

motions to dismiss for forum non conveniens are hereby GRANTED. Defendants' waiver of the statute of limitations, however, shall be conditioned upon plaintiff, Interfab's, instituting this action in a Norwegian court prior to September 1, 2000.

IT IS SO ORDERED this 16th day of October, 1998.



H. DALE COOK

Senior United States District Judge

Donna L. Smith

Donna Smith, OBA #12865
LOGAN & LOWRY, LLP
101 South Wilson Street
P.O. Box 558
Vinita, Oklahoma 74301
Telephone: (918) 256-7511
Facsimile: (918) 256-3187

ATTORNEY FOR DEFENDANT,
HOME OF HOPE, INC.

CERTIFICATE OF MAILING

This is to certify that on this 15th day of ~~September~~ ^{October}, 1998, a true and correct copy of the above and foregoing was mailed, via U.S. Mail, to the office of the following counsel of record:

Gerald R. Lee
117 S. Adair
P.O. Box 1101
Pryor, Oklahoma 74362

Donna L. Smith

recommends that the Bankruptcy Court's decision be **AFFIRMED** in part and **REVERSED** in part...

I. FACTS AND PROCEDURAL BACKGROUND

Retail Marketing Company filed a voluntary petition for bankruptcy under Chapter 11 on September 27, 1991. The case was converted to Chapter 7.

Dills' Action in State Court

On December 16, 1993, the Dills filed a Petition in state court asserting causes of action against Southland Corporation ("Southland"), Contemporary Industries Southern, Inc. ("CIS"), and Retail Marketing Corporation ("RMC"). The Dills asserted that they had acquired franchise rights from RMC in an assignment dated August 14, 1990. The franchise agreement was for a term of fifteen years. In their Petition, the Dills noted that in 1992 or 1993 RMC and CIS entered into negotiations for CIS to acquire certain assets of RMC. The Dills stated that at a hearing on March 19, 1992^{1/}, the Bankruptcy Judge granted, over the objection of the Dills, an oral motion to reject the Dills' franchise agreement. According to the Dills, within 48 hours of the termination of the franchise agreement, representatives of CIS, acting as agents for RMC, ordered the Dills to vacate the franchise store and relinquish possession to CIS. The Dills assert that CIS currently operates the store as a corporate-owned store and does not have an agreement with Southland. The Dills sued for intentional interference with prospective economic advantage, intentional interference with contractual

^{1/} The Appellees indicate this date as March 19, 1993.

relations, breach of contract, bad faith termination of contract, breach of duty to a third party beneficiary, and intentional infliction of emotional distress.

The state court action was removed to federal court, transferred to the Northern District of Oklahoma, and referred to the Bankruptcy Court.

Motions for Bankruptcy Court to Abstain or Transfer to State Court

On April 4, 1994, the Dills filed a "Motion to Abstain and Brief in Support." The Dills requested that the Bankruptcy Court abstain from hearing the action because it was a non-core proceeding, because the Dills had requested a jury trial, and because RMC was no longer a party to the action.

By Order dated May 26, 1994, the Bankruptcy Court concluded that the proceeding was a core proceeding. The Dills' motion to abstain was denied. In addition, by Order dated May 26, 1994, the Bankruptcy Court found that the Dills had a claim against RMC's bankruptcy estate for the breach of the Dills' franchise agreement. The Court noted that the Dills' claim would be in the amount reflected on the Amended Proof of Claim filed by Dill against the RMC estate, and that such claim, once determined, would constitute an unsecured claim against the bankruptcy estate of RMC.

The Dills appealed to the District Court. By Order dated September 15, 1994, the District Court concluded that by "filing a proof of claim the Plaintiffs submitted themselves to the jurisdiction of the Bankruptcy Court." The District Court noted that, upon review of the record, it could find nothing "to indicate that state claims herein require abstention or remand to state court because of their unique nature."

The Bankruptcy Court Memorandum Opinion

The Bankruptcy Court entered an Order on December 16, 1996, denying the claims of the Dills against Southland. A Memorandum Opinion was also filed on December 16, 1996. The Court noted that Southland owns and operated 7-Eleven franchises. The Court observed that the Dills initially became associated with 7-Eleven when Dill was employed by MAKO, a 7-Eleven area licensee. MAKO filed for Bankruptcy in 1988. Pursuant to a liquidation plan, RMC purchased MAKO's assets.

The Bankruptcy Court noted that after the acquisition of the MAKO assets, RMC entered a new Area License Agreement with Southland on August 9, 1989. RMC was given the right to use trademarks and trade names, and Southland could terminate the contract only for a material breach after written notice and an opportunity to cure had been given.

The Bankruptcy Court found that on December 1, 1989, RMC and Peaches, Inc. (the lessor of the Chandler Road Store) entered a new lease which included the Chandler Store and three other sites. One year after RMC purchased Mako's assets, on August 6, 1990, Dill entered a contract with LPD^{2/} to purchase all rights to the Chandler store. Dill was to make an initial payment and subsequent monthly payments of \$1,000 for 66 months. The contract provided that in the event of RMC's bankruptcy, if Dill did not retain the Chandler store, any additional installment

^{2/} According to the Bankruptcy Court on July 6, 1986, MAKO entered an agreement with LPD to sub-lease the Chandler store to LPD.

payments would be excused. RMC consented to the transfer of the franchise from LPD to Dill.

The Bankruptcy Court noted that RMC filed a Bankruptcy Petition on September 27, 1991. On January 24, 1992, RMC filed a motion to sell its assets. In February of 1993, RMC entered a written agreement to sell substantially all of its assets to CIS. CIS indicated it would not acquire certain stores and on March 4, 1993, filed a motion to reject the unexpired sub-lease with Peaches, which included the Chandler Road Store (the Dills' store).

The Bankruptcy Court held a hearing on RMC's motion to reject the Peaches sub-lease on March 19, 1993. The Dills appeared. The Bankruptcy Court granted RMC's Motion to reject the sub-lease. RMC additionally requested that the Court permit RMC to reject the store franchise agreement with the Dills because no store lease existed for the Dills to operate. The Bankruptcy Court granted that motion.^{3/}

On April 8, 1993, RMC filed a supplement to its motion to sell assets. Substantially all assets would be sold to CIS, including the assignment of RMC's area license agreement with Southland. The Bankruptcy Court approved the sale of RMC's assets to CIS on May 7, 1993.

The Bankruptcy Court additionally noted that the Dills filed an adversary proceeding against RMC, Southland, and CIS, and that the Dills settled their claims against CIS for \$50,000. In addition, because the Dills lost the Chandler store, the

^{3/} Defendant notes that the Bankruptcy Court approved RMC's rejection and termination of the lease for Dills' store, and that the Muskogee store was not an asset which was sold to CIS. Defendant states that the lease was terminated; the franchise was rejected; and the real property was abandoned to the landlord.

Dills were excused from paying any remaining installment payments (totaling \$33,000).

II. THE BANKRUPTCY COURT DID NOT ERR IN DECLINING TO REMAND THE DILLS' ACTION TO STATE COURT

The Dills assert that a bankruptcy court may consider equitable grounds to determine whether or not to remand a case, including the degree to which the action relates to the main bankruptcy proceeding and the extent to which state law issues predominate.^{4/} In this case, the Dills assert that the state law issues predominate and the bankruptcy is only remotely related to the Dills' proceeding. The Dills assert that the Bankruptcy Court therefore erred in declining to remand the action to state court.

This issue was addressed by the Bankruptcy Court, appealed by the Dills' to the District Court, and the District Court (Judge Ellison) noted that it found "nothing on this record to indicate that state claims herein require abstention or remand to state court because of their unique nature." See Order of the District Court, filed September 15, 1994 in the District Court, and November 3, 1994 in the Bankruptcy Court. The District Court denied the Plaintiffs' motion to appeal the decision of the Bankruptcy Court. The Magistrate Judge recommends that the District Court reach the same conclusion this time and affirm the decision of the Bankruptcy Court not to remand the

^{4/} Appellants do not assert that any error was committed with regard to 28 U.S.C. § 1334(c)(2). This provision was amended on October 22, 1994. Appellants first request for remand was filed January 10, 1994.

case to state court.^{5/} The District Court, in reaching its decision, was persuaded by the reasoning of the court in In Re Franklin, 802 F.2d 324 (9th Cir. 1986).

Appellants refer to Thomasson v. Amsmouth Bank, N.A., 59 B.R. 997 (N.D. Ala. 1986). In Thomasson, the plaintiffs requested that the case be remanded to the state court. The Court noted:

This case was removed pursuant to 28 U.S.C. § 1452(a). Section 1452(b) of Title 28 states: "The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise." Equitable grounds include: (1) forum non conveniens; (2) a holding that, if the civil action has been bifurcated by removal, the entire action should be tried in the same court; (3) a holding that a state court is better able to respond to questions involving state law; (4) expertise of the particular court; (5) duplicative and uneconomic effort of judicial resources in two forums; (6) prejudice to the involuntarily removed parties; (7) comity considerations; and (8) a lessened possibility of an inconsistent result. See Browning v. Navarro, 743 F.2d 1069, 1076 n.21 (5th Cir.1984).

The court concluded that the action should be remanded to state court. The court noted that the state court had previously considered issues in the case (in an injunction proceeding), that the state court was a more convenient forum, and that the doctrines of comity and absence favored the state court forum.

^{5/} Appellee asserts that because of the prior decision of the Bankruptcy Court, that this issue is *res judicata*. Appellant notes that the prior appeal was interlocutory and therefore not final. Appellee additionally asserts that the District Court decision was not a decision on the merits, but instead was addressed to whether or not Appellant could appeal.

Unlike Thomasson, in this case, the state court has not previously addressed issues. Rather, the Bankruptcy Court noted that this equitable factor weighed in favor of retaining the case in the Bankruptcy Court because the Court was familiar with the issues. In addition, as pointed out by the Bankruptcy Court, the basis of the state law claims was the action of the Bankruptcy Court in permitting the debtor to reject the Dills' franchise agreement.

The Dills additionally reference In re Southern Technical College, Inc., 144 B.R. 421 (E.D. Ark 1952). The court noted numerous factors which a court should consider in determining whether to remand an action to state court based on equitable grounds. These factors include whether:

(1) there is duplication of judicial resources or uneconomical use of judicial resources; (2) the remand will adversely affect the administration of the bankruptcy estate; (3) the case involves questions of state law better addressed by a state court; (4) there are comity considerations; (5) there is prejudice to unremoved parties; (6) the remand lessens the possibility of inconsistent results; and (7) the court where the action originated has greater expertise. . . . Additional factors include: (1) the jurisdictional basis, if any, other than 28 U.S.C. S 1334; (2) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (3) the substance rather than the form of the asserted 'core' proceeding; (4) the feasibility of severing state law claims from core bankruptcy matters to allow judgment to be entered in state court with enforcement left to the bankruptcy court; the burden of the bankruptcy court's docket; (5) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; and (6) the presence of nondebtor parties.

Id. at 422 (citations omitted). Consideration of these factors does not lead to the conclusion that the Bankruptcy Court erred in failing to remand this action to state court.

Dills' argument is that the Bankruptcy Court erred in failing to remand this action to state court. The Dills refer to and rely on equitable reasons to support Dills' contention that this action should have been remanded. The Dills' claims against Southland, RMC, and CIS^{6/} stem from the rejection by RMC, in Bankruptcy Court, of the Dills' franchise agreement. The Magistrate Judge, having reviewed the record, recommends that the District Court affirm the decision of the Bankruptcy Court to retain the state law claims.

III. THE BANKRUPTCY COURT ERRED IN DENYING DILLS A JURY TRIAL

The Dills assert that their action was initially filed in state court, and that they demanded a jury trial. The Dills claim that merely by filing a proof of claim against RMC, although they might have given up their right to a jury trial with respect to RMC, they did not lose their right to a jury trial as to Southland.

Southland asserts that Dill filed a proof of claim and therefore acquiesced to the jurisdiction of the Bankruptcy Court and lost any right to a jury trial. Southland relies on Langenkamp v. Culp, 498 U.S. 42 (1990).

The case law is clear that by filing a proof of claim, the party filing loses the right to a jury trial as to that debtor. However, the case law does not extend as far

^{6/} The Dills settled with and dismissed CIS, and entered into an agreement with RMC.

as Appellee urges. Appellee has not cited and the Court has not located cases which hold that by filing a proof of claim with respect to the debtor, the Dills lose their right to a jury trial as to any and all other potential parties to the prior state court action.

Appellee's other argument is that the principal/agent issue, which the Dills assert entitles them to a jury trial, is only one element of a larger issue which was whether or not the Dills had an allowed claim in RMC's bankruptcy. Appellee's assert that determination of this issue was a threshold issue. However, the Memorandum Opinion of the Bankruptcy Court is devoted to the principal/agent issue. In addition, the Dills have asserted separate state law claims against Southland.

The Magistrate Judge concludes that the Bankruptcy Court improperly denied the Dills their right to a jury trial. The Magistrate Judge recommends that the District Court reverse the decision of the Bankruptcy Court.

IV. RECOMMENDATION

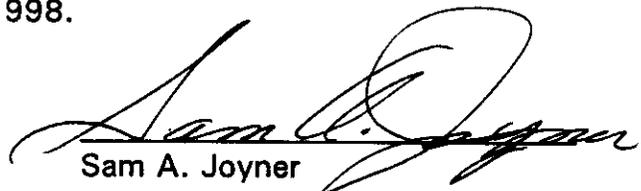
The Magistrate Judge recommends that the District Court affirm in part and reverse in part the decision of the Bankruptcy Court. The Magistrate Judge recommends that the District Court affirm the decision of the Bankruptcy Court to decline to remand this action to state court.^{7/} The Magistrate Judge further recommends that the District Court reverse the decision of the Bankruptcy Court due to the Bankruptcy Court's failure to afford the Dills a jury trial.

^{7/} The Magistrate Judge notes that due to the passage of time the equitable considerations contemplated by the Bankruptcy Court may have changed. This recommendation is not intended to prohibit future consideration of whether or not the Bankruptcy Court should retain this action.

V. OBJECTIONS

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

Dated this 16 day of October 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 19th Day of October, 1998.
C. Kothelly, Deputy Clerk

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

LISA COOKSON,)
)
 Plaintiff,)
 v.)
)
 EUGENE R. HALL, d/b/a/)
 CAVECO, and AIRBORNE)
 EXPRESS, d/b/a AIRBORNE)
 FREIGHT CORP.,)
)
 Defendants.)

ENTERED ON DOCKET

DATE 10-19-98

Case No. 97-CV-583-H ✓

FILED

OCT 16 1998 *J*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on Defendant Eugene R. Hall's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Docket # 12) and Defendant Airborne Express's Motion to Dismiss Plaintiff's Amended Complaint for Lack of Jurisdiction (Docket # 16). By order dated August 11, 1998, the Court ruled that these motions would be treated as motions for summary judgment and granted the parties one month to complete limited discovery relating to the jurisdictional issues. The parties have fully briefed the issues, and in accordance with the Court's Order of August 11, 1998 Plaintiff filed a supplemental response to Defendants' motions on September 18, 1998.

In this lawsuit, Plaintiff alleges she was terminated by Defendants Hall and Airborne Express in violation of Title VII. Defendant Hall seeks dismissal of this claim on the basis that he is not an "employer" as defined by 42 U.S.C. § 2000e(b), and that this Court therefore lacks jurisdiction. Similarly, Defendant Airborne Express seeks dismissal of this claim on the basis that Ms. Cookson was not its "employee" as is required to sustain a claim under the Act, see 42 U.S.C. § 2000e(f), relying on the Tenth Circuit's recent opinion Zinn v. McKune, 143 F.3d 1353

29

(10th Cir. 1998). Plaintiff responds that she has presented sufficient evidence to establish she was an employee of Defendant Airborne Express under the standard set forth in Zinn, and that she has adduced evidence which establishes Defendants Hall and Airborne Express were an integrated enterprise for purposes of Title VII. See, e.g., Lambertsen v. Utah Dept. of Corrections, 79 F.3d 1024, 1029 (10th Cir. 1996).

