability. Pl. Compl. ¶ 8. Plaintiff also claims that Defendant failed or refused to provide any reasonable accommodation for her disability. Comp. ¶ 22. As evidence of disability discrimination, Plaintiff states that Defendant refused to hire a material handler when her handler quit his job; that Ms. Gantz removed the chair that Plaintiff needed at her work station, that Defendant failed to provide her a handicapped parking space, and did not allow her to use a cane at work. Plaintiff also offers comments by Ms. Gantz regarding Plaintiff and other disabled persons as evidence of discrimination.

Defendant contends that Plaintiff has not demonstrated that she has a disability as defined under the ADA.⁶ Defendant claims that Plaintiff cannot prove that she can perform the essential functions of her job because she is absent so frequently. Moreover, Defendant contends that even if Plaintiff has demonstrated a prima facie case, it has legitimate reasons for its actions. Defendant states that Plaintiff's chair was taken away because Plaintiff sat in her chair when she should have been working on the floor. Moreover, Defendant contends that although Plaintiff's

⁵ Plaintiff claims that Defendant's conduct has caused the condition of her leg to grow worse, especially since Defendant failed to provide her a chair so that she could rest during the day, and a material handler, so that she could avoid lifting heavy objects.

⁶ Defendant first contends that it had no obligation to provide any accommodations, such as a parking space or use of cane, to Plaintiff before the ADA became law. The Court here only analyzes Plaintiff's claims arising after the ADA's effective date of July 26, 1990.

material handler was removed, Plaintiff was accommodated in other respects. For example, Defendant claims that Plaintiff was offered assistance in lifting heavy objects, and that she was told not to lift heavy objects by herself.

The ADA provides that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a). To establish a prima facie case of disability discrimination under the ADA, a plaintiff must show (1) that she is a disabled person within the meaning of the ADA; (2) that she is able to perform the essential functions of the job with or without reasonable accommodation; and (3) that the employer took an adverse action against her under circumstances which give rise to an inference that the action was based on her disability. Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997); Sutton v. United Air Lines, 130 F.3d 893, 897 (10th Cir. 1997).⁷

The ADA defines the term “disability” as a “physical or mental impairment that substantially limits one or more of the major life activities of such individual.” 42 U.S.C. § 12101(2). Regulations implementing the ADA define major life activities as including walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i). The appendix to the regulations provides that “other major life activities include, but are not limited to, sitting, standing, lifting, reaching.” 29 C.F.R. Pt. 1630, Appendix to Part 1630, Interpretive Guidance to Title I of the Americans with Disabilities Act, § 1630.2(i) (citing S. Rep. No. 116, 101st Cong., 1st Sess. 22 (1989); H.R. Rep. No. 485 part 2, 101st Cong., 2d Sess. 52 (1990);

⁷ The prima facie case of discrimination under Oklahoma law parallels the requirements under the ADA for a showing of discrimination. Under state law, a plaintiff must demonstrate that she (1) is a disabled person; (2) is able to perform the essential functions of the job with or without reasonable accommodation; and (3) was terminated under circumstances which give rise to an inference that the termination was based on her disability. Williams v. Widnall, 79 F.3d 1003, 1005 (10th Cir. 1996) (setting forth the prima facie case under the Rehabilitation Act, after which the Oklahoma Act is patterned).

H.R. Rep. No. 485 part 3, 101st Cong., 2d Sess. 28 (1990)). “Substantially limited” is defined as “[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.” 29 C.F.R. § 1630.2(j)(1)(ii). Three factors are to be considered when determining whether an impairment substantially limits a major life activity: “(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.” 29 C.F.R. § 1630.2(j)(2).

Plaintiff alleges that her physical impairment to her knee substantially limits her in the major life activities of walking and standing. Defendant contends that Plaintiff cannot prove that she is disabled under the Act and therefore, it is entitled to summary judgment on Plaintiff’s ADA claims. In particular, Defendant alleges that Plaintiff has not shown that she is disabled in the major life activity of working. However, this argument and the supporting authorities cited by Defendant are inapposite. Indeed, Defendant does not address Plaintiff’s contention that she is disabled in the major life activities of standing and walking. The Court concludes that Plaintiff has presented a factual question as to whether she is substantially limited in the major life activities of standing and walking.⁸ Plaintiff alleges that she cannot stand for long periods of time, that she cannot walk for long periods of time, that she must use a cane to walk, and that she must have access to a chair to rest her leg periodically while working. As such, the Court is satisfied that genuine issues of material fact remain as to whether or not Plaintiff is substantially restricted in the major life activity of standing or walking.

⁸ In fact, Plaintiff stated at the hearing that she has made no claim that she is disabled in the major life activity of working.

Defendant contends that Plaintiff cannot prove that she is “qualified” under the ADA because of her excessive absenteeism. In order to establish a prima facie case under the ADA, Plaintiff must show that she is qualified to perform the essential functions of her jobs, with or without accommodation. Hudson v. MCI Telecommunications Corp., 87 F.3d 1167, 1168 (10th Cir. 1996). Defendant observes that Plaintiff, in 1995, missed thirty days of work. Between January 1, 1996 and the date she resigned, Plaintiff missed ten days of work, in addition to vacation time. Defendant contends that attendance is an essential function of the position of lead that Plaintiff cannot perform. Plaintiff responds that Defendant’s failure to accommodate her resulted in an increase in her problems with her knee, which in turn caused her to miss work more frequently.

Some circuits have held that coming to work regularly is an essential job function, Tyndall v. Nat’l Education Centers, Inc., 31 F.3d 209, 213 (4th Cir. 1994), cited with approval in Wilson v. State Ins. Fund, 106 F.3d 414, 1997 WL 12929 at * 2 (10th Cir. Jan. 15, 1997) (unpublished decision); Carr v. Reno, 23 F.3d 525, 530 (D.C. Cir. 1994) (Rehabilitation Act), and that an “employee who cannot meet the attendance requirements of the job at issue cannot be considered a ‘qualified’ individual protected by the ADA.” Tyndall, 31 F.3d at 213. The Tenth Circuit has held that the ADA does not require an employer to provide unpaid leave of an indefinite duration to an employee. Hudson, 87 F.3d at 1169 (10th Cir. 1996). The Court concludes, that under these authorities and the facts of this case, Plaintiff has presented a jury question as to whether Plaintiff is “qualified” under the ADA.

Plaintiff contends that Defendant has failed to accommodate her as required under the ADA. In particular, Plaintiff alleges that Defendant failed to provide a material handler for her in order for her to do her job. Defendant contends that although it did not replace Plaintiff’s material handler, it accommodated her in other respects. Defendant alleges that it cautioned Plaintiff to refrain from lifting heavy objects and reminded her to ask other employees to assist

her. However, Defendant does not contest Plaintiff's allegations that it once provided her a material handler, Plaintiff's material handler left the company, Defendant refused to hire another handler for Plaintiff, and that the condition of Plaintiff's leg worsened due to Defendant's conduct. As such, assuming Plaintiff can prove that she has a disability under the Act, Plaintiff has presented a question of fact as to whether Defendant provided reasonable accommodation for Plaintiff's disability.

Plaintiff also contends that Defendant failed to accommodate her as required under the ADA because it removed the chair that she needed to rest in order to do her job. Defendant responds that it had a legitimate reason for removing Plaintiff's chair. It claims that Plaintiff sat in the chair when she should have been working on the floor as leads were required to do. Again, as with the issue of the material handler, the Court finds that Plaintiff has presented a jury question as to whether Defendant complied with the ADA's requirement of reasonable accommodation when it removed Plaintiff's chair that she alleges she needed to perform her job.

For the above reasons, Defendant's motion to dismiss Plaintiff's ADA claim under Count III is denied. Because the analysis of disability claims under Oklahoma law parallels the federal analysis, Defendant's motion to dismiss Plaintiff's state disability claim under Count Seven also is denied.

For the reasons set forth above, Defendant's motion for summary judgment is granted in part and denied in part.

IT IS SO ORDERED.

This 18TH day of June, 1998.



Sven Erik Holmes
United States District Judge

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

FILED
JUN 19 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

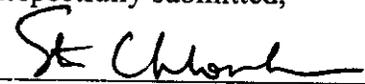
PAUL C. CAMERON, an individual,
Plaintiff,
v.
DAYLIGHT CORPORATION,
an Oklahoma Corporation,
Defendant.

Case No. 97-C-1015-H
ENTERED ON DOCKET
DATE 6-22-98

PLAINTIFF'S DISMISSAL WITHOUT PREJUDICE

Pursuant to Fed. R. Civ. P. 41(a) Plaintiff PAUL C. CAMERON dismisses without prejudice his action against Daylight Corporation. Defendant has not been served with summons and complaint in this case nor has an answer been filed.

Respectfully submitted,



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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JUN 19 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES R. HOWELL,
SSN: 511-50-9414,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of Social Security,¹

Defendant.

Case No. 97-C-0062-H (E)

ENTERED ON DOCKET

DATE 6-22-98

REPORT AND RECOMMENDATION²

Claimant, James R. Howell, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of Social Security ("Commissioner") denying claimant's application for disability benefits under the Social Security Act.³

Claimant appeals the decision of the Commissioner, alleging that the determination of the ALJ is not supported by substantial evidence. In particular, claimant alleges that the ALJ failed to

¹ 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).

² By minute order dated February 4, 1998, this case was referred to the undersigned for all further proceedings in accordance with her jurisdiction pursuant to the Federal Rules of Civil Procedure.

³ On December 8, 1993, claimant protectively applied for Supplemental Security Income (SSI) benefits under Title XVI (42 U.S.C. § 1381 *et seq.*), with a protective filing date of November 16, 1993. Claimant had previously filed for SSI benefits on February 28, 1992 and been denied in a final decision of June 4, 1993. Claimant's present application for benefits was denied in its entirety initially (May 26, 1994) and on reconsideration (July 22, 1994). A hearing before Administrative Law Judge Stephen C. Calvarese ("ALJ") was held April 12, 1995 in Tulsa, Oklahoma. By decision dated June 27, 1995, the ALJ found that claimant was not disabled on or before the date of the decision. On December 10, 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. § 416.1481.

fully and properly consider evidence of all of claimant's exertional and nonexertional impairments, failed to properly evaluate claimant's pain, and improperly analyzed the testimony of the vocational expert. For the reasons discussed below, the undersigned recommends that the District Court **AFFIRM** the decision of the Commissioner.

I. CLAIMANT'S BACKGROUND

Claimant was born on February 23, 1947 and lived in Nowata, Oklahoma at the time of filing his complaint. Claimant finished the eleventh grade. He has worked as a construction laborer, rough carpenter, and laborer in a paint plant. Claimant states that he has not been able to work since March 17, 1991 as a result of ankylosing spondylitis, heart disease, keratoconus, chest pain, back pain, pain throughout his extremities, depression, and exhaustion.

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. § 404.1520.⁴

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,

⁴ 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 RFC to perform medium work, limited as described in the consultative examination reports of Drs. Ronald C. Passmore and Beau C. Jennings. The ALJ found that claimant could not perform his past relevant work. However, relying on the testimony of a vocational expert, the ALJ found that there were other jobs existing in significant numbers in the national and regional economies that claimant could perform, based on his RFC, age, education, and work experience. Having determined 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 on or before the date of the ALJ's decision.

IV. MEDICAL HISTORY OF CLAIMANT

On March 17, 1991, claimant went to an emergency room in Nowata, Oklahoma, complaining of chest pain. He was transferred to St. Francis Hospital in Tulsa, Oklahoma, where he was diagnosed as having had an acute anteroseptal myocardial infarction. Claimant was administered intravenous thrombolysis with Streptokinase. A left heart catheterization, left ventriculography, and selective coronary angiography were performed. Claimant was discharged on March 22, 1991. (R. 133-135)

In a letter of May 5, 1992, Dr. Richard C. Slagle, who had been treating claimant following his myocardial infarction, discussed claimant's coronary disease and recovery from the myocardial

infarction. Dr. Slagle stated that claimant "has average work capability. . . . He should avoid strenuous exertion but normal activities will be tolerated." (R. 218)

In a radiology exam of December 3, 1993, cervical, thoracic, and lumbar spine studies were obtained from claimant and compared to a 1989 study. The examining doctor noted degenerative changes in the cervical, thoracic, and lumbar spine, "essentially similar to the studies in 1989." (R. 338) The examining doctor found that "[n]one of the studies show ankylosing spondylitis." (Id.)

On February 9, 1993, Jim Hulse, MHR, performed a psychological evaluation of claimant at the request of the Commissioner. Mr. Hulse recorded that claimant talked at length about his family and land being repeatedly exposed to harmful chemicals as a result of a neighbor farmer's overbroad spraying of pesticide:

Based on data from the WAIS-R and the clinical interview, there is no data to support the presence of significantly impaired memory; either for recent or remote facts. His performance on the Wechsler was Average to Superior in 9 of 11 subtests. The two subtests which were impaired appear to be affected by oppositional mind-set and perfectionistic trends. Test data throughout all three of the tests do support the presence of extreme emotional tension; however, this seems to be situationally conditioned, i.e. three years of conflict over the spraying of pesticides. Based on his restricted affect, his inability to express his anger appropriately, and some level of short-sightedness in his behavior patterns, an Axis I diagnosis of Dysthymia may be appropriate.

(R. 240)

On March 1, 1994, claimant was examined by Dr. Ronald C. Passmore, a psychiatrist, at the request of the Commissioner. Dr. Passmore's impression was:

Axis I: It appears to me that [claimant] is suffering from depression and also has symptoms of panic and anxiety. He is so obsessed with things that this may constitute an almost paranoid position. I explained to him about medicines and how they work and that he should go to the Indian Hospital and ask them for medications, and I explained that the medications, I thought would help his symptoms very greatly. I do not know if he will follow through because of his feelings about medicine.

Axis II: No diagnosis.

Axis III: He claims he has had a heart attack, that he has hurt his back, and that he has been affected by pesticides.

Axis IV: The stressors are severe. His wife is separated from him because he has become so irritable.

Axis V: His adjustment is fair, but his beliefs are certainly inhibiting his activities at this time. His depression is not as severe as it could be. He is capable of handling any funds that he might have.