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).

The Court first addresses Defendant Hall's contention that he is not an "employer" subject to the requirements of Title VII. For purposes of Title VII, an employer is "a person who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person[.]" 42 U.S.C. § 2000e(b). A defendant's status as an employer under Title VII is jurisdictional. See Zinn, 143 F.3d at 1356; Owens v. Rush, 636 F.2d 283, 287 (10th Cir. 1980). In his affidavit, Defendant Hall sets forth admissible evidence which establishes that CAVECO has never employed the number of employees required to establish employer status under section 2000e(b). Ms. Cookson did not rebut this assertion with admissible evidence in either of her submissions to this Court. Accordingly, the Court finds that Defendant Hall is not an "employer" as defined by 42 U.S.C.

§ 2000e(b) and is therefore not subject to this Court's jurisdiction.¹

The Court next turns to Defendant Airborne Express's Motion to Dismiss. Airborne Express does not dispute that it is an employer as defined by 42 U.S.C. § 2000e(b), but instead asserts that Ms. Cookson was not its employee as is required by 42 U.S.C. § 2000e(f). The parties agree that the common-law agency principles set forth in Lambertsen v. Utah Dept. of Corrections, 79 F.3d 1024 (10th Cir. 1996), and Zinn v. McKune, 143 F.3d 1353 (10th Cir. 1998). Zinn provides in pertinent part:

Though the main focus of . . . [this] inquiry is whether and to what extent a putative employer has the right to control the means and manner of the worker's performance, other factors inform the analysis, including (1) the kind of occupation at issue, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the employer or the employee furnishes the equipment used and the place of work; (4) the length of time the individual has worked; (5) the method of payment, whether by time or by job; (6) the manner in which the work relationship is terminated; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the employer; (9) whether the worker accumulates retirement benefits; (10) whether the employer pays social security taxes; and (11) the intention of the parties.

Zinn, 143 F.3d at 1357 (quotations and citations omitted).

Airborne Express contends that Zinn is "practically indistinguishable" from the instant case. See Defendant Airborne Express's Reply Brief filed July 22, 1998, at 3. The Court disagrees. Although as in Zinn, the relationship between CAVECO and Airborne Express is contractual in nature, in Zinn the means of control relied upon were derived from and necessary to

¹ The Court finds unavailing Ms. Cookson's alternative argument that Hall was an employer for purposes of Title VII because Hall and Airborne Express were an integrated enterprise, as Ms. Cookson has not presented any evidence which would support such a finding. See Evans v. McDonald's Corp., 936 F.2d 1087, 1089-90 (10th Cir. 1991).

the contractual relationship between the Utah Department of Corrections and Prison Health Services. See Zinn, 143 F.3d at 1357-59. Ms. Cookson has adduced admissible evidence which indicates Airborne Express controlled the means and manner of her performance beyond the requirements set forth in the Cartage Agreement executed by Defendant Hall. For example, Ms. Cookson reported directly to Airborne Express managers on a daily basis and had to follow Airborne's "check-out" procedures before being released from her duties. In short, based on the record and the authorities presented in the parties' original and supplemental briefs, Ms. Cookson has adduced admissible evidence from which a reasonable jury could find she was an employee of Airborne Express. See id. at 1359.

Accordingly, Defendant Eugene R. Hall's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Docket # 12) is hereby granted. Defendant Airborne Express's Motion to Dismiss Plaintiff's Amended Complaint for Lack of Jurisdiction (Docket # 16) is hereby denied.

IT IS SO ORDERED.

This 16th day of October, 1998.


Sven Erik Holmes
United States District Judge

DATE 10-19-98

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

WILLIAMS COMMUNICATIONS, INC.,)
)
 Plaintiff(s),)
)
 vs.)
)
 DRIVER PIPELINE CO., INC.,)
)
 Defendant(s).)

Case No. 98-CV-583-K(J)

F I L E D

OCT 19 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

REPORT AND RECOMMENDATION

Defendant filed a Motion to Dismiss Plaintiff's Complaint for Improper Venue, or in the Alternative to Transfer to the Eastern District on August 26, 1998. [Doc. Nos. 3-1, 3-1]. Defendant initially asserts that venue in this District is improper. Defendant additionally asserts that the forum in which Plaintiff has sued is an inconvenient forum and this action should be transferred to Texas. Plaintiff argues that venue is proper and that this District is not an inconvenient forum. The District Court referred Defendant's Motion to the Magistrate Judge on September 22, 1998. The Magistrate Judge recommends that the District Court **DENY** Defendant's Motion for Improper Venue [doc. no. 3-1], and **GRANT** Defendant's Motion to Transfer to the Eastern District of Texas [doc. no. 3-2].

Plaintiff filed a Motion to Dismiss Defendant's allegations of fraud based on the failure of Plaintiff to plead such complaint with particularity. Defendant responded that Defendant would file an amended complaint. According to Defendant, Plaintiff had no

15

objection to Defendant's filing of a more particular complaint. The Magistrate Judge recommends that the District Court find the Motion to Dismiss **MOOT**. [Doc. No. 6-1].

I. FACTS AND PROCEDURAL BACKGROUND

Defendant, Driver Pipeline Co., Inc. ("Driver"), is a Texas corporation with its principal place of business in Texas. Plaintiff, Williams Communications, Inc. ("Williams"), is a Delaware corporation with its principal place of business in Tulsa, Oklahoma.

Williams and Driver entered a contract in which Driver was to supply personnel and equipment necessary to bore beneath the Neches River in Texas to permit fiber optic cable to be placed under the river. According to Williams, Driver began work on May 9, 1998, and was to complete the project within 25 days. Williams asserts that Driver did not complete the work required by the contract and withdrew from the worksite on May 30, 1998.

Williams obtained a second contractor to complete the work. According to Williams the other contractor finished the project in four days.

Williams claims that Driver requested payment from Williams of costs and damages it incurred in performing services pursuant to the contract in the sum of \$270,000. Williams contends that it has no obligation to pay Driver for any labor or costs because Driver did not complete the work required by the contract, and Williams was obligated to pay only if Driver completed the work.

Williams filed a declaratory judgment action requesting that the Court find that due to Driver's actions and omissions and Driver's failure to complete the work

required by the contract, that Williams has no obligation to compensate Driver for any sums. Williams also requests attorneys fees.

Driver filed a Motion to Dismiss claiming that venue in this District is improper and asserting that this District is an inconvenient forum.

II. IMPROPER VENUE

Defendant initially asserts that venue in this Court is improper because few events or omissions giving rise to the claim on which this litigation is based occurred in this judicial district. Defendant refers to 28 U.S.C. § 1391(a). Defendant observes that venue is proper only in the judicial district where the defendant resides, or the judicial district in which a substantial part of the event or omissions giving rise to the claim occurred, or in the district where the defendant is subject to personal jurisdiction at the time the action is commenced.

Plaintiff responds to Defendant's motion by noting that, for the purpose of determining venue, Defendant is deemed to reside within this judicial district because 28 U.S.C. § 1391(c) provides that a corporate defendant is deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. Plaintiff notes that Driver has made no objection to personal jurisdiction in this Court and has therefore waived any defense to an assertion that this Court lacks personal jurisdiction. Plaintiff therefore concludes that venue is appropriate in this judicial district.

Although Plaintiff filed a reply brief, Plaintiff did not address this argument. The Magistrate Judge concludes that Plaintiff, by failing to object to personal jurisdiction

in this judicial district, is deemed to reside within this judicial district and venue is therefore proper.

III. FORUM INCONVENIENS

A. UNDERLYING FACTS

Defendant is a Texas corporation located and doing business in Texas. Plaintiff is a Delaware corporation with its principal place of business in Oklahoma. In May 1998, Plaintiff and Defendant entered into a contract for Defendant to bore a tunnel under the Neches River in Jasper County, Texas. Defendant began working on the project on May 9, 1998. Plaintiff asserts that Defendant never completed the project and Plaintiff had to hire a separate company to complete the project.

Defendant asserts that the negotiations of the contract between the parties were conducted by Defendant from Defendant's Dallas, Texas office through telephone and e-mail. The contract was to be performed in Jasper County, Texas, which is in the Eastern District of Texas. Defendant asserts that meetings regarding the planning and execution of the project occurred at Plaintiff's office in Lumberton, Texas. Defendant asserts that Plaintiff served as general contractor on the project and that representatives and agents of Plaintiff were at the project site on a daily basis. Defendant notes that payments on the contract were to be made at Defendant's Dallas, Texas office.

According to Defendant, substantially all of the witnesses who would testify in this litigation are located within the District Court for the Eastern District of Texas. Defendant notes that several witnesses would not be subject to compulsory process

in the Northern District of Oklahoma. Defendant notes that the testimony of Lyle E. Girouard, Chief Financial Officer of Ranger Direction Inc. will be necessary and that he is subject to compulsory process in Texas but not in the Northern District of Oklahoma. Defendant similarly refers to Douglas G. Hulter of the National Park Service, who Defendant maintains may be served in Texas but not in the Northern District of Oklahoma. Defendant additionally references Mark H. Gagliano of Coastal Environments. According to Defendant, Mr. Gagliaono, who lives in Baton Rouge, Louisiana is not subject to compulsory process in the Eastern District of Texas or the Northern District of Oklahoma. Defendant additionally asserts that contract and tort issues involve Texas law.

Plaintiff states that Defendant made phone calls to Tulsa to talk to representatives of Plaintiff. Plaintiff notes that Plaintiff mailed the contract to Defendant, that Defendant signed and mailed the contract back to Plaintiff, and that Plaintiff then signed and executed the contract. Plaintiff states that the decision to refuse to pay Defendant for the work which Defendant did not complete was made in Tulsa.

Plaintiff identifies Robert Jackson, Jerry Poplin, and Fred Lawler as potential witnesses. Each of these witnesses are employed by Plaintiff and live in this Court's District. Plaintiff also identifies Richard Korgan, a Louisiana resident as a potential witness. Robert McKenzie, an inspector and an Oklahoma resident, and Wayne Johns, a field representative and a Louisiana resident are additionally identified as potential witnesses.

Plaintiff additionally asserts that Oklahoma law applies to the contract action. Defendant counters that the Oklahoma contract interpretation issue is fairly standard, but the case also involves a unique tort counterclaim which is based on Texas law and is confusing.

B. FACTORS FOR CONSIDERATION

The Tenth Circuit Court of Appeals identified several factors for consideration by the court in determining whether or not to transfer a case to a more "convenient" forum.

Among the factors [a district court] should consider is the plaintiff's choice of forum; the accessibility of witnesses and other sources of proof, including the availability of compulsory process to insure attendance of witnesses; the cost of making the necessary proof; questions as to the enforceability of a judgment if one is obtained; relative advantages and obstacles to a fair trial; difficulties that may arise from congested dockets; the possibility of the existence of questions arising in the area of conflict of laws; the advantage of having a local court determine questions of a practical nature that make a trial easy, expeditious and economical.

Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509 (10th Cir. 1991).

1. Plaintiff's Choice of Forum

One factor for the Court's consideration is the plaintiff's choice of forum. This action, however, is a declaratory judgment action. The Plaintiff is requesting that the Court determine, based on the contract, that Plaintiff does not have to pay Defendant. Defendant asserts that they are the "true Plaintiff." Although a plaintiff is entitled, to some degree, to a choice of forum, under the circumstances of this case, the named

Defendant is the more "traditional Plaintiff." Consequently, the Magistrate Judge does not give substantial weight to the named Plaintiff with regard to their choice of forum.

2. Accessibility of Witnesses Including Compulsory Process

Defendant is located in Texas and notes that substantially all of the witnesses who would testify are located within the District Court of the Eastern District of Texas. Defendant identifies Mr. Girouad and Mr. Hutler who are not employees of Defendant but who are subject to service of process in the Eastern District of Texas. Defendant additionally identifies Mr. Gagliano who Defendant notes lives in Baton Rouge, Louisiana and is not subject to compulsory process in the Eastern District of Texas but who lives closer to that district than to the Northern District of Oklahoma.

Plaintiff has identified three employees of Williams who are "located in Tulsa" who probably will testify in the litigation. Plaintiff has additionally identified Mr. Korgan, a Louisiana resident, Mr. McKenzie an Oklahoma resident, and Mr. Johns a Louisiana resident, as potential witnesses. Plaintiff has not stated whether any of these individuals are subject to service of process in the Eastern District of Texas. The only individuals Plaintiff identifies as being amenable to process in this District but as being outside of the scope of service of process in the Eastern District of Texas are the three Williams employees.^{1/} Plaintiff has some degree of control over their own employees. Certainly the individuals residing in Louisiana are closer to the Texas forum.

^{1/} Plaintiff identifies one other "Oklahoma resident" as potential resident but does not state whether or not that individual is subject to service of process in this District.

3. Determination of law by a "local court"

Plaintiff asserts that this case involves the interpretation of Oklahoma contract law and therefore this Court is the better forum. Defendant notes that although Oklahoma contract law is involved the contract issues are not novel or unique. Defendant additionally asserts that Defendant's tort counterclaim, which is based on Texas law and involves the negligent performance of contractually created rights, is unique and is a "muddy" area. Defendant asserts that the Texas forum is therefore more appropriate.

IV. RECOMMENDATION

The Court has reviewed the various factors discussed by the parties.^{2/} The contract was performed in Texas. Defendant is located in Texas. Plaintiff had inspectors at the contract site in Texas on a daily basis. Plaintiff has an office in Texas where some of the contract negotiations occurred. The majority of the witnesses reside in Texas or Louisiana. Of the four witnesses listed by Plaintiff who reside in Oklahoma, three are employees of Plaintiff. The case involves interpretation of both Oklahoma law and Texas law, but Defendant contends the Texas law issues are more complex. Based on all of these factors, the Magistrate Judge recommends that the District Court grant Defendant's Motion to Transfer this Case to the Eastern District of Texas. [Doc. No. 3-2].

^{2/} Plaintiff additionally states that Defendant failed to provide adequate details as to the potential testimony of principal witnesses, etc. The Magistrate Judge believes that the information provided by the parties is sufficient to reach a conclusion that Texas is the more convenient forum. See Gschwind v. Cessna Aircraft Co., 1998 WL 654171 (10th Cir. Sept. 18, 1998) *7, citing Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

The Magistrate Judge additionally recommends that the District Court **DENY** Defendant's Motion to Dismiss for improper venue [doc. no. 3-1], and find Plaintiff's Motion to Dismiss for failure to plead fraud with particularity **MOOT**.

OBJECTIONS

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

Dated this 19th day of October 1998.

CERTIFICATE OF SERVICE

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

19 Day of October, 1998.

A. Schwelke


Sam A. Joyner
United States Magistrate Judge

ENTERED ON DOCKET
DATE 10-19-98

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

BECKY ROBERTS,)
)
Plaintiff,)
)
vs.)
)
FARMERS INSURANCE COMPANY,)
INC.,)
Garnishee.)

No. 97-C-870-K **FILED**

OCT 16 1998 *P*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the Motion of the Garnishee, Farmers Insurance Company Inc. (Farmers), for Summary Judgment. Plaintiff Becky Roberts brought this garnishment action against Farmers seeking payment of a judgment by Farmers on behalf of its insured, Allen W. Roberts, Plaintiff's husband.