(R. 357-358)

On March 1, 1994, Dr. Beau C. Jennings performed a consultative examination of claimant at the request of the Commissioner. Dr. Jennings recorded that claimant's chief complaints were chest pain and back pain. Dr. Jennings found that claimant had visual acuity for both eyes of 20/25 with correction and 20/300 without correction. The right eye had no acuity with or without correction. Dr. Jennings noted that claimant had no cervical bruits or adenopathy. Claimant's heart was of regular rate and rhythm. Dr. Jennings wrote that claimant showed some tenderness to palpation over the spinous processes. Claimant had full range of motion for his upper and lower extremities. There was no redness, swelling, or deformities of any of the joints. A straight leg raising test was negative sitting and supine. Claimant's range of motion of the cervical spine was found to be limited to 20 degrees extension, with 20 degrees flexion. Upon examination of claimant's lumbar spine, Dr. Jennings found a range of motion and extension of 20 degrees, forward flexion 60 degrees, and normal bilateral side bending. As to claimant's standing posture, Dr. Jennings noted a slight scoliotic curve convexity left thoracic, right lumbar. Dr. Jennings'

assessment was: (1) chronic back pain, with a history of ankylosing spondylitis; (2) chest pain, status post myocardial infarction by history; and (3) anxiety by history, situational. (R. 362)

A consultative examination of claimant was performed on May 9, 1994 by Dr. Jerry D. First. Dr. First recorded his impressions as: (1) chest pain typical of angina, but not demonstrated by objective evidence; (2) ankylosing spondylitis by history; (3) decreased memory, of uncertain etiology; (4) keratoconus; (5) exposure to insect spray 24D; and (6) "generalized not feeling well," possibly secondary to situational anxiety depression or chemical exposure. (R. 367)

V. REVIEW

Claimant appeals the decision of the Commissioner, alleging that the determination of the ALJ is not supported by substantial evidence. In particular, claimant alleges that the ALJ failed to fully and properly consider evidence of all of claimant's exertional and nonexertional impairments, failed to properly evaluate claimant's pain, and improperly analyzed the testimony of the vocational expert.

A. *Failure to Consider Evidence of Further Exertional and Nonexertional Impairments*

Claimant alleges that the ALJ only considered claimant's back pain, neck pain, and depression, failing to fully and properly consider evidence of other exertional and nonexertional impairments. Specifically, claimant points to "chest pains, pain from the base of [claimant's] skull radiating to his lower back, stiffness in his joints, hands, knees, elbows, hips and shoulders, diminished memory, keratoconus (blindness), emotional stress, exhaustion and no energy." Plaintiff's Brief from Unfavorable Decision (Docket #7), at 3.

Contrary to claimant's assertions, the ALJ *did* consider and discuss these impairments. Moreover, in some cases the ALJ found the impairment to be severe enough to diminish claimant's

ability to work and, therefore, included the impairment in his determination of claimant's RFC.⁵ As to chest pain, the ALJ stated "Dr. First found no objective basis for the claimant's angina-like complaints, there were no significant EKG changes. . . . The claimant does not have an objective basis to support his complaints of chest pain." (R. 22) As to back pain and stiffness in various joints, the ALJ stated "[t]he extremities had a normal range of motion and the grip strength was good. There was a reduction of the range of motion of the neck and back, however, significant motion was still possible; the claimant could walk normally." (R. 21-22) As to diminished memory, the ALJ stated "Dr. Passmore's evaluation shows that the claimant has a moderate limitation on his memory." (R. 22) As to vision impairments, the ALJ stated "Dr. Jennings' medical notes show that the claimant has no vision in his right eye, however, vision in the left eye was 20/25." (R. 21) As to emotional stress and depression, the ALJ found that claimant suffered from some level of depression and anxiety, detailing his findings in an attached Psychiatric Review Technique form ("PRTF"). (R. 22, 25-27) The undersigned finds no error in the ALJ's consideration of claimant's exertional and nonexertional impairments. Moreover, his findings are supported by substantial evidence.

B. The ALJ's Assessment of Plaintiff's Pain and Credibility

Claimant asserts that the ALJ failed to properly assess plaintiff's credibility regarding his allegations of back pain and chest pain. The framework for the proper analysis of evidence of

⁵ Claimant, in his argument that the ALJ only considered the claimant's back pain, neck pain, and depression, quotes the ALJ as stating that "The claimant is impaired by back and neck pain and depression, and such impairments are severe enough to reduce his ability to work." Plaintiff's Brief from Unfavorable Decision (Docket #7), at 2 (quoting R. 23). This statement is taken from the ALJ's listing of findings. The ALJ's consideration of the various impairments which claimant alleges were ignored is contained in the previous section of the ALJ's report, titled "Rationale." (R. 21-23)

allegedly disabling pain was set forth by the Tenth Circuit in Luna v. Bowen, 834 F.2d 161, 163-64 (10th Cir. 1987). That analysis requires the Court to consider:

(1) whether Claimant established a pain-producing impairment by objective medical evidence; (2) if so, whether there is a "loose nexus" between the proven impairment and the Claimant's subjective allegations of pain; and (3) if so, whether considering all the evidence, both objective and subjective, Claimant's pain is in fact disabling.

Kepler v. Chater, 68 F.3d 387, 390 (10th Cir. 1995) (internal quotations omitted).

Claimant, in his brief to this Court, asserts that claimant suffers from back pain. Plaintiff's Brief from Unfavorable Decision (Docket #7), at 4. The undersigned notes that the ALJ found that claimant "is impaired by back and neck pain." (R. 23) To the extent that claimant is asserting that his back and neck pain are of greater severity than that determined by the ALJ, claimant's argument fails. The ALJ determined that claimant's back and neck pain were of such severity that they, along with other impairments, limited claimant to an RFC of medium work. 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). The findings of the ALJ are supported by substantial evidence.

The findings of the ALJ in regard to claimant's allegation of chest pain are also supported by substantial evidence. As stated above, the ALJ found that claimant had not by objective evidence proven the existence of an impairment that would produce chest pain. The ALJ stated that Dr. First's examination of claimant showed no objective basis for claimant's angina-like complaints. (R. 22) The ALJ noted that the EKG performed by Dr. First showed no significant changes. (Id.) Dr. First

specifically stated on the EKG report that there was “no objective evidence of myocardial ischemia for this amount of activity.” (R. 369) The Tenth Circuit has stated that “subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by clinical findings.” Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The medical records must be consistent with the nonmedical testimony as to the severity of the pain. Unsubstantiated subjective evidence is not sufficient to prove disability. Diaz, 898 F.2d at 777. It has been recognized that “some claimants exaggerate symptoms for purposes of obtaining government benefits, and deference to the fact-finder’s assessment of credibility is the general rule.” Frey, 816 F.2d at 517. The ALJ did not err in finding that claimant’s allegations of disabling chest pain are not supported by objective medical evidence.

C. *The ALJ’s Hypothetical Question to the Vocational Expert*

Claimant asserts that the ALJ improperly analyzed the testimony of the vocational expert, specifically arguing that “the ALJ erred in failing to consider the VE’s finding that [claimant’s] impairments eliminated all jobs proffered during the hearing.” Plaintiff’s Brief from Unfavorable Decision (Docket #7), at 4. It is true that the vocational expert stated that if every complaint of claimant’s was accepted as fact, claimant would be disabled. Likewise, the vocational expert’s opinion about what jobs claimant was capable of performing varied in accord with changing hypothetical questions by claimant’s counsel. (R. 80-84) However, the ALJ did not rely on these secondary hypotheticals in making his Step Five determination.