I. Statement of Facts

The Insurance Policy:

In April 1994, Allen Roberts owned a homeowners' insurance policy issued by Farmers. The policy listed the insured address as 804 Maxwell, Mounds, Oklahoma. The Agreement Section of the policy stated: "We will provide the insurance described in this policy. In return you will pay the premium and comply with all policy provisions." The policy referred to both the named insured and his spouse, if the spouse was a resident of the same household, as "you" or "your". The policy defined "insured" as: "you and the following persons if permanent residents of your household...your relatives...." Other relevant policy provisions provided:

Residence Premises- *means the one or two family dwelling and separate structures or that part of any other building where you reside, and which is shown in the Declarations. Under Section II-Liability, residence premises includes the grounds on which the dwelling and separate structures are located.*

SECTION II EXCLUSIONS

Applying To Coverage E-Personal Liability

We do not cover...

6. Bodily injury to any resident of the residence premises except a residence employee who is not covered under Workers' Compensation or Employers' Liability Coverage.

Applying to Coverage F-Medical Payments to Others

We do not cover bodily injury:

1. To you or any resident of your residence premises except a resident employee.

The policy places the Agreement and Definition Sections, including the definitions of "you" and "your," "insured," and "residence premises," on the first page of the policy. The policy sets out Section II Coverages, which includes Coverage E for personal liability and Coverage F for medical payments to others, on page seven. The Section II Exclusions are also located on page seven.

The Events:

On April 30, 1994, while working at the insured address, Allen Roberts accidentally dropped a pipe on Becky Roberts' head, injuring her. Becky Roberts lived with her husband at the insured address both before and after the accident. Becky Roberts filed a claim with Farmers after the accident, and Farmers denied the claim. Becky Roberts then sued her husband in state court for \$100,000, the policy limit for personal liability coverage under his homeowners' policy. Becky Roberts and Allen Roberts entered into an agreed judgment for \$100,000 on June 30, 1997. Becky Roberts agreed not to attempt collection against her husband. Plaintiff filed this garnishment action against Farmers in state court and Farmers removed to Federal Court based upon diversity of

citizenship.

Farmers contends that summary judgment is proper, because there is no genuine issue of material fact for trial. The Plaintiff opposes the Motion, arguing that summary judgment is not appropriate in this case because the "reasonable expectations" of the average insured is a question of fact and should be presented to a jury. Finally, the Plaintiff requests that the Court certify to the Oklahoma Supreme Court two questions: (1) Whether the "reasonable expectations" doctrine applies to the household exclusion in a homeowners insurance policy, and (2) Whether the "reasonable expectation" of the average insured is a question of law or fact.

II. 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).

III. Discussion

Farmers contends that summary judgment is appropriate because the explicit language of the policy clearly provides no coverage for Plaintiff's claims. The Plaintiff was married to and lived with her husband at 804 Maxwell, Mounds, Oklahoma 74047 both before and after the accident in April 1994. She was clearly a resident of these premises, and was not covered under the homeowner's policy in effect at the time of the accident, which excluded coverage for residents of the resident premises.

Farmers urges this Court to adopt the well-established rules for the construction of insurance policies. Farmers argues that insurance policies are contracts, and they should, therefore, be interpreted by courts in their plain and ordinary sense if the policies are clear and unambiguous. *Littlefield v. State Farm Fire and Cas.*, 857 P.2d 65, 69 (Okla. 1993); *Dodson v. St. Paul Ins. Co.*, 812 P.2d 372, 376 (Okla. 1991). If the terms of insurance policies are unambiguous, clear, and consistent, courts should enforce the policies as written to carry out the expressed intention of the parties. *See Dodson*, 812 P.2d at 376.

There is no question that Plaintiff is an "insured," as defined in the policy. The policy clearly defines "you," as used in the policy, to refer to the named insured on the Declarations page and his spouse if the spouse is a resident of the same household.¹ The Plaintiff admits that Allen Roberts is the named insured and that she is his spouse and that she lived at the same residence as Mr. Roberts both before and after the injury occurred. It is also clear that 804 Maxwell, Mounds,

¹Plaintiff also fits the definition of "insured" as defined in the body of the Definition section which designates that permanent residents of the household who are relatives of the insured are "insureds" as well.

Oklahoma is the residence premises. Under Exclusion 6 to Coverage E, Personal Liability, the policy *does not cover bodily injury to any resident of the residence premises*. Thus, Exclusion 6 clearly excludes the Plaintiff from coverage. In addition, the policy provides no coverage for the Plaintiff pursuant to Coverage F, Medical Payments to Others. Exclusion 1 to Coverage F *denies coverage to "you" or any resident of the residence*. The Plaintiff satisfies both categories, and the policy, as written, clearly denies coverage to Becky Roberts for her bodily injury.

The Plaintiff concedes that the policy is written to preclude coverage for residents of the residence premises, but argues that the "reasonable expectations doctrine" allows recovery where the insured has a "reasonable expectation" of coverage, or where the relevant provisions are either ambiguous or hidden in the policy. In support of this proposition, Plaintiff cites *Max True Plastering v. U.S. Fidelity & Guaranty Co.*, 912 P.2d 861 (Okla. 1996). The Plaintiff contends that *Max True Plastering* alters the analysis the Court must undertake. The Plaintiff argues that "[u]nder the reasonable expectations doctrine, if the exclusion is buried in the policy language or ambiguous, the policy will be interpreted to provide coverage the reasonable insured would expect, even if the clear language of the policy would provide there is no coverage." Plaintiff claims that the reasonable expectations doctrine applies here because the residence exclusion upon which Defendant relies is both hidden and ambiguous and because a reasonable insured would expect the coverage which this policy excludes.

Oklahoma explicitly adopted the doctrine of reasonable expectations in *Max True Plastering*. Although the court noted that "generally the language of the policy will provide the best indication of the parties' reasonable expectation...." and that "courts must examine the policy language objectively to determine whether an insured could reasonably have expected coverage," *Max True*

Plastering nevertheless points to two circumstances in which the reasonable expectations doctrine is applicable. First, the doctrine may be applied where the insurer or its agent created a reasonable expectation of coverage in the insured which is not supported by policy language. *Max True Plastering* at 864. Secondly, the court held that the reasonable expectations doctrine may apply to the construction of ambiguous insurance contracts or to contracts containing exclusions masked by technical or obscure language or hidden policy provisions. *Id.* at 868. This Court finds that neither circumstance discussed by *Max True Plastering* is present here, and the doctrine of reasonable expectations does not apply.

Max True Plastering made clear that the factual circumstances surrounding the contractual agreement for insurance may create an insured's expectations and help determine whether those expectations are reasonable. "Under the doctrine, if the insurer or its agent creates a reasonable expectation of coverage in the insured which is not supported by policy language, the expectation will prevail over the language of the policy." *Id.* at 864. Where there is no evidence that the expectation has been created by surrounding circumstances, however, the doctrine is inapplicable. The court cites *Johnson v. Farm Bureau Mutual Insurance Co.*, 533 N.W.2d 203 (Ia. 1995), in which the Supreme Court of Iowa rejected an insured's claim of coverage based on reasonable expectations because the insured offered no evidence demonstrating that circumstances attributable to the insurer fostered his expectation of coverage. *Id.* at 207. See also *Bensalem Township v. International Surplus Lines Ins. Co.*, 38 F.3d 1303, 1311-12 (3rd Cir. 1994) (stating that an insured's reasonable expectation will trump written policy provisions where insurer or agent creates the expectation).

Similarly, here there is no evidence that the insurer created a reasonable expectation of coverage for the insured's spouse. The Plaintiff has proffered no evidence of statements, promises,

or inferences made by the insurer which would create a reasonable expectation of coverage in this case. The Plaintiff's only "evidence" of the creation of that expectation is the *absence* of a statement on the Declarations page which lays out the exclusion for a resident of the premises. Based on this, the Plaintiff concludes that the expectation of coverage is created. As discussed *supra*, the policy places the Agreement and Definition Sections, including the definitions of "you" and "your," "insured," and "residence premises," on the first page of the policy. The fact that the resident exclusion is not discussed until page seven of the contract cannot in itself trigger the reasonable expectations doctrine discussed in *Max True Plastering*.

Alternately, the Plaintiff contends that *Max True Plastering* requires the application of the reasonable expectations doctrine because the exclusion is hidden or buried in the policy, or the policy is ambiguous. The Plaintiff argues that the placement, typeset, and wording of the residence exclusion has intentionally been drafted to hide the exclusion. Plaintiff cites *Conner v Transamerica Ins. Co.*, 496 P.2d 770 (Okla. 1972) in support. *Conner* involved a professional liability policy in which Transamerica agreed to defend Conner against any suit even if the allegations were groundless, false, or fraudulent. The policy, however, contained an exclusion to the contrary. The court held that the insurer had a duty to defend Conner in spite of the exclusion, because the exclusionary clause was ambiguous and unclear. Conner did not deal with the creation of reasonable expectations in a situation where the exclusion was alleged to be "hidden" or "buried." Thus, *Conner* is simply not applicable here.

Furthermore, this Court has reviewed the policy and determined that the exclusion is not "hidden." The typeset containing the exclusion is identical to that of the text in the remainder of the policy. Only headings are set in large type, and the heading under which the exclusion is listed

reads, "SECTION II EXCLUSIONS, Applying to Coverage F- Medical Payments to Others." Plaintiff contends, nevertheless, that the structure of the policy "takes on added significance given the indisputable importance of the household exclusions." Plaintiff then poses the question, "Who would an insured want more to protect than his own family members who live with him?" It is not for this Court to decide if the residence exclusion is appropriate and fair, or who an insured most wants to protect. This Court will not find that the provision is "hidden" merely because the Plaintiff disagrees with it. The provision is under an appropriate heading, is clearly stated, and is not set in fine print.

The Plaintiff argues, additionally, that the exclusion is ambiguous, and therefore, *Max True Plastering* demands the application of the reasonable expectations doctrine. As evidence of the ambiguity of the statement, Plaintiff offers the affidavit of Dr. Kathleen Donovan, a psychology professor at a state university, who claims that the statement is indeed ambiguous. Dr. Donovan made her determination based on a survey she presented to 126 college students. The Plaintiff asserts that the policy household exclusion *must* be ambiguous, because 69% of the 126 college students surveyed found the contract confusing.

A contract is only determined to be ambiguous if it is susceptible to two constructions. *Max True Plastering*, 912 P.2d at 869; *Littlefield*, 857 P.2d at 69. Courts must interpret insurance contracts and determine whether they are ambiguous as a matter of law. *Max True Plastering* at 869; *Dodson*, 812 P.2d at 376. Because insurance contracts are contracts of adhesion², courts should

²"An adhesion contract is a standardized contract prepared entirely by one party to the transaction for the acceptance of the other. These contracts, because of the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected on a "take it or leave it" basis without opportunity for bargaining—the services contracted for cannot be obtained except by acquiescing to the form agreement. Insurance contracts are contracts of adhesion because of the uneven bargaining positions of the parties." Max True Plastering Company v

interpret them most favorably to the insured if the contractual language is subject to two possible interpretations. *Littlefield*, 857 P.2d at 69.

In reviewing the wording of the exclusion, taken with the definitions provided on page one of the policy, this Court determines that the exclusion is not ambiguous as a matter of law. The terms and definitions as laid out in the policy are not reasonably susceptible to more than one meaning, and the Plaintiff has not alleged as much. The Plaintiff's only support of a claim of ambiguity is the survey of Dr. Donovan, intended to show that the contract must be ambiguous if a group of college students finds it to be so. This Court disagrees. The Oklahoma Supreme Court has admonished courts not to indulge in forced or strained constructions to create and then construe ambiguities where they do not otherwise exist. *Max True*, 912 P.2d at 869; *Dodson*, 812 P.2d at 376. Because this Court must determine if the policy is ambiguous as a matter of law, the survey of Dr. Donovan is inappropriate and irrelevant to establish the existence of an ambiguity.

Conclusion

This Court finds that Farmers has created no reasonable expectation of coverage.³ In reviewing the contract, we also determine, as a matter of law, that the exclusion is not ambiguous, as it is not susceptible to two reasonable constructions. Furthermore, this Court concludes that the

United States Fidelity and Guaranty Company, 912 F.2d 861, 863 (Okl. 1996).

³Plaintiff has also requested that this Court certify the question to the Supreme Court of Oklahoma on whether the reasonable expectations are a question of law or of fact and whether the doctrine applies to a household exclusion. Pursuant to 20 Okla.Stat. Ann. §1602, questions may be certified to the Oklahoma Supreme Court only when "there is no controlling precedent in the decisions of the Supreme Court or Court of Criminal Appeals of this state." The decision to certify is left to the discretion of the Court. This Court declines to certify Plaintiff's questions. Starr v. Pearle Vision, Inc., 54 F.3d 1548, 1553 (10th Cir. 1995).

exclusion provision, despite being listed on page seven (7) of a ten (10) page contract, is not "hidden" in the document, but is logically placed under the appropriate heading, and is set in normal type. Therefore, the "reasonable expectations doctrine" does not apply in this case. Finally, Dr. Donovan's affidavit is irrelevant in this Court's determination of "ambiguity," and should be stricken from the record. IT IS THEREFORE ORDERED that Garnishee's Motion for Summary Judgment (Docket #3) is GRANTED, and Garnishee's Motion To Strike Affidavit of Dr. Donovan (Docket #9) is GRANTED. All other pending motions in this case are hereby deemed MOOT.

ORDERED this 15 day of OCTOBER, 1998.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

CIMARRON EQUIPMENT, L.L.C.,)
)
Plaintiff,)
)
v.)
)
BILL SPRINGER, individually, and dba)
BILL SPRINGER MACHINERY SALES,)
)
Defendant.)

ENTERED ON DOCKET

DATE 10-15-98

Case No. 98-CV-301-H(E) ✓

FILED

OCT 14 1998 *d*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on Defendant's Special Entry of Appearance and Motion for Ruling on the Motion to Dismiss Filed on May 29, 1998 (Docket # 6).

For purposes of this motion, the following facts are not in dispute:

1. The Plaintiff is an Oklahoma corporation with its principal place of business in Tulsa, Oklahoma. The Defendant Bill Springer is a citizen of Alabama, and Bill Springer Machinery Sales is a business operated in the State of Alabama.
2. On April 21, 1998, the Plaintiff filed in this Court a Complaint alleging Breach of Contract, Breach of Warranty, and Fraudulent Inducement.
3. In response to said Complaint, the Defendant entered a Special Appearance and filed a Motion to Dismiss on May 29, 1998.
4. In response to Defendant's Motion to Dismiss, the Plaintiff filed an Application for an Extension of Time to Respond to Defendant's Motion to Dismiss.

7

5. The Court granted Plaintiff's Motion for an Extension of Time on June 17, 1998, giving Plaintiff ten (10) days from the date Defendant responded to Plaintiff's limited discovery requests.

6. Plaintiff's limited discovery requests were served upon Defendant on August 3, 1998.

7. Thereafter, Defendant responded to Plaintiff's limited request on August 25, 1998. However, in response to Request Number 8, the Defendant needed additional time to respond. Thereafter, on September 2, 1998, Defendant responded.

8. Plaintiff, with three (3) additional days for mailing, is deemed to have received Defendant's responses on September 5, 1998. By any calculation, Plaintiff's response to Defendant's Motion to Dismiss was due no later than September 23, 1998.

9. Plaintiff has wholly failed to timely respond to Defendant's Motion to Dismiss. No contact has been made with Defendant's counsel requesting additional time to respond, and no motion requesting additional time has been filed with the Court.

Based on the above, the Court finds that Plaintiff has violated its obligation under the Federal Rules of Civil Procedure and failed to comply with the order of this Court.¹ Rule 41(b) of the Federal Rules of Civil Procedure allows the Court to dismiss an action "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court." See also Stanley v. Continental Oil Co., 536 F.2d 914, 917 (10th Cir.1976) (stating that a court has inherent

¹ The Court observes that notwithstanding the provisions of Local Rule 7.1 the remedy of dismissal with prejudice is not immediately available under these circumstances. Mobley v. McCormick, 40 F.3d 337 (10th Cir. 1994).

authority to dismiss for failure to prosecute). Accordingly, this case is hereby dismissed without prejudice. Defendant's Special Entry of Appearance and Motion for Ruling on the Motion to Dismiss Filed on May 29, 1998 (Docket # 6) is hereby granted. All other motions are hereby moot.