The vocational expert testimony upon which the ALJ did rely was premised on a hypothetical that reflected his findings as detailed in his report and discussed above. It is true that “testimony elicited by hypothetical questions that do not relate with precision all of a claimant’s impairments

cannot constitute substantial evidence to support the [Commissioner's] decision." Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). However, in forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). As discussed above, the ALJ's findings are supported by substantial evidence. Thus, the hypothetical question was not tainted and the ALJ did not err in relying on the testimony of the vocational expert.

VI. CONCLUSION

Based on the legal and factual issues in this case, the undersigned recommends that the District Court **AFFIRM** the decision of the Commissioner. Any objection to this report and recommendation must be filed with the Clerk of the Court within ten days of service of notice. Failure to file objections within the specified time will result in a waiver of the right to appeal the District Court's legal and factual findings. See Ayala v. United States, 980 F.2d 1342 (10th Cir. 1992); Niehaus v. Kansas Bar Ass'n., 793 F.2d 1159, 1164-65 (10th Cir. 1986) (superseded by rule on grounds not relevant to holding on waiver).

DATED this 19th day of June, 1998.

Claire V Eagan
CLAIRE V. EAGAN
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

12th Day of June, 1998.
C. Pateley, Deputy Clerk

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

JUN 19 1998

ROBERT WAGNER,
Petitioner,
vs.
RITA MAXWELL,
Respondent.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-C-43H(J)

ENTERED ON DOCKET

DATE 6-22-98

REPORT AND RECOMMENDATION

Petitioner, who is represented by counsel, filed a Petition for a Writ of Habeas Corpus on January 15, 1997. [Doc. No. 1-1]. Petitioner alleges that the trial court committed numerous errors which entitle him to habeas relief. Respondent filed its Response to the Petition on March 10, 1997. [Doc. No. 5-1]. Petitioner was directed to file a reply by minute order dated March 3, 1998, and by Order of the District Court dated March 6, 1998. No reply was filed.

The undersigned United States Magistrate Judge has reviewed Petitioner's Petition, the briefs filed by the parties, and the trial transcript. A review of the alleged errors reveals no reversible error. The United States Magistrate Judge recommends that Petitioner's Petition for a Writ of Habeas Corpus be **DENIED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner was charged by information with first degree rape of a minor and with lewd molestation. See [Doc. No. 5-1] Exhibit A. The charge of lewd molestation was dismissed by the Court. Petitioner had a three day jury trial, beginning October 3,

1994 and concluding October 5, 1994 in Delaware County, Oklahoma. See [Doc. No. 5-1] Exhibit G.

Jenny Robinson, the victim's mother testified for the State. She indicated that the Petitioner was her former brother-in-law. [Tr. at 122]. She testified that during the summer of 1992, her three children (including the victim) went to Jay, Oklahoma to visit their father. [Tr. at 123]. Upon the return of the three children to her house in Wyoming, she noticed changes in her youngest daughter, Amanda, the victim. [Tr. at 123-24]. According to her mother, her daughter was cranky, moody, fussy, complained her stomach hurt, had nightmares, and would take baths as frequently as three or four in one day and sometimes in the middle of the night. [Tr. at 124]. In addition, Amanda's grades went from B's, C's and A's to D's. [Tr. at 131-32]. Ms. Robinson additionally stated that when Amanda returned to school she told a school counselor that she had been molested. [Tr. at 125]. According to Ms. Robinson, her daughter told her that she was taking baths to "wash Uncle Bob off." [Tr. at 132]. On cross-examination Ms. Robinson agreed that she really did not know what happened to the children while they were in Oklahoma. [Tr. at 137]. On re-direct, Ms. Robinson testified that sometimes Amanda would wake up screaming, late at night, and she would yell "no, Uncle Bob, stop, don't." [Tr. at 140]. On re-cross, Ms. Robinson stated that Amanda had not yet begun her menstrual cycle. [Tr. at 142].

Amanda Robinson, the alleged victim testified. She was twelve years old at the time that she testified. [Tr. at 143]. She identified Petitioner and stated that her father sometimes took her to Petitioner's house so Petitioner could babysit she and her

brothers and sisters. [Tr. at 149]. Amanda stated that the first time that she stayed the night at Petitioner's house she slept in a bed with her sisters. [Tr. at 150]. The second time that she stayed the night at Petitioner's house, Amanda testified that her Uncle Bob came into the room, tore off her nightgown, and raped her. [Tr. at 150]. Amanda stated that Petitioner called her a "bitch" and told her that if she told anybody about the rape he would shoot her. [Tr. at 152]. According to Amanda, Petitioner put his hand over her mouth to prevent her from screaming although she tried to scream and bite him. [Tr. at 152]. Amanda described Petitioner's penis as grey with hair all over it. [Tr. at 152]. Amanda testified that Petitioner hurt her and that when he was done she noticed blood on the blanket and on her private parts. [Tr. at 152-53]. According to Amanda, she did not tell anybody about this incident because she was afraid that her father would blame her and she was also afraid that Petitioner would shoot her. [Tr. at 153].

Amanda testified that Petitioner raped her a second time during a cookout. [Tr. at 154]. According to Amanda, the second rape occurred in Petitioner's backyard while everyone was inside the house. Amanda stated that Petitioner told her that if she told anyone about the rape he would take all of the children and Amanda's mom to a boat in the middle of the lake and drown them. [Tr. at 155].

Amanda testified that the third incident occurred while Petitioner was in the house sitting on a couch next to Amanda. According to Amanda, Petitioner had a pillow over her and Petitioner put his hands down Amanda's pants and rubbed her. [Tr.

at 156]. Petitioner stated that her brother and sisters were in the room with them but that she did not say anything at the time. [Tr. at 156].

According to Amanda, she did not tell anybody about these incidents until two months after she returned to Wyoming to live with her mother. Amanda told a teacher at school and later told her mother. [Tr. at 157].

Amanda testified that she had nightmares about Petitioner continuing to hurt her and that after she returned to Wyoming she did not do as well in school. [Tr. at 158]. Amanda also acknowledged that she took baths more frequently and sometimes bathed in the middle of the night to "wash him [Petitioner] off." [Tr. at 159].

On cross-examination when Petitioner's attorney asked Amanda what kind of nightgown she was wearing she answered that she was wearing a long shirt but could not recall the color. [Tr. at 171]. Amanda also stated that Petitioner's wife, Aunt Shirley, asked Amanda if Petitioner had hurt her the night of the first rape. [Tr. at 189].

Barbara Sammon, a therapist in private practice in Jay, Oklahoma testified. [Tr. at 197]. According to Ms. Sammon, the symptoms which are usually common among sexual abuse victims include generalized anxiety, fear that someone is going to kill the child's family, changes in personality, nightmares, and isolation. [Tr. at 205-06]. She additionally testified that a child between the ages of ten and twelve was very unlikely to be able to maintain an untrue story over a period of two years. [Tr. at 216-17]. She additionally noted that the child's story might vary in some ways due to confusion but still be true. [Tr. at 218].

Emily Robinson, who is 15-years-old, and a sister of Amanda testified. [Tr. at 247]. She testified that when she was 12-years-old Petitioner would discuss "women's body parts" with her. [Tr. at 250]. Emily additionally recalled that Amanda stated that she hated Uncle Bob and wished that he had never lived. [Tr. at 259].

Jerry Robinson, Amanda's father testified. [R. at 261-62]. During the time that the asserted abuse occurred, Mr. Robinson testified that he was not aware that it had occurred. [Tr. at 267]. After he was told about the abuse, he recalled a conversation with his sister, Shirley (Petitioner's wife) in the summer of 1992. [Tr. at 267]. According to Mr. Robinson, Shirley asked him if Amanda had started her period because she had found blood on some sheets. [Tr. at 268]. Mr. Robinson did not specifically recall a time that Petitioner and Amanda were alone together but he testified that that was possible. [Tr. at 270].

Dr. Sharon Freeman, a pediatrician, testified. [Tr. at 290]. Dr. Freeman examined Amanda on November 13, 1992. [Tr. at 299]. Dr. Freeman noted that she conducted an initial interview with Amanda and that Amanda told her that Petitioner tore off Amanda's clothes and raped her. [Tr. at 301]. Dr. Freeman understood that Amanda had had several nightmares. [Tr. at 303]. Dr. Freeman confirmed that Amanda's physical exam indicated that she was not at the right stage of puberty to have begun her periods. [Tr. at 305]. Dr. Freeman additionally noted that Amanda or somebody had related to Dr. Freeman that Petitioner had threatened Amanda. [Tr. at 306]. The doctor also stated that Amanda told her that the sexual abuse had happened three times a week while she had been in Oklahoma. [Tr. at 308]. According to Dr. Freeman,

Amanda's physical examination indicated trauma which was consistent with Amanda's story of sexual abuse. [Tr. at 314, 322]. Dr. Freeman testified that the injury to Amanda would have resulted from an object penetrating her, that Amanda was not born with the injury, and that incidental trauma would not have resulted in the injury. [Tr. at 319-20]. On cross-examination, Dr. Freeman additionally stated that Amanda told her that while Petitioner raped her she screamed but nobody came to help her. [R. at 336]. Dr. Freeman concluded that Amanda's sexual abuse did occur but that she could not give a specific time period of when the abuse occurred. [Tr. at 341, 355].

Bill Stout, the deputy sheriff in Delaware County testified. [Tr. at 359]. He stated that he read Petitioner his rights before he talked to Petitioner. He testified that Petitioner told him that the girls were always trying to sneak around to watch him go to the bathroom when he went outside. [Tr. at 362]. According to Mr. Stout, Petitioner also stated that his nieces were all liars and thieves. [Tr. at 362]. Petitioner informed the deputy sheriff that the girls' brother was probably the individual who had raped her. [Tr. at 363]. The deputy sheriff admitted, on cross-examination, that the description which had been faxed to him of the perpetrator did not match Petitioner. [Tr. at 366].

Shirley Wagner, the wife of Petitioner, testified on behalf of Petitioner. [Tr. at 370]. She testified that she never saw blood on any of Amanda's clothing, bed sheets, or blankets. [Tr. at 377]. She additionally stated that she never saw Amanda's nightgown ripped. [Tr. at 379]. According to Ms. Wagner, her husband's pubic hair is

brown. [Tr. at 379]. Ms. Wagner testified that her husband would occasionally wake up and go to the bathroom but that was it. [Tr. at 391].

Petitioner testified. [Tr. at 404]. According to Petitioner he did not abuse Amanda in any way.

Sue Robinson testified for the state as a rebuttal witness. [Tr. at 463]. She stated that Petitioner used inappropriate language in front of the children. [Tr. at 471-73]. In addition, Ms. Robinson testified that Petitioner made a sexual advance towards her. [Tr. at 474]. In addition, she recalled a conversation with Shirley Wagner in which Ms. Wagner told her that Ms. Wagner had to ask Jerry Robinson to tell Amanda about menstruation because she had found blood on the sheets. [Tr. at 480].

Petitioner was found guilty by the jury. Punishment was set at fifteen years, five years suspended.

III. EXHAUSTION AND EVIDENTIARY HEARING

As a preliminary matter, a court must determine whether a Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by establishing that either (a) the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) the petitioner had no available means for pursuing a review of a conviction in state court at the time of the filing of the federal petition. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), *cert. denied*, 475 U.S. 1020 (1986).

In this case, Petitioner has already presented each of the issues which he asserts in his Petition before the highest state court. The Magistrate Judge concludes that Petitioner has exhausted his issues.

The granting of an evidentiary hearing is discretionary with the court. Because the issues raised by Petitioner can be resolved on the basis of the record, the Magistrate Judge declines to hold an evidentiary hearing. See Townsend v. Sain, 372 U.S. 293, 318 (1963), *overruled in part by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

IV. RECOMMENDATION REGARDING ALLEGED ERRORS

- A. The trial court's alleged error in granting the state's motion in limine did not deny petitioner his right to a fair trial.**

Petitioner notes the State erred in granting a motion in limine pertaining to evidence of prior accusations of child abuse involving Amanda's father, Jerry Robinson. Petitioner asserts that trial counsel had been furnished evidence from the District Attorney's office of accusations of child abuse by Jerry Robinson. Petitioner additionally asserts that he was improperly not permitted to question Jerry Robinson about the reason for the divorce between Jerry Robinson and Amanda's mother. Petitioner asserts that this evidence was relevant because it was evidence of child abuse. Petitioner argues that the trial court improperly denied the admission of this relevant evidence and therefore deprived him of a fair trial.

Respondent notes that the evidence had nothing to do with the allegations against Petitioner and did not involve allegations of sexual abuse, but were related to

neglect. Respondent additionally argues that charges were never filed, that Amanda's father was not convicted, and that the state court's decision not to admit the evidence was correct. Respondent finally asserts that Petitioner's issue does not rise to the level of a constitutional violation.

In Matthews v. Price, 83 F.3d 328, 331 (10th Cir. 1996), the Court of Appeals for the Tenth Circuit initially noted that issues concerning whether the state court properly admitted evidence pursuant to state law were not appropriate for the purpose of federal habeas review. The Court did address asserted Fifth and Fourteenth Amendment violations in connection with the refusal by the trial court to admit, in a sexual abuse case, evidence that another individual may have engaged in sexual acts with the asserted victim.

Alternatively, Mr. Matthews argues that the trial court's exclusion of the Cardenas boys' statements offends his rights under the Fifth and Fourteenth Amendments. We review due process challenges to state evidentiary rulings only for fundamental unfairness, see Donnelly v. DeChristoforo, 416 U.S. 637, 642, 94 S. Ct. 1868, 1871, 40 L. Ed. 2d 431 (1974); Hatch v. Oklahoma, 58 F.3d 1447, 1467 (10th Cir.1995), *petition for cert. filed*, (Jan 16, 1996) (No. 95-8361), an inquiry which hinges on the materiality of the excluded evidence to the defense, Maes v. Thomas, 46 F.3d 979, 987 (10th Cir.), *cert. denied*, --- U.S. ---, 115 S. Ct. 1972, 131 L. Ed. 2d 861 (1995). Furthermore, although state and federal rules of evidence are helpful in determining whether a defendant's constitutional rights were violated, on habeas corpus review we need not address the state or federal rules of evidence, see Hopkinson v. Shillinger, 866 F.2d 1185, 1200 (10th Cir.1989), *cert. denied*, 497 U.S. 1010, 110 S. Ct. 3256, 111 L. Ed. 2d 765 (1990); our inquiry is limited to whether the court's hearsay determinations deprived the defendant of his constitutional rights to due process and to compel

favorable testimony. See United States v. Valenzuela-Bernal, 458 U.S. 858, 867, 102 S. Ct. 3440, 3446, 73 L. Ed. 2d 1193 (1982).