IT IS SO ORDERED.

This 14TH day of October, 1998.



Sven Erik Holmes
United States District Judge

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

F I L E D

OCT 15 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HOUSING AUTHORITY OF THE)
CITY OF TULSA,)
)
Plaintiff,)
)
vs.)
)
SAMUEL J. WILDER,)
)
Defendant.)

Case No. 98-CV-794-BU

ENTERED ON DOCKET
DATE OCT 15 1998

ORDER

On October 9, 1998, Defendant, Samuel J. Wilder, filed a Notice of Removal, wherein he removed the above-entitled action to this Court from the District Court of Tulsa County, State of Oklahoma.¹ The case number for the state court action was SC-98-16063. In the Notice of Removal, Defendant states that "the above-entitled action is a civil action alleging violations of Defendant's Constitutional Rights, to due process of law, and conspiracy to defraud."

A defendant may remove an action to federal court only if the

¹Defendant attempted to file the Notice of Removal in Case No. 98-CV-747-BU. Because Defendant was removing a state court action with case number SC-98-16063, the Court Clerk opened a new case for the Notice of Removal and the case was eventually assigned to this Court. Defendant did not file a motion for leave to proceed in forma pauperis with the Notice of Removal. However, the Court is not inclined to require a motion at this time. Based upon the affidavits filed by Defendant in previous cases, including 98-CV-797-BU, the Court grants Defendant leave to proceed in forma pauperis and does not require Defendant to pay a filing fee for removal of the above-entitled action to this Court.

①

district court has "original jurisdiction" over the action. 28 U.S.C. § 1441(a). Original jurisdiction is generally set forth in 28 U.S.C. §§ 1331 and 1332. Under these statutes, original jurisdiction exists only when an action "arises under" the Constitution, laws, or treaties of the United States (28 U.S.C. § 1331) or when the plaintiff and defendant are of diverse citizenship and the amount in controversy exceeds the sum of \$75,000.00 (28 U.S.C. § 1332).

In deciding whether a suit arises under federal law, the court is guided by the "well-pleaded complaint" rule, under which a suit arises under federal law "only when the plaintiff's statement of [its] own cause of action shows that it is based" on federal law. Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908). The plaintiff's anticipation of a defense based on federal law is not enough to make the case "arise under" federal law. Id. Moreover, neither a defendant's assertion of a federal defense nor a defendant's assertion of a federal counterclaim is a proper basis for removal. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987) (federal defense); 14A Wright, Miller, & Cooper, Federal Practice and Procedure, § 3731 (2d ed. 1985); 16 Moore's Federal Practice, § 107.14(3)(a)(vi) (3d ed. 1998) (federal counterclaim). In other words, the plaintiff is master of the complaint and may avoid federal jurisdiction by relying exclusively on state law. Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987).

In the instant case, Plaintiff's petition, on its face, only alleges a state law claim. Despite Defendant's statements to the contrary, no claim arising under the Constitution, laws, or treaties of the United States is alleged in the petition. Based upon the face of Plaintiff's petition, the Court lacks original jurisdiction over this action under 28 U.S.C. § 1331.

In order for a court to have "original jurisdiction" under 28 U.S.C. § 1332, the citizenship of the parties must be diverse and the amount in controversy must exceed the sum of \$75,000.00. In the instant case, the citizenship of the parties is not diverse. Moreover, the amount in controversy as established by Plaintiff's petition is not in excess of the sum of \$75,000.00. Therefore, the Court lacks original jurisdiction over this action under 28 U.S.C. § 1332.

As original jurisdiction does not exist under §§ 1331 and 1332, the Court finds that it lacks subject matter jurisdiction over this action. Consequently, the Court finds that remand of the above-entitled action to the District Court of Tulsa County, State of Oklahoma, is required.

Based upon the foregoing, the above-entitled action is REMANDED to the District Court of Tulsa County, State of Oklahoma. The Clerk of the Court is DIRECTED to effect the remand of this action to the District Court of Tulsa County, State of Oklahoma.

In light of the Court's ruling, Defendant's Motion to

Consolidate (Docket Entry #1), Defendant's Request to File Supplemental Documents in Support of Defendant's Notice of Removal and Motion to Consolidate (Docket Entry #2), Defendant's Request to File Supplemental Brief in Support of Defendant's Notice of Removal and Motion to Consolidate (Docket Entry #3) and Defendant's Information Sheet (Request) for Temporary Restraining Order (Docket Entry #5) and Defendant's Request to File Supplemental Documents in Support of Temporary Restraining Order (Docket Entry #6) are DECLARED MOOT.

Entered this ____ day of October, 1998.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

MICHAEL MARES,

Plaintiff,

v.

BW/IP INTERNATIONAL,
INC., a Delaware corporation,

Defendant.

)
)
)
)
)
)
)
)
)
)
)

No. 97-CV-92-K

FILED

FALL 1998
U.S. DIST. CT.

JUDGMENT

This matter came before the Court for consideration of the Motion by Defendant BW/IP International, Inc., for Summary Judgment against Plaintiff Michael Mares.

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 Defendant BW/IP International, Inc. and against Plaintiff Michael Mares.

ORDERED THIS 14 DAY OF OCTOBER, 1998.



TERRY C. KEEN, CHIEF
UNITED STATES DISTRICT JUDGE

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

FILED
OCT 14 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

DANZAS CORP., a New York corporation,)
Plaintiff,)

v.)
)

R.I.P.C., INC., an Oklahoma corporation, et. al.)
Defendant/Counterclaimant, and STEVEN C.)

REYNOLDS, individually and d/b/a REYNOLDS)
INTERNATIONAL; MILLENNIUM SHIPPING)

COMPANY, an Oklahoma corporation; and)
R.I.P.C. CHILE, LTDA., a Chilean limited liability)

company, Additional Defendants.)
)

v.)
)

DANZAS CORP., JACK EDWARDS,)
WERNER REISACHER, RENATO CHIAVI,)

and JERARD (OR GERARD) TRAMPLER,)
Counterclaim Defendants.)

Case No. 98-CV-0081-BU(M)

Judge Michael Burrage

ENTERED ON DOCKET

DATE OCT 15 1998

STIPULATION OF DISMISSAL WITH PREJUDICE

It is hereby stipulated by the undersigned counsel of record for each of the parties in the above-captioned case that the above-entitled case, including all causes of action, claims, and counterclaims, may be dismissed with prejudice, each party to bear its own costs and attorney fees. The Court, however, shall retain continuing jurisdiction with respect to the enforcement of the parties' settlement herein.

Dated this 14th day of OCTOBER, 1998.

Respectfully submitted,



Donald L. Kahl (OBA #4855)
Heather E. Pollack (OBA #17333)
Hall, Estill, Hardwick, Gable, Golden &
Nelson, P.C.
320 South Boston, Suite 400
Tulsa, Oklahoma 74103-3708
Attorneys for Danzas Corp., Jack Edwards,
Werner Reisacher, Renato Chiavi,
Jerard Trampler



John A. Burkhardt (OBA #1336)
Paul J. Cleary (OBA #1727)
Boone, Smith, Davis, Hurst & Dickman
500 ONEOK Plaza, 100 West Fifth Street
Tulsa, Oklahoma 74103
(918) 587-0000
Attorneys for R.I.P.C., Inc., R.I.P.C. Chile
Ltda., Millennium Shipping Company,
Steven C. Reynolds

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

F I L E D

OCT 14 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT



VENCOR, INC.,)
)
 Plaintiff,)
)
 v.)
)
 ARROW MURRAY MANOR)
 NURSING HOME, INC.,)
)
 Defendant.)

Case No. 98-CV-0215-EA

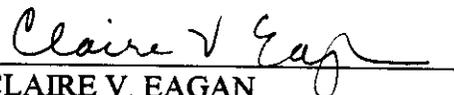
ENTERED ON DOCKET
DATE OCT 15 1998

ADMINISTRATIVE CLOSING ORDER

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

If, within 20 days of a final adjudication of the bankruptcy proceedings, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 14th day of October, 1998.


CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

OCT 14 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLES BOWLDS,

Plaintiff,

v.

LAMBERT'S ENGINE & PARTS
WAREHOUSE, INC.,

Defendant.

Case No. 97-CV-0980-EA

ENTERED ON DOCKET

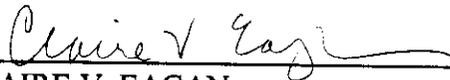
DATE OCT 15 1998

ORDER

On August 10, 1998, plaintiff filed his motion to dismiss complaint (styled dismissal without prejudice) (Docket #11). The Court granted that motion by Minute Order dated September 4, 1998.

IT IS THEREFORE ORDERED that this action be **DISMISSED** without prejudice.

DATED this 14th day of October, 1998.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

(12)

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

DANZAS CORP., a New York corporation,)
Plaintiff,)

v.)

R.I.P.C., INC., an Oklahoma corporation, et. al.)
Defendant/Counterclaimant, and STEVEN C.)
REYNOLDS, individually and d/b/a REYNOLDS)
INTERNATIONAL; MILLENNIUM SHIPPING)
COMPANY, an Oklahoma corporation; and)
R.I.P.C. CHILE, LTDA., a Chilean limited liability)
company, Additional Defendants.)

v.)

DANZAS CORP., JACK EDWARDS,)
WERNER REISACHER, RENATO CHIAVI,)
and JERARD (OR GERARD) TRAMPLER,)
Counterclaim Defendants.)

ENTERED ON DOCKET

DATE OCT 15 1998

Case No. 98-CV-0081-BU(M) ✓

Judge Michael Burrage

FILED

OCT 14 1998

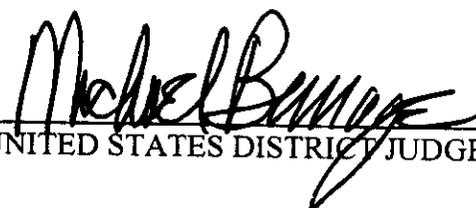
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

This cause comes before the Court on the parties' Stipulation of Dismissal With Prejudice, and upon being advised that the parties are in agreement regarding the dismissal of this case as indicated by said Stipulation, finds that said Stipulation is proper, and this case would be dismissed with prejudice.

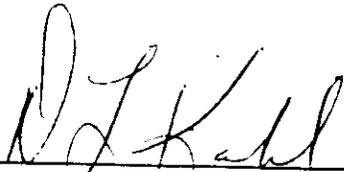
IT IS THEREFORE ORDERED, that this action, including all claims and counterclaims between the parties, is hereby dismissed with prejudice, each party to bear its own costs and fees. The Court retains continuing jurisdiction with respect to the enforcement of the parties' settlement herein.

Dated this 14th day of October, 1998.

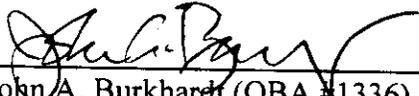

UNITED STATES DISTRICT JUDGE

(93)

APPROVED AS TO FORM AND CONTENT:



Donald L. Kahl (OBA #4855)
Heather E. Pollack (OBA #17333)
Hall, Estill, Hardwick, Gable, Golden &
Nelson, P.C.
320 South Boston, Suite 400
Tulsa, Oklahoma 74103-3708
Attorneys for Danzas Corp., Jack Edwards,
Werner Reisacher, Renato Chiavi, Jerard Trampler



John A. Burkhardt (OBA #1336)
Paul J. Cleary (OBA #1727)
Boone, Smith, Davis, Hurst & Dickman
500 ONEOK Plaza, 100 West Fifth Street
Tulsa, Oklahoma 74103
(918) 587-0000
Attorneys for R.I.P.C., Inc., R.I.P.C. Chile
Ltda., Millennium Shipping Company,
Steven C. Reynolds

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

FILED

OCT 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THE HOME INSURANCE CO.,
a corporation,

Plaintiff,

v.

PHILLIPS PETROLEUM COMPANY,

Defendant.

Case No. 98-CV-0270HEV

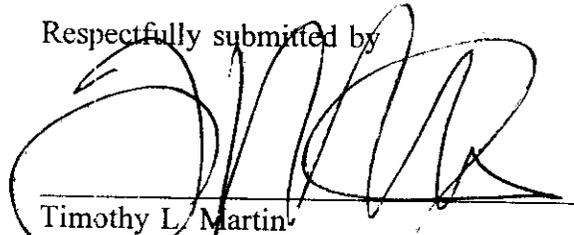
ENTERED ON DOCKET

DATE 10/14/98

STIPULATION FOR DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, The Home Insurance Co., by and through their attorney of record, Timothy L. Martin; and the Defendant, Phillips Petroleum Company, by and through its attorney of record, Suzan Charlton, and hereby stipulate and agree that the above-captioned cause may, upon Order of the Court, be dismissed with prejudice to further litigation pertaining to all matters involved herein, and state that a compromise settlement agreement covering all claims has been made between the parties, and the said parties hereby request the Court to dismiss said action with prejudice pursuant to this Stipulation.

Respectfully submitted by



Timothy L. Martin
LOONEY, NICHOLS & JOHNSON
528 Northwest 12th Street
Oklahoma City, OK 73103
(405) 235-7641
(405) 239-2050 (FAX)

and

mail
01/2
AMR HT

Roger E. Warin
John A. Flyger
Paul R. Hurst
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000
(202) 429-3902 (FAX)

**ATTORNEYS FOR PLAINTIFF,
THE HOME INSURANCE COMPANY**



Donald S. Zimmerman
Associate General Counsel
Phillips Petroleum Company
1284 Adams Building
Bartlesville, OK 74004

**ATTORNEYS FOR DEFENDANT,
PHILLIPS PETROLEUM COMPANY**

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

F I L E D

OCT 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PERRY PRIBBLE,)
)
Plaintiff,)
)
vs.)
)
SOCIETE INTERNATIONALE DE)
TELECOMMUNICATIONS AERONAUTIQUES,)
an unqualified foreign corporation, AMERICAN)
AIRLINES, INC., a Delaware corporation in good)
standing, GLENN NAUMAN, an individual and)
AL SMITH, an individual,)
)
Defendants.)

Case No. 98-C-506-E ✓

ENTERED ON DOCKET

DATE OCT 14 1998

ORDER

Now before the Court is the Motion To Remand (docket #3) of the plaintiff, Perry Pribble (Pribble).

Plaintiff, Perry Pribble, filed suit in state court, claiming that he was terminated and deprived of an employment bonus from his employer, Societe Internationale De Telecommunications Aeronautiques (SITA) due to the actions of SITA's employees Glenn Nauman (Nauman) and Al Smith (Smith). He further asserts that Nauman and Smith used their positions at American Airlines (American) and SITA to carry out a personal vendetta against him and that American and SITA knew or should have known of the actions of Nauman and Smith.

The defendants removed the action to this court, claiming that there was diversity jurisdiction because Nauman and Smith, individual residents of the state of Oklahoma, were fraudulently joined.

Defendants assert that the only possible claim pled against the individual defendants in the complaint is one for intentional infliction of emotional distress, and that because, under the facts as pled, plaintiff fails to state a claim for intentional infliction of emotional distress, the courts must conclude that the individuals were fraudulently joined. Defendants rely on *Roe v. General American Life Ins. Co.*, 712 F.2d 450, 452 (10th Cir. 1983) for the proposition that “the joinder of a defendant against whom no cause of action is pled, or against whom there is in fact no cause of action, will not defeat removal.” Defendants rely on *Smith v. Farmers Co-Op. Ass’n of Butler*, 825 P.2d 1323 (Okla. 1992), and *Mirzaie v. Smith Cogeneration, Inc.*, Case No. 88202, 1998 WL 184582 (Okla. App. 1998) for their assertion that, under these facts, there is no intentional infliction of emotional distress claim.