Of particular importance to the propriety of excluding the hearsay testimony is the finding by both the trial court and the magistrate that the Cardenas boys had moved away from the neighborhood and therefore were not in the neighborhood at the time Mr. Matthews allegedly assaulted L. and T. Moreover, the statements of the Cardenas boys indicate that the alleged sexual assaults committed by Mr. Matthews' son occurred at a house where the Matthews family had lived prior to moving to the house where the sexual assaults committed by Mr. Matthews took place. The hearsay evidence sought to be introduced simply was not relevant in time or place to the charges against Mr. Matthews and therefore was not material to Mr. Matthews' defense. Cf. Maes, 46 F.3d at 987. Thus, the exclusion of the hearsay testimony was not fundamentally unfair. Cf. Hatch, 58 F.3d at 1467.

Id. at 331.

Similar to Matthews, the trial court concluded that the evidence was not relevant to the allegations against Petitioner. The allegations were of child neglect not sexual abuse, and the allegations were not filed or prosecuted. The exclusion of this testimony was not fundamentally unfair.

B. Alleged errors by the trial court in admitting improper hearsay testimony do not justify a writ of habeas corpus.

Petitioner asserts that the trial court improperly admitted hearsay testimony. Petitioner initially focuses on the testimony of Jenny Robinson, Amanda's mother. She testified that a counselor who had talked to Amanda informed Ms. Robinson that Amanda had told the counselor that Amanda had been molested. The trial court overruled an objection to the testimony noting without elaborating that the testimony was not offered for the truth of the matter asserted. Petitioner asserts that this testimony was clearly solicited solely for an improper purpose to prove that Amanda was assaulted.

Petitioner additionally objects to the testimony by Dr. Freeman about an interview that a social worker had with Amanda. Petitioner notes that Dr. Freeman testified that a social worker who interviewed Amanda noted something about Uncle Bob taking the kids onto a boat and sinking it. Petitioner asserts that the testimony concerning the alleged threats was improperly admitted to the jury and the medical records were never introduced into evidence.

Admission of hearsay statements implicates the Confrontation Clause. The Supreme Court has held that to protect a criminal defendant's Sixth Amendment and Fourteenth Amendment rights to confront witnesses, hearsay evidence is admissible only if the government shows (1) that the witness is unavailable, and (2) that the statement bears sufficient indicia of reliability. Ohio v. Roberts, 448 U.S. 56, 65-66 (1980). The Court in Roberts explained that "[r]eliability can be inferred without more

in a case where the evidence falls within a firmly rooted hearsay exception." Id. at 66. In cases where evidence does not meet a hearsay exception, the Court implied that other "particularized guarantees of trustworthiness" could justify admission. Id.

In determining whether Petitioner's Confrontation Clause rights were violated a court does not need to "address whether hearsay evidence was properly admitted under the [Oklahoma Evidence Code] or whether admission would have been proper under the Federal Rules of Evidence; rather our inquiry is whether the admission of hearsay evidence deprived [the defendant] of his rights under the Sixth Amendment to confront and cross-examine the witnesses against him." Hopkinson v. Shillinger, 866 F.2d 1185, 1201 (10th Cir.1989), *cert. denied*, 497 U.S. 1010 (1990).

Respondent initially asserts that the statement by Amanda's mother that the counselor informed her that Amanda told the counselor that she had been raped was not offered for the truth of the matter asserted but was offered to explain to what Amanda's mother attributed Amanda's behavioral changes. Petitioner does not respond to this argument.

If a statement is not offered for the truth of the matter asserted, it is not hearsay, and the Confrontation Clause is not implicated. Arguably, the statement was not admitted for the truth of its assertion. However, admitting it for the purpose of explaining what Amanda's mother attributed Amanda's behavioral changes to appears unnecessary. Amanda's mother's testimony regarding changes in behavior is relevant to establish that Amanda's behavior was consistent with the behavior of someone who has been raped. The Magistrate Judge is not convinced that testimony concerning

what Amanda's mother attributed the changes to is necessary. Arguably, therefore, the statement should not have been admitted. However, as discussed below, the Magistrate Judge concludes that even if the statement was improperly admitted, the admission was harmless.

Petitioner additionally complains that the doctor testified that she had been informed that Amanda stated that Petitioner would take Amanda and the other children to a boat in the middle of the lake and sink the boat. Respondent points out that Amanda was present at the trial and Petitioner had the opportunity and did cross-examine her concerning her statement concerning Petitioner's threat. Respondent asserts that no Confrontation Clause problems are presented.

Assuming the referenced statements were improperly admitted, Confrontation Clause violations are constitutional trial errors and are therefore subject to harmless error analysis.

A federal court reviewing a state court determination in a habeas proceeding should not grant relief unless the court finds the trial error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637(1993) (quoting Kotteakos v. United States, 328 U.S. 750 (1946)). To obtain relief for the error, the habeas petitioner must "establish that it resulted in 'actual prejudice.'" Brecht, 507 U.S. at 637 (citation omitted). Where a court "is in grave doubt as to the harmlessness of the error . . . the [habeas] petitioner must win." O'Neal v. McAnninch, 513 U.S. 432 (1995). We examine Miles's statement in light of the entire record to determine the error's possible effect on the jury. Tuttle v. Utah, 57 F.3d 879, 884 (10th Cir. 1995).

Crespin v. State of New Mexico, - F.3d -, 1998 WL 226269 (10th Cir., May 7, 1998) at 6-7. In this case, the Magistrate Judge concludes that any error was harmless.

Both statements about which Petitioner complains are statements which Amanda purportedly made to somebody. In this case, Amanda testified at trial and was cross-examined. Amanda testified that she was raped, and Amanda testified that Petitioner threatened her. Further, as discussed below, the record contains more than sufficient evidence to substantiate Petitioner's conviction. Based on the record and the two statements about which Petitioner complains, the Magistrate Judge concludes that Petitioner was not prejudiced by the admission of the statements, and the admission was harmless error.

C. Alleged prosecutorial misconduct does not justify a writ of habeas corpus.

Petitioner asserts that the prosecutor's conduct was improper and unduly prejudicial. Plaintiff asserts that as a result of the prosecutor's conduct he was denied a fair trial. Petitioner refers to the prosecutor's comments that the prosecutor would not have filed charges unless the prosecutor was convinced that the charges were true. Petitioner notes that such comments were highly prejudicial. Petitioner observes that his trial counsel failed to object to such comments, but argues that the prejudicial nature of the remarks constitutes clear error.

In analyzing whether a petitioner is entitled to federal habeas relief for prosecutorial misconduct, a federal court must determine whether there was a violation of the criminal defendant's federal constitutional rights which so infected the trial with unfairness as to make the resulting conviction a denial of due process.

Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); Coleman v. Saffle, 869 F.2d 1377, 1395 (10th Cir. 1989), *cert. denied*, 494 U.S. 1090 (1990). The factors considered in this due process analysis are: (1) the strength of the state's case; (2) whether the judge gave curative instructions regarding the misconduct; and, (3) the probable effect of the conduct on the jury's deliberative process. Hopkinson v. Shillinger, 866 F.2d 1185, 1210 (10th Cir. 1989), *cert. denied*, 497 U.S. 1010 (1990).