Both propositions of law are correct. Defendants argument, however, fails on its assumption that the only claim pled against Nauman and Smith is one for intentional infliction of emotional distress. The substantive claim against Nauman and Smith in the Complaint is as follows:

Glenn Nauman and Al Smith used their positions at both American and SITA to carry out a personal vendetta against the Plaintiff, intentionally inflicting emotional distress on him, and causing him to lose his bonus, his job, benefits and income, for which he is entitled to be reasonably compensated in a sum in excess of \$10,000.00.

Although perhaps “inartfully drawn,” the Complaint is, under Oklahoma’s liberal pleading code, sufficient to give notice of a claim for tortious interference with contract or tortious interference with prospective economic advantage. *See, e.g., Brander’s Club, Inc. v. City of Lawton*, 918 P. 2d 69 (Okla. 1996). Defendants do not assert that the facts pled are not sufficient to support a claim for tortious interference.

Because the Court finds that the individual defendants were not fraudulently joined, this matter is remanded to state court because the parties are not completely diverse. Plaintiff’s motion

to remand (Docket #2) is granted.

IT IS SO ORDERED THIS 9TH DAY OF OCTOBER, 1998.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

v.

JON ERIC ANDREWS, D.C.,

Defendant.

)
)
)
)
)
)
)
)
)
)
)

No. 98CV0549B(J)

ENTERED ON DOCKET

DATE OCT 14 1998

DEFAULT JUDGMENT

This matter comes on for consideration this 13th day of Oct, 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, Jon Eric Andrews, D.C., appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Jon Eric Andrews, D.C., was served with Summons and Complaint on September 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.

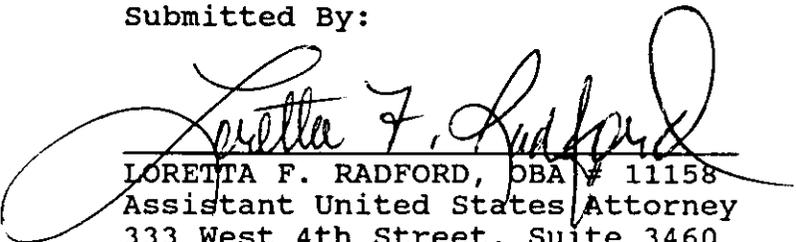
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Jon Eric Andrews, D.C., for the principal amount of \$90,360.60, plus accrued interest of \$1,756.38, plus interest thereafter at the rate of 8.25 percent per annum until judgment, plus filing fees in the amount of

6

\$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 4.730 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

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

MICHAEL MARES, an individual)

Plaintiff,)

vs.)

BW/IP INTERNATIONAL, INC.,)
a Delaware Corporation,)

Defendant.)

ENTERED ON DOCKET

DATE 10-14-98

No. 97-CV-092-K ✓

FILED
C. J. ...

PHIL ...

ORDER

Before the Court is the Defendant, BW/IP's, Motion for Summary Judgment (#28). In ruling on this Motion, the Court will also resolve the Plaintiff's Motion for Leave to File a Reply to Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment (#46).

I. Litigation History

Plaintiff, Mares, instituted this case on January 30, 1997, against Defendant, BW/IP, alleging three causes of action, including Wrongful Discharge in violation of Oklahoma public policy, Intentional Infliction of Emotional Distress, and Defamation. After considering the Defendant's Motion to Dismiss, this Court dismissed Plaintiff's wrongful discharge claim as to his reporting of employee fraud and theft, but denied the motion as the Plaintiff's refusal to illegally manipulate BW/IP's financial statements. The Court dismissed the Plaintiff's defamation claim as to statements made by employees of BW/IP, but declined to dismiss the defamation claim as it related to statements made by BW/IP to third persons. The motion to dismiss the claim of intentional infliction of emotion distress was denied. Now the Defendant moves for Summary Judgment on the remaining claims.

48

II. Statement of Facts¹

The Plaintiff, Mares, was employed as Controller in the Accounting Department of BW/IP from May of 1991 until his discharge on July 30, 1996. Prior to his promotion to Controller in May of 1991, he worked in various positions in the company beginning March 15, 1982. The Plaintiff's position as Controller involved overseeing all activities of the Accounting and Information Departments for the Tulsa operation and two (2) service centers of the Company. He developed budgets and projections for the three manufacturing groups of the Tulsa division, prepared and presented financial statements to the Presidents of the Pump Division and his staff on a quarterly basis, performed internal audits of designated company plants, and monitored production and performance of staff personnel.

The Plaintiff's position involved his coordinating the monthly closing of the company's books and preparation of financial statements which, Plaintiff believes, were submitted to the United States Securities and Exchange Commission. BW/IP is a publicly traded company on the New York Stock Exchange. The Plaintiff processed accounts payable, billing, and other cost systems, and had intimate knowledge of the company's financial position and operations.

Plaintiff alleges that he uncovered a "scheme" known as "billing in place." "Billing in place" involves reporting in the company's records invoices for products for which the title had not yet been transferred to the supposed purchasers. The company demanded that Plaintiff cause these fraudulent invoices to be integrated into the company's results of financial operation which, in turn, materially impacted said results. The Plaintiff says these financial operations materially impacted and overstated the company's sales and revenue reports which were disseminated to the public.

Plaintiff alleges that he refused to make the fraudulent financial entries on a number of

¹The facts as they relate to Plaintiff's other remaining claims have been omitted, as Plaintiff has conceded that these claims are without merit and should not be considered by this Court.

occasions, and was ridiculed and criticized for not being a "team player." He alleges that his refusal to illegally manipulate the Company's financial statements resulted in his termination. Plaintiff says he received repeated warnings that the Operations Manager, Joe Marengi, was out to get him in retaliation for his not being a "team player" with respect to fraudulent financial reporting of the company's activities. Plaintiff was told he should be looking for a new job.

The Plaintiff was terminated from his job as Controller on or about July 30, 1996, and brings this claim for damages and exemplary damages. The Plaintiff alleges he was discharged in retaliation for his refusal to manipulate financial records. The Defendant contends, however, that the Plaintiff, like other employees occupying his same position of Controller at other plants, was discharged as the result of a corporate restructuring.

III. 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).

IV. Discussion

The Defendant, BW/IP, is seeking summary judgment on the Plaintiff's claim of wrongful discharge, arguing that the Plaintiff has failed to raise a genuine issue of fact for trial. The Defendant contends, first, that Mares has failed to provide a state statute which demonstrates that his firing was against public policy, and, second, that Mares has failed to demonstrate a prima facie case of retaliatory discharge.

The Supreme Court, in 1989, recognized a narrow remedy and exception to the employment-at-will doctrine in *Burk v. K-Mart*, 770 P.2d 24 (Okla. 1989), for those employees discharged for refusing to act in violation of an established and well-defined public policy or for performing an act consistent with a clear and compelling public policy. The Court emphasized that *Burk* was creating a narrow exception to employment-at-will doctrine, and it should be cautiously applied.

Recently, the Supreme Court handed down their decision in *Griffin v Mullinix*, 947 P.2d 177 (Okla. 1997), which has further clarified the scope of *Burk*. In *Griffin*, the plaintiff claimed he had been unlawfully discharged by a bank for complaining about what he believed to be inadequate protection of the safety of employees and customers. In support for his claim, the plaintiff relied upon a statement of public policy appearing in the state's Occupational Safety & Health Standards Act (40 O.S. 1991 § 401, *et seq.*) The Supreme Court found that the statute did not apply to private employers like the bank, and therefore, the OSHSA did not provide "the clear mandate of public policy required by *Burk*." *Griffin* at 180. *Griffin* made clear that it is necessary that a specific Oklahoma decision, statute, or constitutional provision serve as the articulation of Oklahoma public policy. Violations of federal law or an inapplicable Oklahoma statute will not be sufficient to sustain a *Burk* claim. *Id.*

The Defendant contends that the *Burk* exception to employment-at-will is only applicable where the Plaintiff has been fired in violation of public policy, and the Plaintiff has failed to provide

such evidence. The Defendant argues that Mares can only invoke *Burk* if the procedure which Mares was allegedly forced to implement, "billing in place," is made illegal by a specific Oklahoma statute, constitutional provision, or judicial decision. Because billing in place is not illegal under Oklahoma law Plaintiff has no cause of action.

The Plaintiff, on the other hand, claims that billing in place has been made illegal pursuant to a specific Oklahoma statute because it constitutes a "misleading statement." For this proposition, the Plaintiff cites 18 U.S.C. §1001 which makes it a federal crime to file false financial statements relating to a publicly traded company's financial condition. With this federal statute as a baseline, the Plaintiff goes on to cite 71 1991 O.S. §403, arguing that, "Under Oklahoma securities law, filing of fraudulent financial statements is against Oklahoma Public Policy."² The Plaintiff contends that the Defendant's accounting records, which reflected "billing in place" procedures, were used to prepare filings with the SEC and the Oklahoma Securities Administrator, in violation of 18 U.S.C. §1001 as well as 71 O.S. §403.

The Defendant concedes that billing in place procedures were implemented and reflected on the statements, but argue that an accounting procedure is not unlawful simply because it does not comport with Generally Accepted Accounting Principles ("GAAPs"). *Provenz v Miller*, 103 F.3d. 1478 (9th Cir. 1996). Furthermore, the Defendant points out that, during Mares' employment as the Tulsa controller, BW/IP's stock was traded on the NASDAQ and the New York Stock Exchanges and was registered with the SEC. Thus, BW/IP was not required to register its stock in Oklahoma. 71 O.S. 1991 §§401 (a) (19) & (20). Because BW/IP did not submit documents to the Oklahoma

²71 O.S. §403 reads: "It is unlawful for any person to make or cause to be made, in any document filed with the Administrator or in any proceeding under this act, any statement which is, at the time and in light of the circumstances under which it is made, false or misleading in any material respect."

Securities Administrator, the billing in place procedure, even if unlawful, could not have violated 71 O.S. 1991 §403.

The Court is persuaded by the Defendant's argument. Mares does not refute BW/IP's claim that they are exempt from Oklahoma Securities law because they do not file statements with the OSA. The Plaintiff has not presented this Court with any evidence that BW/IP does, in fact, file with the OSA. Thus, billing in place, even if it constituted a "false or misleading statement," could not have violated a state securities statute. Whether billing in place procedures violate 18 U.S.C. §1001 is irrelevant for this inquiry as well, because, as the *Griffin* court explicitly held, a federal statute cannot serve as an expression of Oklahoma public policy for purposes of a *Burk* claim.

Alternately, Mares attempts to make the argument that, pursuant to the Oklahoma Accountancy Act, which regulates public accounting, he would have been in violation of 59 O.S. 1991 §15.26, "knowingly falsifying reports," for his role in the billing in place accounting procedure. Thus, he argues, being fired for refusing to do so is a violation of Oklahoma public policy. The Defendant contends that the services provided by Mares as Controller for BW/IP are not covered by the Act. We need not reach that question.

At the very least, for a violation of the Oklahoma Accountancy Act to occur, billing in place must be unlawful. Mares has failed to cite any case in which billing in place procedures have been determined to be false or misleading. The Plaintiff has cited statutes which clearly prohibit filing or creating "false" or "misleading" documents, but he has failed to point to one case in which any of these statutes have been interpreted to include billing in place methods. Furthermore, he has not provided any evidence to refute Defendant's position that they are not bound by GAAPs, or even that a departure from GAAPs can serve as a statutory violation. While it is true that the Defendant holds itself out as a company which follows GAAPs, while it appears they do not, this Court has been

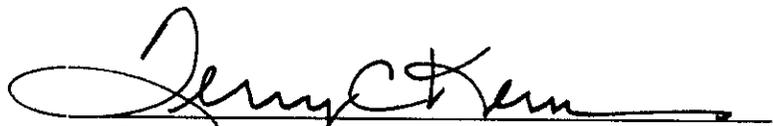
provided no basis for determining that billing in place is unlawful in light of current Oklahoma law. In keeping with *Griffin*, absent a clear statement of Oklahoma law, we must narrowly construe exceptions to the employment-at-will doctrine. We decline to find that Mares' termination constituted a wrongful discharge in violation of public policy.

As to the question of whether Mares has satisfied his burden for creating a prima facie case of retaliatory discharge, we need not reach that issue. At a minimum, the Plaintiff had the burden on summary judgment to present the underlying Oklahoma decision, statute, or constitutional provision which makes the procedure, billing in place, unlawful. He has failed to do so.

V. Conclusion

It is the Order of the Court that the Defendant's Motion for Summary Judgment (#28) is GRANTED as to all remaining claims. Plaintiff's Motion for Leave to File a Reply to Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment (#46) is hereby DENIED as moot.

ORDERED this 9 day of October, 1998.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

TONI YUNG,

Plaintiff,

vs.

WESTERN STATES FIRE
FIRE PROTECTION CO.,

Defendant.

ENTERED ON DOCKET

DATE 10-14-98

No. 98-CV-114-K ✓

FILED
10-14-98

FULL COURT

JUDGMENT

This matter came before the Court for consideration of the Defendant Western States Fire Protection Co.'s Motion for Summary Judgment pursuant to *Fed. R. Civ. P.* 56. The issues having been duly considered and a decision having been rendered in accordance with this Court's Order, the Court finds summary judgment is appropriate in favor of Western States Fire Protection Co.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Western States Fire Protection Co. and against the Plaintiff Toni Yung.

ORDERED this 9 day of October, 1998.



TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

10

ENTERED ON DOCKET

DATE 10-14-98

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

MKP ROCKY, LTD.,
Appellant,
vs.
MUSKOGEE ENVIRONMENTAL
CONSERVATION CO., et al.,
Appellees.

No. 97-C-847-K

FILED
10/14/98
m

ORDER

Now before the Court is the interlocutory appeal of an order of the bankruptcy court. Debtors filed for Chapter 11 protection in October, 1996. Appellants asserted claims against the debtors in the Bankruptcy Court. 11 U.S.C. §1121(b) provides that the debtor exclusively may file a plan for reorganization until 120 days after the filing of the bankruptcy case. 11 U.S.C. §1121(d) provides that, upon request of a party in interest, the Bankruptcy Court may reduce or increase this "exclusivity" period. After previous extensions granted over debtors' objections, the Bankruptcy Court entered an order filed March 27, 1997.

In that order, the Bankruptcy Court recited that the claims which were asserted against the debtors were the subject of state court litigation and were presently on appeal. The Bankruptcy Court stated that it had "previously declared its intention" to maintain the status quo until the state court appeals were resolved. The Bankruptcy Court concluded that this objective would be furthered by extending the exclusivity period until disposition

8

of the state court appeals.¹ It is from this order that debtors appeal. This Court has jurisdiction to hear the appeal pursuant to 28 U.S.C. §158(a)(2).

An order altering the exclusivity period will not be set aside absent an abuse of discretion. In re Gibson & Cushman Dredging Corp., 101 B.R. 405, 409 (E.D.N.Y.1989). An abuse of discretion takes place if the lower court does not apply the correct law or rests its decision on a clearly erroneous finding of material fact. See United States v. Tsosie, 92 F.3d 1037, 1041 (10th Cir.1996). Upon review, this Court concludes that the abuse of discretion standard has not been met. In its previous order of February 27, 1997, the Bankruptcy Court quite reasonably concluded that a definitive determination as to the amount and viability of debtors' claims would be beneficial to the formulation of a reorganization plan. Further, comity between federal and state courts would be maintained by permitting the state appeals to run their course. These findings are sufficient to satisfy the "cause" for decision required by 11 U.S.C. §1121(d).