The Magistrate Judge has reviewed the trial transcript and the comments referenced by Petitioner. The Magistrate Judge concludes that the comments about which Petitioner complains do not rise to the level required to affect Petitioner's federal constitutional rights.

D. Petitioner's assertion that the evidence presented at trial was insufficient to sustain a conviction is not supported by the trial record.

Petitioner asserts that no rational trier of fact could find Petitioner guilty beyond a reasonable doubt. Petitioner argues that Amanda's testimony was inherently improbable, was not sufficiently corroborated, and was unworthy of belief. Petitioner additionally asserts that the trial court improperly overruled a motion to dismiss at the close of the State's evidence.

Petitioner refers to Oklahoma law and notes that evidence of a rape conviction may be reversed when the evidence is too inherently improbable to support a conviction without corroboration. Petitioner refers to Gamble v. State 576 P.2d 1184, 1186 (Okla. Cr. 1978). Petitioner notes that the medical evidence merely established

that a rape had occurred and did not establish who the perpetrator was. Petitioner additionally asserts that some evidence indicated that Amanda's father had abused her. According to Petitioner, the only corroborating testimony of blood on the sheets was contradicted by Petitioner and Petitioner's wife. Petitioner asserts that his wife was present with Amanda during the entire cookout and that he was not alone with her. Petitioner asserts that one of the incidents allegedly occurred while several other individuals were present in the room. Petitioner argues that the description of the perpetrator which was given to the deputy sheriff did not match Petitioner. Finally, Petitioner states that Amanda's testimony was contradicted because Amanda, on one occasion, stated that she screamed but later stated that she did not scream; because Amanda's description of Petitioner's penis differs from Petitioner's wife's description; because Amanda testified to only three incidents yet Dr. Freeman stated Amanda told her she had been raped three times each week, and because Amanda's testimony regarding whether or not her nightgown was ripped was contradictory.

A federal court, in reviewing a claim challenging the "sufficiency of the evidence" claim focuses on "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307 (1979). See also Wingfield v. Massie, 122 F.3d 1329, 1332 (10th Cir.1997). A court refers to state law for the "substantive elements" of the relevant criminal offense. Jackson, 443 U.S. at 324 n. 16. A claim based on sufficiency of the evidence is a mixed question of fact and law and is reviewed *de novo* on federal habeas. See Maes

v. Thomas, 46 F.3d 979, 988 (10th Cir.1995). "This standard 'gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" Wingfield, quoting Jackson, 443 U.S. at 319. The court must "accept the jury's resolution of the evidence as long as it is within the bounds of reason." Grubbs v. Hannigan, 982 F.2d 1483, 1487 (10th Cir.1993).

The Magistrate Judge has thoroughly reviewed the transcript and concludes that the record contains sufficient evidence to support the verdict. A medical doctor testified that her examination indicated that Amanda had been raped. Amanda testified that Petitioner raped her, and after the first time she was raped she bled. Amanda's mother testified that Amanda sometimes screamed in the middle of a nightmare for Petitioner to "stop it," that Amanda took frequent baths, and that Amanda's grades had dropped. A counselor testified that the behavior exhibited by Amanda was consistent with sexual abuse. Amanda's father testified that Amanda and Petitioner may have been alone during the cookouts but that he could not state for certain. Amanda's father stated that he had a conversation with his sister (Petitioner's wife) and she told him that she found blood on Amanda's sheets.^{1/} Ms. Robinson also testified that she had a conversation with Petitioner's wife and Petitioner's wife told her that she had found blood on the sheets. Both Amanda's mother and the medical doctor testified that Amanda had not yet begun menstruating.

^{1/} Petitioner's wife testified that she did not find blood on the sheets and that she did not have such a conversation with her brother, Amanda's father.

Petitioner asserts that the description of the "perpetrator" was given to the sheriff and the description did not match Petitioner. The sheriff did testify that he had a description which did not match Petitioner. The record contains nothing to suggest where this description originated. Amanda testified that Petitioner raped her. Amanda's mother, the counselor, and the doctor all testified that Amanda consistently referred to Petitioner as the rapist.

Petitioner's other asserted contradictions concern whether or not Amanda screamed, the color of Petitioner's penis, whether or not Amanda's nightgown was ripped, and whether or not Amanda told the doctor she was raped three times each week or three times over a period of two months. These references by Petitioner are simply not enough to establish that the record lacks sufficient evidence to support a conviction.

The Magistrate Judge concludes, after examining the record and the arguments advanced by Petitioner, that the record contains sufficient evidence to support the conviction.

CONCLUSION

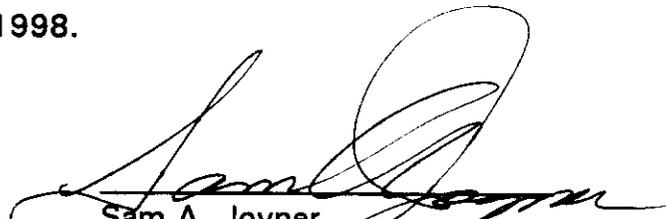
The United States Magistrate Judge recommends that Petitioner's Petition for a Writ of Habeas Corpus be **DENIED**.

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 19 day of June 1998.


Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

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

22 Day of June, 1998.

C. P. Talley, Deputy Clerk.

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

FILED

JUN 19 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHEILA BARNES,
SSN:451-29-6897,

Plaintiff,

v.

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

Defendant.

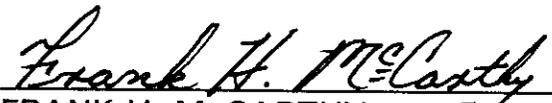
CASE NO. 97-CV-514-M ✓

ENTERED ON DOCKET

DATE JUN 22 1998

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 19th day of June, 1998.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

JUN 19 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHEILA BARNES,
451-29-6897

Plaintiff,

vs.

Case No. 97-CV-514-M

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

ENTERED ON DOCKET

DATE JUN 22 1998

ORDER

Plaintiff, Sheila Barnes, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.¹ 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

¹ Plaintiff's January 12, 1993, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held February 26, 1996. By decision dated March 22, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on April 18, 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.

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

Plaintiff was born November 8, 1960, and was 35 years old at the time of the hearing. She has a General Equivalence Diploma and formerly worked as a busboy, labeler, stocker/order puller and waitress. She claims to be unable to work since December 14, 1993, as a result of back and leg pain and headaches. The ALJ determined that although Plaintiff cannot perform her past relevant work, she has the residual functional capacity to perform a full range of sedentary work, subject to some mild back pain from former back surgery. Based on testimony of a vocational expert that mild back pain would not substantially reduce the sedentary unskilled jobs recognized in Appendix 2, Subpart P, Regulations No. 4, Section 201.00, the ALJ concluded that there exist occupations that Plaintiff can perform even with her limitations, therefore she is not disabled. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. See

Williams v. Bowen, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) failed to properly consider the evidence; (2) performed an inadequate credibility analysis; and (3) posed an improper hypothetical to the vocational expert.