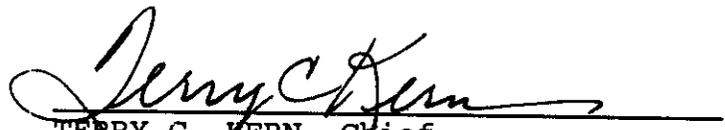
Finally, appellants protest that the Bankruptcy Court rendered its decision without holding a hearing, while 11 U.S.C. §1121(d) requires "notice and a hearing". 11 U.S.C. §102(1)(A) states that "after notice and a hearing" means "after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances."

¹This Court conducted a Westlaw search, and apparently the state court appeals remain unresolved.

11 U.S.C. §102(1)(B) states that the phrase authorizes an act without an actual hearing if such notice is properly given and such a hearing is not requested timely by a party in interest. The debtors' objection, filed March 25, 1997, makes no request for a hearing. The Fifth Circuit has held that "[w]here a matter has already been adequately argued before the bankruptcy judge, and the judge determines that no further hearings are necessary, then the [party's] due process rights are not violated when the judge decides the issue without further hearings." Central Sullivan Plaza I, Ltd. v. BancBoston Real Estate Capital Corp., 935 F.2d 723, 727 (5th Cir.1991). No basis for reversal has been presented.

It is the Order of the Court that the order of reference to Magistrate Judge Joyner is hereby vacated. The March 27, 1997 order of the Bankruptcy Court below is hereby AFFIRMED. All other motions are declared moot. This Order represents a final order in District Court case no. 97-C-847-K.

ORDERED this 9 day of October, 1998.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

INDIANA GLASS COMPANY and)
LANCASTER COLONY CORPORATION,)
)
Plaintiffs,)
)
v.)
)
INTERPACK & PARTITIONS, INC.,)
)
Defendant.)

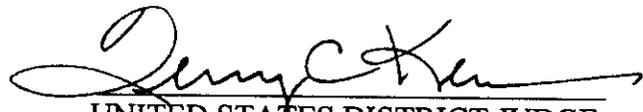
ENTERED ON DOCKET
DATE 10-14-98

Case No.: 97CV665K(J) ✓

ORDER OF DISMISSAL

The above matter comes on to be heard this 9 day of October, 1998, upon the written stipulation of the parties for a dismissal of said action with prejudice, and the Court, having examined said stipulation, finds that the parties have entered into a compromise settlement covering all claims involved in the action, and the Court, being fully advised in the premises, finds that said action should be dismissed pursuant to said stipulation.

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


UNITED STATES DISTRICT JUDGE

JK

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

MICHAEL TERRENCE OLIVER,

Petitioner,

vs.

RITA MAXWELL, Warden,

Respondent.

ENTERED ON DOCKET

DATE

10-14-98

No. 97-CV-247-K ✓

ORDER

Petitioner, a state inmate appearing *pro se*, seeks habeas corpus relief pursuant to 28 U.S.C. § 2254 (Docket #1). Respondent has filed a response (#5), and Petitioner has filed a reply to Respondent's response (#6). As more fully set out below, the Court concludes that Petitioner's application for a writ of habeas corpus should be denied without an evidentiary hearing.

BACKGROUND

On March 26, 1992, Petitioner pled no contest pursuant to a plea agreement in Tulsa County District Court, CF 91-1843, to charges of possession of marijuana, second offense after former conviction of a felony (count one), and unlawful delivery of marijuana after former conviction of a felony (count two). He was sentenced on May 1, 1992 to twenty (20) years imprisonment on each count to run concurrently. Petitioner did not appeal his conviction or sentence.¹

¹In response to question 13(a) on his petition asking why he did not file a direct appeal, Petitioner states that "[t]he Petitioner didn't know that he had been sentenced to a sentence that exceeded the maximum sentence allowable under statute." (#1 at 2). A few questions later (16(a)(5)), he answers that he did not raise his excessive sentence claim on direct appeal because "[t]he Petitioner was denied effective assistance of Counsel by his trial attorney's failure to properly inform him to the true range of punishment." (#1 at 5). These statements do not seem to relate to the reason Petitioner failed to appeal, but instead appear to imply that his plea was not informed. However, Petitioner denies that he is attacking the voluntariness of his plea (see #1 at 5a), and the Court accordingly does not construe Petitioner's statements as stating a claim that his plea was invalid.

Petitioner filed an application for post-conviction relief in Tulsa County District Court, which denied it on August 26, 1996. The district court held that Petitioner waived his claims by failing to file an appeal or offer sufficient reason for such failure. The district court went on to address Petitioner's contention that his conviction on count one could not be enhanced by non-drug felonies and concluded that the claim was without merit as the state could properly elect to enhance the sentence under 21 O.S. § 51(B) rather than 63 O.S. § 2-402.

Petitioner appealed the district court's denial of his application for post-conviction relief, and on February 6, 1997 the Court of Criminal Appeals affirmed the denial.

On March 19, 1997, Petitioner filed the instant petition for habeas corpus, alleging that he was denied due process because the trial court sentenced him to a sentence on count one that exceeded the maximum allowable under the applicable statute.

Respondent raises the defense of procedural bar, contending that the Oklahoma Court of Criminal Appeals imposed a procedural bar and Petitioner has not shown cause and prejudice, or a colorable showing of factual innocence, sufficient to overcome the bar. In his reply to the response, Petitioner claims that he is actually innocent of the twenty-year enhanced sentence, so the procedural bar should not be imposed.

ANALYSIS

The Court determines that Petitioner has met the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Coleman v. Thompson, 501 U.S. 722, 732 (1991); Rose v. Lundy, 455 U.S. 509 (1982).

The doctrine of procedural default prohibits a federal court from considering specific habeas claims where the state's highest court declined to reach the merits of those claims on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 724; see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir. 1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "in the vast majority of cases." Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991)).

Applying these principles to the instant case, the Court concludes that Petitioner's claim that his sentence is excessive is barred by the procedural default doctrine. The Oklahoma Court of Criminal Appeal's procedural bar as applied to Petitioner's claim as presented in his state application for post-conviction relief was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently applied a procedural bar and denied such claims unless the petitioner provides "sufficient reason" for his failure to raise the claim earlier. Moore v. State, 889 P.2d 1253 (Okla. Crim. App. 1995).

Because of Petitioner's procedural default, this Court may not consider his claim unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 510 U.S. at 750. The "cause" standard requires a petitioner to "show that some objective factor external to the defense impeded

... efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). The "fundamental miscarriage of justice" exception requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

In reply to Respondent's raising of the procedural bar doctrine, Petitioner does not attempt to show "cause" for his failure to present this issue on direct appeal. Instead, he urges that he is actually innocent of the sentence and that, therefore, this Court's failure to address the issue will result in a miscarriage of justice.

The "fundamental miscarriage of justice" exception to the procedural default rule applies to a narrow class of cases in which a petitioner can show that a constitutional violation probably resulted in the conviction of an innocent person. Schlup v. Delo, 513 U.S. 298, 323-32 (1995); Murray v. Carrier, 477 U.S. at 496. The United States Supreme Court has acknowledged that the "actual innocence" exception extends to capital sentencing proceedings, see Sawyer v. Whitley, 505 U.S. 333 (1992) (citing Smith v. Murray, 477 U.S. 527, 537 (1986)), but has not addressed whether the exception should apply to the sentencing phase of noncapital cases.

In United States v. Richards, 5 F.3d 1369, 1371 (10th Cir. 1993), the Tenth Circuit held that "a person cannot be actually innocent of a noncapital sentence" and refused to apply the exception in the context of successive motions to correct sentence pursuant to 28 U.S.C. § 2255. See also, Reid v. Oklahoma, 101 F.3d 628, 630 (10th Cir. 1996) (petitioner's claim that he was "innocent of the

[Oklahoma] enhancement charge" did not fall within the potential scope of the miscarriage of justice exception allowing successive § 2254 petition to be reviewed on its merits). In discussing the actual innocence exception as it applied to a double jeopardy claim, however, the Tenth Circuit appeared to endorse use of the exception in habitual offender cases, stating that "[i]n a habitual offender case, the petitioner is actually innocent of the sentence if he can show he is innocent of the fact — i.e., the prior conviction — necessary to sentence him as an habitual offender. In any event, actual innocence of the sentence still requires a showing of factual innocence." Selsor v. Kaiser, 22 F.3d 1029, 1036 (10th Cir. 1994) (dictum).

Here, Petitioner does not claim that he is actually innocent of the crime of which he was convicted, nor does he allege that he is innocent of the prior conviction(s) used for enhancement of his sentence. Instead, he asserts that he is "actually innocent of the sentence." (#6 at 1). Even assuming that the actual innocence exception applies to habitual offender proceedings under a liberal reading of the Selsor case, Petitioner has failed to allege factual innocence sufficient to meet the exception.

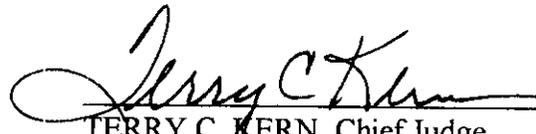
Therefore, because Petitioner has not demonstrated "cause and prejudice" or that a "fundamental miscarriage of justice" will result, the Court concludes that it is procedurally barred from considering Petitioner's claim on the merits. Coleman v. Thompson, 510 U.S. 722, 724 (1991).

CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States. The petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED Petitioner's petition for a writ of habeas corpus (#1) is denied.

SO ORDERED THIS 9 day of October, 1998.



TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED
OCT 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MICHAEL TERRENCE OLIVER,)
)
 Petitioner,)
)
 vs.)
)
 RITA MAXWELL, Warden,)
)
 Respondent.)

ENTERED ON DOCK

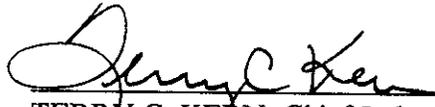
DATE 10-14-98

No. 97-CV-247-K ✓

JUDGMENT

In accord with the Order denying Petitioner's application for a writ of habeas corpus, the Court hereby **enters judgment** in favor of Respondent and against the Petitioner.

SO ORDERED THIS 9 day of October, 1998.



TERRY C. KEAN, Chief Judge
UNITED STATES DISTRICT COURT

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 ONE HUNDRED TEN (110))
 ELECTRONIC AND/OR)
 MECHANICAL GAMBLING)
 DEVICES, MORE OR LESS,)
 AND PROCEEDS,)
)
 Defendants.)

ENTERED ON DOCKET

DATE 10-14-98

No. 95-CV-949-K ✓

FILED
OCT 15 1998
FBI DISTRICT COURT

ORDER

Before the Court is Michael Allen O'Brien's Motion to Strike any Order Entered in this Action (#44), Motion to Consolidate Cases (#45-1) and Stay Proceedings (#45-2), and Motion to Dismiss (#46). Also before the Court is the Plaintiff's, United States of America, Motion to Dismiss Counterclaim (#51).

I. Statement of Facts

On September 14, 1995, the Internal Revenue Service, the Federal Bureau of Investigation, and various state and local law enforcement agencies executed a number of search warrants. Twenty-three (23) warrants were executed on personal residences. One warrant was executed on a vending machine business establishment. One hundred and ten (110) electronic video and mechanical gambling machines were seized from these locations. The gambling devices which O'Brien claims an interest to are part of those one hundred and ten (110) electronic video and mechanical gambling machines seized.

54

The government filed its complaint for forfeiture *in rem* in the instant case on September 20, 1995. During the criminal investigation and criminal prosecution of the parties involved in the gambling operations, the government did not pursue its forfeiture of the defendant gambling devices. Ninety-two (92) electronic and/or mechanical gambling devices, more or less, including, in addition to said machine, the keys operating manuals, repair books, repair or proceeds logs were seized from the locations and disclaimers of interest have been obtained and filed in this case by all potential owners.

The government claims that seventeen (17) machines were seized from The Blue House, owned by Michael A. O'Brien and Dorothy O'Brien, two individuals who have been convicted of the federal felony of operation of a gambling business and for which no disclaimers of interest have been obtained.

Mr. O'Brien was subsequently tried criminally and was found guilty by a jury. During the criminal trial of another defendant, who was charged with related crimes, FBI agents traveled to Forth Worth, Texas to the FMC where O'Brien is incarcerated. They conducted interviews with O'Brien on December 19, 1996 and January 13, 1997. The FBI report of the interview on December 19, 1996 states that during that interview, O'Brien asked about a deal with the U.S. Attorney's Office, and was told by the agents there existed some type of sentence modification procedure, the details of which the agents were not clear but that was a matter for the U.S. Attorney's Office and not for the FBI. The Government contends that at the end of the December 19, 1996 interview, O'Brien acknowledged to the agents that no promises had been made to him about his cooperation, a deal, or his prosecution. The Government reports identical conversations in relation to the January 13, 1997 interview.

O'Brien has stated repeatedly that he entered into an agreement with the U.S. government

in January of 1997, an agreement which affects his term of incarceration. O'Brien alleges that the terms of this agreement have not been complied with, resulting in his unlawful incarceration and the confiscation of his gambling devices. O'Brien has produced absolutely no evidence of the existence of the agreement. The government denies its existence.

This Court will address O'Brien's and the Plaintiff's Motions separately.

II. Discussion

Motion to Strike

O'Brien contends that all Orders entered in this matter should be struck by the Court under Rule 11 of the Federal Rules of Civil Procedure as a sanction to the Plaintiff for misconduct. O'Brien contends that the alleged agreement entered into between him and the government calls for his immediate release from prison and the return of eighteen (18) gambling devices seized from the Blue House. Thus, the existence of the agreement would deem the pending litigation frivolous, and subject the government to Rule 11 sanctions for proceeding with the forfeiture action.

However, as the Plaintiff contends and as this Court has found, O'Brien has not produced any evidence of the agreement. Furthermore, he did not contest the forfeiture when notified of the proceedings via letter dated February 26, 1997. By the date of the receipt of the letter, O'Brien would have already entered into the alleged agreement, but he did not file a claim in the forfeiture action, and did not notify the AUSA of the alleged agreement. Absent proof of the agreement, O'Brien has failed to produce any evidence to show this action against him is frivolous and worthy of Rule 11 sanctions.

Motion to Consolidate Cases

O'Brien moves, further, to consolidate this forfeiture proceeding with other proceedings already initiated by O'Brien. Consolidation is appropriate pursuant to F.R.C.P. 42(a) when:

"[A]ctions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial or any or all the matters in issue in the actions...to avoid unnecessary costs or delay."

Consolidation is proper to preserve judicial resources and valuable time.

In this case, however, O'Brien has failed to provide any evidence of the existence of other proceedings to consolidate with the forfeiture action. He has not produced any file stamped pleadings or a case number to verify he has initiated a case. O'Brien alleges he has filed a petition seeking habeas corpus relief. Neither the Plaintiff or this Court has been provided with any evidence of such a petition, and, even if one did exist, it is wholly unrelated to the civil forfeiture action and is not proper for consolidation with this case.

Motion to Stay

O'Brien moves this Court to stay the forfeiture proceeding pending a determination on his habeas corpus petition. Once again, O'Brien has not produced any evidence of the existence of such a petition. A stay of a civil forfeiture may be appropriate where there is a pending criminal litigation, in order to protect the Claimant's Fifth Amendment rights. Here, however, O'Brien was tried and convicted over two years ago, alleviating any concerns of self incrimination. Thus, a pending habeas petition cannot serve as grounds for a stay of a civil forfeiture proceeding, as it holds no threat of additional punishment for the Claimant. *United States v. Certain Real Property*, 812 F. Supp. 332, 333 (E.D. NY 1992).

O'Brien's Motion to Dismiss

O'Brien further asks this Court to dismiss the Plaintiff's Complaint for Forfeiture *In Rem*. O'Brien contends that he was served over two years after the forfeiture was initiated, and that the limitations period has run, making the action void. Furthermore, O'Brien argues that the forfeiture was made void pursuant to the alleged agreement entered into between O'Brien and the Plaintiff in January of 1997. Finally, O'Brien asserts that the Plaintiff has no legal or factual basis for the forfeiture action.

The government has responded that the prosecution of the forfeiture action did not proceed during the pendency of the criminal investigation directly connected to the seizure of the defendant gambling devices. The government was operating under concerns of Fifth Amendment claims, and to prevent improper discovery.

The government further argues that, because discovery in criminal cases is much more limited than that in civil cases, it is inappropriate to make use of liberal discovery procedures applicable to civil suits as a method of avoiding the restrictions on criminal discovery. *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962). The Supreme Court, as well, has recognized that a pending criminal case justifies delaying forfeiture proceedings because of the potential abuses in the discovery process. *United States v. \$8,850*, 461 U.S. 555 (1983).

O'Brien has made no argument to the Court that he was prejudiced by the delay. In fact, because of the interconnectedness of the civil forfeiture with the criminal proceeding, it was entirely appropriate for the government to protect O'Brien's constitutional rights and delay the civil forfeiture until the criminal proceeding was finalized.

Alternately, O'Brien contends that the Complaint should be dismissed because it has been made void pursuant to an agreement entered into between O'Brien and the Plaintiff. Once again,

O'Brien has failed to prove the existence of that agreement. He has reiterated time and again that it exists, but has not produced a scintilla of evidence that the government "struck a deal" with him. This Court will not dismiss a civil forfeiture action based on a document which, seemingly, does not exist.

Finally, O'Brien argues that the Plaintiff has "no legal or factual basis for the request of the government to foreclose on O'Brien's property." All of the facts as presented to this Court are to the contrary. There is, in fact, more than a sufficient factual and legal basis for the Plaintiff to pursue this action. O'Brien does not point to anything to support this claim. He only reiterates, time and again, the importance of the agreement he made with the Plaintiff. As discussed *supra*, the conspicuous absence of any evidence of the agreement's existence ends this inquiry.

Plaintiff's Motion to Dismiss

The Plaintiff asks this Court to dismiss the Counterclaim of O'Brien on the grounds that he has failed to state a question of law or fact in common with the pending civil forfeiture action. In order for the counterclaim to be exempt from the requirements of 28 U.S.C. § 2675(a), the Claimant must prove that the counterclaim is compulsory. A compulsory counterclaim "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." F.R.C.P. 13(a).

The Plaintiff argues that the government's *in rem* action is based on establishing probable cause that the defendant gambling devises, keys, operating manuals, repair books, proceeds, etc., are subject to seizure and forfeiture pursuant to 18 U.S.C. §1955. The machines were used to conduct an illegal gambling business, as that term is defined in 18 U.S.C. §1955, and pursuant to 15 U.S.C. §1177 because the machines were used in violation of the provisions of 15 U.S.C. §§ 1177 through 1178. The Plaintiff argues that these facts and questions of law do not relate to those surrounding

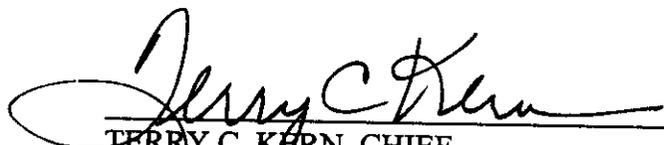
Claimant's Counterclaim, which relates to an alleged agreement for purported evidence in the prosecution of another defendant in the criminal proceedings.

O'Brien's Counterclaim does, in fact, deal entirely with the government's breach of the alleged agreement, and is not so intricately tied to the facts and legal issues in the civil forfeiture proceeding to satisfy the definition of "compulsory." O'Brien's counterclaim focuses entirely on the damage he has suffered as a result of the government's breach of the agreement. Because of this breach, O'Brien claims he is being unlawfully detained in prison, and that he is due the immediate return of the eighteen (18) machines which are the subject of this forfeiture. The validity of any claims based on the existence of the alleged agreement has been fully discussed in this Order. No proof of that agreement exists; thus, the Claimant's Counterclaim must be dismissed.

III. Conclusion

For the above stated reasons, it is the Order of the Court that Michael Allen O'Brien's Motion to Strike any Order Entered in this Action (#44) is DENIED, O'Brien's Motion to Consolidate Cases (#45-1) and Stay Proceedings (#45-2) is DENIED, and O'Brien's Motion to Dismiss (#46) is DENIED. The Plaintiff's Motion to Dismiss Counterclaim (#51) is GRANTED.

ORDERED this 9 day of October, 1998.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

OCT 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

EDWARD L. GRAMES,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 97-CV-1129-EA

ENTERED ON DOCKET
DATE OCT 14 1998

JUDGMENT

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

It is so ORDERED this 13th day of October, 1998.

Claire V. Eagan
CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

(16)

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

ENTERED ON DOCKET

DATE OCT 14 1998

EDWARD GRAMES,
Plaintiff,

vs.

KENNETH S. APFEL,
Commissioner,
Social Security Administration,
Defendant

§
§
§
§
§
§
§
§
§

No. 97-CV-1129-~~K~~^{EA} ✓ **F I L E D**

OCT 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT



ORDER

IT IS ORDERED, ADJUDGED AND DECREED that this case be, and it is hereby remanded to the Defendant for further administrative action pursuant to sentence four (4) of §205(g) of the Social Security Act, 42 U.S.C. §405(g). Melkonyan v. Sullivan, 501 U.S. 89 (1991). The Commissioner shall remand the case to the Appeals Council with instructions that the Appeals Council shall remand the case to an ALJ to reevaluate the claimant's subjective complaints, credibility and residual functional capacity. Specifically, the ALJ will consider and explain the weight given to the examining and treating sources as well as to the findings of fact made by State Agency medical consultants. If necessary, the ALJ will obtain testimony from a medical expert to assist in determining the precise functional limitations imposed by the claimant's impairments. The ALJ will pose clearly defined hypothetical questions to a vocational expert in order to obtain testimony from such expert concerning whether jobs exist that the claimant can perform. Upon completion of the record, the ALJ will determine if the record shows that the claimant was unable to engage in substantial gainful activity by reason of a medically determinable impairment which lasted a continuous period of twelve months. Furthermore, the ALJ will reevaluate the claimant's

(13)

work activity from December 1993 through May 1994 to determine if the claimant's work constituted an unsuccessful work attempt or if it constituted substantial gainful activity. See 20 C.F.R. §§ 404.1571 - 404.1574(1998); SSR 84-25. Finally, the ALJ will issue a new decision, setting out the evidence which supports each conclusion and explaining how any material inconsistencies were resolved.

THUS DONE AND SIGNED on this 13th day of October, 1998.

Clair Egan
United States District Judge
MAGISTRATE

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

FILED

OCT 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

OCT 14 1998

ANDY DARNELL SMITH,)

Petitioner,)

vs.)

NEVILLE MASSIE,)

Respondent.)

Case No. 98-CV-376-BU (M))
(BASE FILE))

98-C-734-BU

ORDER

This 28 U.S.C. § 2254 habeas action has been consolidated with Case No. 98-CV-734-BU which was transferred to this district on September 24, 1998, from the United States District Court for the Western District of Oklahoma. Petitioner, a prisoner currently incarcerated at the Oklahoma County Jail, challenges the judgment and sentence entered September 3, 1997, by Tulsa County District Court, Case No. CF-96-5306.

Prior to the transfer of Case No. 98-CV-734-BU to this Court, Petitioner filed a letter with the United States District Court for the Western District of Oklahoma requesting his habeas petition be dismissed without prejudice (Case No. 98-CV-734-BU, Docket #1-7). In his letter, Petitioner explained that his request for dismissal without prejudice was due to the fact that he had "not exhausted all available state remedies. 22 O.S. 1998 sec. 1080 et. seq." Pursuant to Haines v. Kerner, 404 U.S. 519, 520-21 (1972), the Court liberally construes Petitioner's letter as a motion to dismiss without prejudice for non-exhaustion.

The United States Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). 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). 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).

In this case, Petitioner indicates he has not exhausted all of his state remedies. Because Petitioner must give the Oklahoma Court of Criminal Appeals the first opportunity to correct any constitutional errors by presenting his claims via the procedures defined in the Oklahoma Post-Conviction Procedure Act, Okla. Stat. tit. 22, § 1080, et seq., the Court finds Petitioner's request that this action be dismissed without prejudice filed in Case No. 98-CV-734-BU should be granted. Although a similar motion was not filed in Case No. 98-CV-376-BU, the Court notes that Petitioner challenges the same conviction and raises the same issues in both cases. Therefore, the Court concludes Case No. 98-CV-376-BU should also be dismissed without prejudice for failure to exhaust state remedies. In the event Petitioner is not granted the relief he seeks in an appeal from the denial of his application for post-conviction relief, he may refile his petition for a writ of habeas corpus in this Court.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Petitioner's request to dismiss his habeas corpus petition without prejudice for failure to exhaust state remedies (see Docket #1-7, in Case No. 98-CV-734) is **granted** and Case No. 98-CV-734-BU is **dismissed without prejudice** for failure to exhaust state remedies.

2. Case No. 98-CV-376-BU is **dismissed without prejudice** for failure to exhaust state remedies.
3. The Clerk is directed to file a copy of this Order in Case No. 98-CV-734-BU.
4. All pending motions are **denied as moot**.

SO ORDERED THIS 13 day of October, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

OCT 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DUANE P. KINCAID and SHAREN)
M. KINCAID, Husband and)
Wife,)
)
Plaintiffs,)
)
vs.)
)
HAROLD E. STANDRIDGE, DON K.)
LITTLE, JR., FARMERS INSURANCE)
COMPANY, INC., and FARMERS)
INSURANCE EXCHANGE,)
)
Defendants.)

Case No. 97-C-913-BU

ENTERED ON DOCKET
OCT 14 1998
DATE _____

ORDER

This matter comes before the Court upon Plaintiffs' Motion to Set Aside Jury Verdict, Alter or Amend Judgment, or in the Alternative, Motion for New Trial. Defendants, Harold E. Standridge, Farmers Insurance Company, Inc. and Farmers Insurance Exchange, have responded to the motion, and upon due consideration, the Court makes its determination.

Plaintiff, Sharen M. Kincaid ("Kincaid"), brought this action to recover damages for injuries she allegedly received in a motor vehicle accident. At the time of the accident, Kincaid was a passenger in a car driven by Defendant, Don K. Little, Jr. ("Little"). Defendant, Harold E. Standridge ("Standridge"), was driving the car which rear-ended Little's car. Kincaid alleged that her injuries were caused by the individual or joint negligence of Little and Standridge. Kincaid asserted claims against Defendants, Farmers Insurance Company, Inc. and Farmers Insurance Exchange, for recovery of underinsured motorist benefits.

Plaintiff, Duane P. Kincaid, asserted claims against Little and Standridge for loss of consortium.

During the trial of Plaintiffs' claims, the Court granted Little's oral motion for judgment as a matter of law pursuant to Rule 50(a), Fed. R. Civ. P. The Court, however, denied the Rule 50(a) motion of Plaintiffs for a judgment as a matter of law against Standridge on the issue of liability. Plaintiffs' claims were submitted to the jury and the jury returned a verdict in favor of Standridge on those claims.

In the instant motion, Plaintiffs contend that the Court should have entered judgment as a matter of law in their favor on the issue of Standridge's liability. Plaintiffs contend that Standridge admitted that he diverted his attention from the vehicle in which Kincaid was a passenger at the time of the motor vehicle accident and that this inattentiveness was the actual cause of the motor vehicle accident. Plaintiffs additionally contend that Standridge's own expert medical witness opined that Kincaid was injured as a result of the accident and sustained medical damages. Plaintiffs contend that the Court's error in not granting judgment as a matter of law on the issue of negligence was not harmless and requires the Court to set aside the jury's verdict, amend or alter its judgment or order a new trial pursuant to Rule 59, Fed. R. Civ. P.

Judgment as a matter of law is appropriate when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on

that issue...." Rule 50(a)(1), Fed. R. Civ. P. The trial court views the evidence and all reasonable inferences drawn from it in favor of the nonmoving party without weighing the evidence, passing on the credibility of the witnesses, or substituting its judgment for that of a jury. Greene v. Safeway Stores, Inc., 98 F.3d 554, 557, 560 (10th Cir. 1996). Judgement as a matter of law is appropriate only where the evidence and all inferences to be drawn therefrom are so clear that reasonable minds could not differ on the conclusion. Unless the proof is all one way or so overwhelmingly preponderant in favor of the movant as to permit no other rational conclusion, judgment as a matter of law is improper. Id. (citations and quotation omitted).

The Court finds that it did not err in denying Plaintiffs' motion for judgment as a matter of law under Rule 50(a) on the issue of liability. The evidence in the record did not point solely in Plaintiffs' direction. There was sufficient evidentiary basis to find in favor of Standridge on Plaintiffs' claims. The Court concludes that a reasonable jury could conclude that Plaintiffs did not prove all of the elements of their claims by a greater weight of the evidence. The Court rejects Plaintiffs' arguments to the contrary.

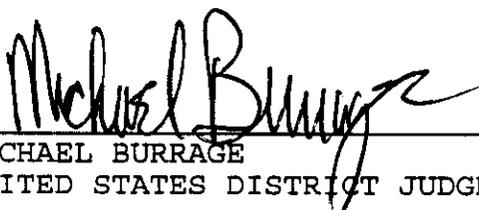
Plaintiffs maintain that a new trial is warranted because the jury's verdict was against the weight of the evidence. A motion for new trial made on the ground that the verdict is against the weight of evidence presents a question of fact, and not of law, and is addressed to the discretion of the trial court. Getter v. Wal-

Mart Stores, Inc., 66 F.3d 1119, 1125 (10th Cir. 1995), cert. denied, 516 U.S. 1146 (1996). In the instant case, the record contains sufficient evidence to support the jury's verdict. The jury verdict is not clearly, decidedly, or overwhelmingly against the evidence. Id.

Plaintiffs request that the judgment be altered or amended under Rule 59(e), Fed. R. Civ. P. A Rule 59(e) motion to alter or amend the judgment should be granted only "to correct manifest errors of law or to present newly discovered evidence." Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1523 (10th Cir. 1992) (quoting Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985)). Plaintiffs have not shown any manifest error of law warranting relief under Rule 59(e).

Accordingly, Plaintiffs' Motion to Set Aside Jury Verdict, Alter or Amend Judgment, or in the Alternative, Motion for New Trial (Docket Entry #51) is DENIED.

ENTERED this 13th day of October, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

BEVERLY J. MILAZZO and)
FRANK T. MILAZZO, Husband and Wife,)
)
Plaintiffs,)
)
v.)
)
METROPOLITAN LIFE INSURANCE)
COMPANY, a New York corporation, Claims)
Administrator, and)
THE RAYTHEON COMPANY, a Delaware)
corporation, Trustee, The Raytheon)
Company's Employee's Trust Disability,)
Plan Administrator,)
)
Defendants.)

ENTERED ON DOCKET

DATE 10-13-98

Case No. 97-C-436-H ✓

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

ORDER

This matter comes before the Court on Plaintiffs' motion to dismiss a party (Docket # 40), Plaintiff's motion for admission of exhibits not in the administrative record (Docket # 33), Defendants' motion for summary judgment (Docket # 22), Defendants' motion to dismiss (Docket # 28), and Plaintiffs' motion for summary judgment (Docket # 45).

Plaintiff Beverly J. Milazzo was an employee of Sedco, a subsidiary of Raytheon Company ("Raytheon") until June of 1991. As an employee, she was a participant and beneficiary in the Raytheon Long Term Disability Plan. Mrs. Milazzo alleged disability on March 28, 1991, due to vertigo caused by Meniere's disease. She received disability benefits from June 29, 1991 through February 16, 1995, at which time Defendant Metropolitan Life Insurance Company ("MetLife"), the administrator of the Raytheon plan, determined that Plaintiff was no longer totally disabled. Mrs. Milazzo appealed MetLife's administrative

57

determination that she was no longer entitled to benefits, but MetLife upheld its prior finding discontinuing benefits.