Plaintiff listed 177 pages of "well-documented pages of medical evidence" which she claims the ALJ ignored. [Dkt. 7, p. 2, fn.1]. Contrary to Plaintiff's contention, quite a few of the pages listed are not medical evidence at all. Some are Social Security forms Plaintiff was required to fill out detailing her work history, identifying treating physicians, and describing her daily activities. [R. 112-119; 196-202; 205-217]. Most of the remaining pages are not relevant to a determination of whether Plaintiff was capable of performing work after December 14, 1993, because they predate the onset date. [R. 122-130 (1/91-12/92); 134-139 (12/92); 142-150 (3/92-2/93); 218-253 (1987-1991); 283-295 (12/92-8/93); 316-333 (1991); 350-363 (1989)]. And, some of the pages listed are duplicate copies of records that predate the onset date. [R. 298-302; 373-379]. The Court finds no error in the ALJ's failure to discuss these records.

Concerning the relevant time-frame, the ALJ cited Exhibits B-23 and B-24 and noted that Plaintiff was seen on October 12, 1994, for back pain; that an X-ray showed only *mild* degenerative disk disease at L5-S1; and that an October 17, 1994, MRI showed only a slight bulge without herniation at L5-S1. [R. 20]. He noted that the

medical record indicated Plaintiff complained of headaches on June 24, 1995, but that there was no objective evidence of treatment after that date. *Id.* The ALJ specifically noted the lack of treatment records from October 1994 until June 1995, and the further absence of treatment records after June 1995. [R. 22]. The Court finds that the ALJ adequately addressed the medical records related to the relevant time-frame.

There is no support for Plaintiff's claim that the ALJ failed to apply the appropriate standards in the evaluation of her pain and credibility. The Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ listed the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20 C.F.R. 404.1529(c)(3) and 20 C.F.R. 416.929(c)(3), and appropriately applied the evidence to those guidelines. [R. 21-22]. The Court finds that the ALJ evaluated the record, Plaintiff's credibility and allegations of pain in accordance with the correct legal standards established by the Commissioner and the courts.

Plaintiff claims the hypothetical question asked of the vocational expert failed to accurately detail her limitations. Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision. *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991). However, in posing a hypothetical question, the ALJ

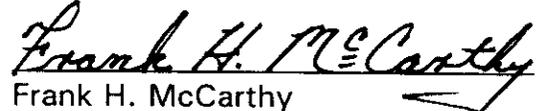
need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990).

The ALJ asked the vocational expert whether a 35 year old woman with the education and experience of Plaintiff, who experiences some mild back pain from time-to-time would be able to do work that exists in the economy at the sedentary level of exertion. [R. 62-63]. The vocational expert testified that jobs exist for such an individual. *Id.* The ALJ asked another question which included the limitation of headaches occurring from one to three times a month and of such a severity so as to be incapacitating for 2-3 days. The vocational expert answered that the excessive absences caused by such a condition would not preclude performance of work activity, but would preclude the ability to maintain an employment position. [R. 63-64].

According to the Plaintiff, the ALJ ignored the answer to the second hypothetical. However, it is clear that the ALJ did not accept as true that Plaintiff suffered headaches of the severity or frequency outlined in the second hypothetical question. In his decision, the ALJ noted that Plaintiff had not been to the hospital for a headache since 1993, and that she complained of headaches only once in the relevant time frame. [R. 22]. These observations are supported by the record. Therefore, the Court finds that the hypothetical question asked of the vocational expert and relied upon by the ALJ was proper.

The Court finds there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

SO ORDERED THIS 19th Day of June, 1998.


Frank H. McCarthy
United States Magistrate Judge

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

FILED

JUN 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JEANNE E. STEELEY,
SSN: 442-30-9406,

Plaintiff,

v.

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

Defendant.

CASE NO. 97-CV-29-M

ENTERED ON DOCKET

DATE JUN 22 1998

JUDGMENT

Judgment is hereby entered for Defendant and against Plaintiff. Dated
this 18th day of June, 1998.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

JUN 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JEANNE E. STEELEY,

Plaintiff,

vs.

Case No. 97-CV-29-M ✓

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

ENTERED ON DOCKET

DATE JUN 22 1998

ORDER

Plaintiff, Jeanne E. Steeley, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.¹ 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

¹ Plaintiff's May 2, 1991, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held August 11, 1994 and September 16, 1994. By decision dated June 26, 1995 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on November 8, 1996. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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 54 years old at the time of the hearing. She has completed the 9th grade and formerly worked as a housekeeper, apartment complex manager, retail clerk and bar maid. She is seeking widow's benefits and claims to be unable to work since June 17, 1990, as a result of back pain, problems with her arm and hand resulting from a fracture received in an automobile accident; and somataform disorder. The parties agree that under the applicable regulations, Plaintiff was required to demonstrate she was disabled on or before April 30, 1992.

The ALJ determined that although Plaintiff has no past relevant work, during the relevant period she was capable of performing the requirements of work except for repetitive reaching with the right hand, lifting greater than 20 pounds at a time, occasionally, or frequent exposure to extreme temperature changes or environmental pollutants. [R. 27]. Based on the testimony of the vocational expert, the ALJ determined that there are a significant number of jobs in the national economy that Plaintiff could perform with these limitations. 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).

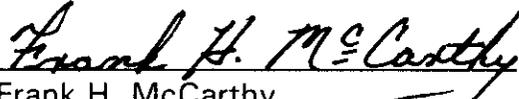
Plaintiff asserts that the ALJ's determination is not supported by substantial evidence because the ALJ "did not consider objective medical evidence of the effect of plaintiff's somatoform disorder on her pain and the increased limitation this disorder places on her ability to work." [Dkt. 15]. The Court finds that the ALJ's decision is supported by substantial evidence.

A medical expert reviewed Plaintiff's medical records and assessed her residual functional capacity. After hearing Plaintiff's testimony he recommended that a psychological evaluation be performed with attention to affective disorders or somatoform disorders. [R. 111]. In accordance with this recommendation, a psychological evaluation was performed by John W. Hickman, Ph.D. Psychological testing was consistent with the presence of a somatoform disorder and the presence of classical conversion symptoms. From a psychological viewpoint, it was Dr. Hickman's opinion that Plaintiff "is capable of engaging in most activities of daily living," although she may tend to use poor judgment in some situations. [R. 369]. He found no indication of any difficulties with concentration; that her ability to get along with others is somewhat hampered; and she is somewhat vulnerable to decompensation in a stressful work setting. *Id.*

Plaintiff alleges that the record depicts "a woman who has objective indications of conditions that might cause pain, and a psychological state that would magnify her perceptions of pain." [Dkt. 15, p. 3]. According to Plaintiff, the case should be remanded because the ALJ did not address the effects of her somatoform disorder on her perception of pain and therefore on her ability to work. Contrary to the Plaintiff's allegations, the ALJ noted the examiner's impression that the claimant has a somatoform pain disorder. [R. 23]. However, the ALJ also noted that the only pain medication Plaintiff takes is over-the-counter Tylenol and that there is no evidence of continuing pain-relief efforts that would indicate that Plaintiff was suffering debilitating pain. [R. 24]. He also discounted Plaintiff's testimony due to inconsistencies between Plaintiff's testimony and the record. [R. 25]. The Court finds that the ALJ evaluated the record, Plaintiff's credibility, and allegations of pain in accordance with the correct legal standards established by the Commissioner, 20 C.F.R. 404.1529(c), 20 C.F.R. 416.929(c)(3), and the Courts, *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987).

The Court finds there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

SO ORDERED THIS 18th day of June, 1998.


Frank H. McCarthy
United States Magistrate Judge