Plaintiff Beverly Milazzo and her husband Frank T. Milazzo instituted this action in state court due to MetLife's termination of long-term disability benefits. Defendants subsequently removed the action to this Court. After Defendants filed the instant motion for summary judgment, Plaintiff filed an amended complaint asserting three causes of action pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq.: an improper denial of benefits under 29 U.S.C. § 1132(a)(1)(B); failure to provide plan information in a timely manner under 29 U.S.C. § 1132(c); and failure to provide full and fair review under 29 U.S.C. § 1133. Plaintiff also has asserted a state law claim for intentional infliction of emotional distress. Mr. and Mrs. Milazzo have moved to dismiss Mr. Milazzo as a party to this action and Mrs. Milazzo has moved to supplement the evidence in the administrative record. Plaintiffs also have moved for summary judgment on their claim that she was improperly denied benefits.¹ Additionally, Defendants have moved to dismiss or have moved for summary judgment on all of Plaintiff's claims.

¹ In its response to Plaintiffs' motion for summary judgment, Defendants state that Plaintiffs have moved for summary judgment on other claims, including the § 1133 claim and the § 1132(c) claim. Defendants also insist that they, not Plaintiffs, are entitled to summary judgment on these claims. Defs.' Resp. Br. at 28. The Court finds, however, that Plaintiffs have not moved for summary judgment on these claims, but merely "reiterate" the basis of each of these claims. Pls.' Mt. Summ. Judg. at 22-23. Defendants also have not moved for summary judgment on these two claims, but have merely moved to dismiss them. Accordingly, the Court only treats Plaintiffs' motion for summary judgment as dealing with the improper denial of benefits under § 1132(a)(1)(B) and will review the § 1133 and § 1132(c) claims based on Defendants' motion to dismiss.

I

Plaintiffs first move to dismiss Frank T. Milazzo as a party to this action since he has no standing to sue under ERISA. The rule governing voluntary dismissals provides that “an action shall not be dismissed at the plaintiff’s insistence save upon order of the court and upon such terms and conditions as the court deems proper.” Fed. R. Civ. P. 41(a)(2). Plaintiffs request that Mr. Milazzo be dismissed with prejudice since he was not “a participant or a beneficiary” under ERISA and thus has no status as a plaintiff. 29 U.S.C. § 1132(a)(1). In contrast, Defendants contend that any dismissal of Mr. Milazzo as a party to this action should be conditioned upon an award of attorneys’ fees to Defendants.

The Court finds that dismissal of Mr. Milazzo as a party to this action is proper. As Plaintiffs note, since Mr. Milazzo was not a participant or beneficiary in the benefit plan, he does not have a cognizable action under ERISA. Accordingly, Plaintiffs’ motion for dismissal of a party is hereby granted. However, the Court makes no determination at this time upon an award of attorney’s fees relating to the defense of an action against Mr. Milazzo.

II

Plaintiff Mrs. Milazzo has next moved for the admission of exhibits not in the administrative record. Plaintiff requests that the Court supplement the administrative record in this matter through the addition of several of Plaintiff’s medical treatment records. Such material has been attached to her brief as exhibits A through P.

In the Tenth Circuit, “the district court generally may consider only the arguments and evidence before the administrator at the time it made that decision.” Sandoval v. Aetna Life &

Cas. Ins. Co., 967 F.2d 377, 380 (10th Cir. 1992). In adopting this standard, the court stated as follows:

A primary goal of ERISA was to provide a method for workers and beneficiaries to resolve disputes over benefits inexpensively and expeditiously. Permitting or requiring district courts to consider evidence from both parties that was not presented to the plan administrator would seriously impair the achievement of that goal. If district courts heard evidence not presented to plan administrators, employees and their beneficiaries would receive less protection than Congress intended.

Id. (quoting Perry v. Simplicity Engineering, 900 F.2d 963, 967 (6th Cir. 1990)).

Plaintiff contends that the Court should allow the submission of exhibits not in the administrative records pursuant to Quesinberry v. Life Ins. Co. of North America, 987 F.2d 1017 (4th Cir. 1993). In Quesinberry, the Fourth Circuit held that in most cases the court should only consider the evidence before the administrator, but that “exceptional circumstances” may warrant the consideration of additional evidence. Id. at 1025-26. What Plaintiff fails to note, however, is that the Tenth Circuit has rejected Quesinberry, holding that reliance on this case, which involved a de novo review of an administrator’s decision, is inapplicable to an arbitrary and capricious review, as is present in the instant case. Chambers v. Family Health Plan Corp., 100 F.3d 818, 824 (10th Cir. 1996).²

Accordingly, the Court finds that, in accordance with Sandoval, it will only consider the evidence in the administrative record in its review of the administrator’s decision. Like Sandoval, Mrs. Milazzo had the opportunity to submit any additional evidence she felt relevant to her decision in both the initial review and appeal stages of the decision. Accordingly, the

² The Court also notes that Quesinberry is inapplicable since that court rejected the view of the Sixth Circuit in Perry, while the Tenth Circuit has expressly adopted and quoted the Perry standard for admission of evidence not before the administrator. See Sandoval, 967 F.2d at 380.

Court finds that the administrative record is not incomplete and will limit its review to that evidence. Plaintiff's motion for the admission of exhibits not in the administrative record is hereby denied.

III

Defendants have moved to dismiss Plaintiff's claims under 29 U.S.C. § 1132(c) for failure to provide plan information in a timely manner and have also moved to dismiss Plaintiff's claim under § 1133 for Defendants' alleged failure to provide "full and fair review."³

To prevail on a motion to dismiss, a defendant must establish that there is no set of circumstances upon which the plaintiff would be entitled to relief. Jenkins v. McKeithen, 395 U.S. 411 (1969); Ash Creek Mining Co. v. Lujan, 969 F.2d 868, 870 (10th Cir. 1992). For the purposes of this analysis, the Court accepts as true all material allegations in the complaint. Id.

A

Defendants have first moved to dismiss Plaintiff's claim for failure to provide certain plan information in a timely manner pursuant to 29 U.S.C. § 1132(c). That section provides in pertinent part as follows:

Any administrator . . . who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary . . . may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to \$100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

³ Defendants also have moved to dismiss Plaintiff's claim for denial of benefits under § 1132(a)(1)(B) and Plaintiff's claim for intentional infliction of emotional distress, incorporating by reference its arguments in Defendants' motion for summary judgment. These claims will be addressed in section IV, infra.

29 U.S.C. § 1132(c)(1)(B).⁴

The only reference to this cause of action in Plaintiff's amended complaint is found in paragraph 22. Paragraph 22 states in its entirety that "[t]he Plaintiff also has an action under § 1132(c) for failure of the Administrator to supply certain material when requested. (See Exhibit "C," attached hereto, and incorporated herein by reference.)" Exhibit "C" is a letter from Mrs. Milazzo's attorney to Cheryl Robilotta requesting seventeen different documents. Defendants contend that this claim should be dismissed because Plaintiff has not specifically pled a cause of action under § 1132(c).

In Maez v. Mountain States Tel. & Tel., Inc., 54 F.3d 1488 (10th Cir. 1995), the plaintiffs had "requested certain information" from "the Defendant administrators." Id. at 1507. The Tenth Circuit affirmed dismissal of this complaint for civil penalties under § 1132(c) because the "plaintiffs had not alleged what documents were requested, what documents were received, and how plaintiffs had been harmed." Id. Defendants allege that Mrs. Milazzo's claim should be dismissed under Maez since she also did not state what documents were received or how she was harmed by the delay in providing the information. Defendants also contend that Plaintiffs have not requested the plan information from the "administrator," as required under § 1132(c), since Cheryl Robilotta was not an employee of the Raytheon Company, the plan administrator, but was only an employee of MetLife.

⁴ A plan administrator is required to respond to requests for information pursuant to 29 U.S.C. § 1025, while § 1132(c) authorizes civil penalties of up to \$100 per day for failure to provide plan documents. The penalty is designed to induce compliance with information requests by beneficiaries and participants. See Sage v. Automation, Inc., Pension Plan and Trust, 845 F.2d 885, 894 n.4 (10th Cir. 1988).

Plaintiffs, by contrast, argue that her complaint satisfies the minimal notice pleading standards and that a showing of prejudice or injury is not required to recover civil penalties for failure to provide plan documents. See Moothart v. Bell, 21 F.3d 1499, 1506 (10th Cir. 1994) (holding that “neither prejudice nor injury are prerequisites to recovery under the penalty provisions of the statute” for failure to provide documents but are instead factors to consider in deciding whether to award a penalty); Sage, 845 F.2d at 894 n.4. Plaintiff also argues that her cause of action should not be precluded because the request for information was not sent to the plan administrator. Plaintiff states that she had communicated with Ms. Robilotta on several occasions and that Ms. Robilotta informed Plaintiff that she had forwarded the request for information to the proper party.

The Court finds that Mrs. Milazzo has properly indicated the individual to whom she directed her request for information. As the Tenth Circuit has noted, a letter not sent directly to the plan administrator can under certain circumstances still be considered a request for information for purposes of § 1132(c). See Boone v. Leavenworth Anesthesia, Inc., 20 F.3d 1108, 1109-10 n.2 (10th Cir. 1994) (stating that a “letter may be a sufficient written request even if not sent directly to the plan administrator”); McKinsey v. Sentry Ins., 986 F.2d 401, 404-05 (10th Cir. 1993) (stating that the actions of other employees may be imputed to the plan administrator “if in practice, company personnel other than the plan administrator routinely assume responsibility for answering requests from plan participants and beneficiaries”).

However, the Court further finds that, applying the standard articulated in Maez, Mrs. Milazzo’s allegations are insufficient to state a claim under § 1132(c). The conclusory declaration that plaintiff “has an action” under a statute simply does not satisfy the minimal

notice pleading standards contemplated by law. For this reason, Defendants' notice to dismiss the § 1132(c) is hereby granted.

B

Defendants next moved to dismiss Plaintiff's claim that she was not provided a "full and fair review" pursuant to 29 U.S.C. § 1133. Section 1133 provides as follows:

In accordance with regulations of the Secretary, every employee benefit plan shall--

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

29 U.S.C. § 1133.

Defendants allege that a claim under this section must be dismissed because a § 1133 claim can only be asserted against the plan itself, while Plaintiff has only sued the plan administrator and claim administrator. Second, Defendants contend that this claim must be dismissed since Plaintiff has not requested the only remedy available under this section, a remand for further administrative appeal.

In response, Plaintiff states that she named the Raytheon Company, as trustee of the plan and as plan administrator, in her amended complaint. Plaintiff does not address, however, Defendants' argument that § 1133 only applies to the plan and not to the plan administrator. The Court finds that a claim pursuant to § 1133 can only be sustained against the plan itself, rather than against the plan administrator. See Walter v. International Assoc. of Machinists Pension

Fund, 949 F.2d 310, 315 (10th Cir. 1991) (stating that “ERISA provisions providing for recovery against the ‘plan’ cannot be used to recover against the ‘plan administrator’ because the terms ‘plan’ and ‘plan administrator’ refer to two entirely distinct actors”) (quoting Groves v. Modified Retirement Plan, Etc., 803 F.2d 109, 116 (3d Cir. 1996)); Vanderklok v. Provident Life & Accident Ins. Co., 956 F.2d 610, 618 (6th Cir. 1992) (stating that the “duties of the ‘plan’ as stated in section 1133 are not duties of the ‘plan administrator’ as articulated in section 1132(c)”). Accordingly, since Plaintiff has not filed suit against the plan, Defendants’ motion to dismiss Plaintiff’s § 1133 claim is hereby granted.

IV

Both Plaintiffs and Defendants have moved for summary judgment on Plaintiff’s claim for improper denial of benefits. Defendants also have moved for summary judgment on Plaintiff’s state law claim for intentional infliction of emotional distress. 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). Additionally, in ERISA actions, the Tenth Circuit has noted that the issues can "normally be handled by the expedient of summary judgment." Carter v. Central States, SE and SW Areas Pension Plan, 656 F.2d 575, 576 (10th Cir. 1981).

A

The parties have first moved for summary judgment on Plaintiff's claim that she was improperly denied benefits under 29 U.S.C. § 1132(a)(1)(B). This section states that

A civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan

29 U.S.C. § 1132(a)(1)(B).

The parties do not dispute that the plan gives MetLife, the administrator, discretionary authority to determine eligibility for benefits.⁵ Thus, because the plan gave MetLife this discretion, the Court reviews the administrator's decision under the "arbitrary and capricious" standard of review. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989); Sandoval, 967 F.2d at 380. Lack of substantial evidence and a mistake of law are indications of arbitrary and capricious actions, as are bad faith or conflict of interest. Sandoval, 967 F.2d at 380 n.4. The touchstone of the inquiry "is whether defendant's interpretation of its plan is reasonable." Semtner v. Group Health Serv. of Okla., Inc., 129 F.3d 1390, 1393 (10th Cir. 1997). Further, "substantial evidence" has been defined as "'evidence that a reasonable mind might accept as adequate to support the conclusion reached by the [decisionmaker].'" Substantial evidence

⁵ In addition to the parties' agreement on this issue, the Court also finds that the plan allows MetLife discretion in determining benefits. For example, the plan gives MetLife the authority to determine whether proof of claim for a long-term disability is satisfactory and the amount due on such claims. The Plan Document also states that the plan and claims administrators have sole discretion to interpret the plan and matters arising under the plan. See Record at 44, 47, 143.

requires ‘more than a scintilla but less than a preponderance.’” Sandoval, 967 F.2d at 382 (quoting Flint v. Sullivan, 951 F.2d 264, 266 (10th Cir. 1991)).⁶

Additionally, the Tenth Circuit has adopted a “sliding scale” of deference to an administrator’s decision when the administrator operates under a conflict of interest. Chambers, 100 F.3d at 826. Under the “sliding scale” approach, a court must “decrease the level of deference given to the conflicted administrator’s decision in proportion to the seriousness of the conflict.” Id. at 825.

The Court will apply these principles in its review of the administrator’s decision to discontinue Plaintiff’s disability benefits. The Raytheon plan has two phases of long-term disability benefits. The first phase, which continues for two years, pays benefits if the participant is unable to perform substantially all the duties of his or her job. The second phase of benefits, which begins at the expiration of the two-year period, pays benefits only if the participant “cannot do any other job for which he or she is fit by education, training or experience.” Record at 33. Further, plan participants must “provide satisfactory medical proof that [they are] disabled.” Record at 24.

⁶ Moreover, as Sandoval noted,

[t]he district court’s responsibility lay in determining whether the administrator’s actions were arbitrary or capricious, not in determining whether [plaintiff] was, in the district court’s view, entitled to disability benefits. In effect, a curtain falls when the fiduciary completes its review, and for purposes of determining if substantial evidence supported the decision, the district court must evaluate the record as it was at the time of the decision.

Sandoval, 967 F.2d at 381.

MetLife contends that its decision to discontinue benefits was justified and was supported by the record, taking into account all of Mrs. Milazzo's medical complaints, as well as the input in interpreting the medical records by an independent physician and board-certified specialist in occupational medicine, Dr. Petrie. Although Mrs. Milazzo claimed that her vertigo prevented her from performing any work, MetLife contends that the evidence reflected that her condition was intermittent and controlled by medication. Specifically, MetLife points to Plaintiff's MRI and neurologic condition, which showed normal, as well as two audiograms which did not demonstrate progressive Meniere's disease. MetLife also notes that none of Plaintiff's physicians certified that she was disabled from all jobs after February 17, 1995. MetLife also argues that their two-day surveillance investigation of Mrs. Milazzo found her to be active, running errands, walking, and lifting without difficulty. Accordingly, Defendants argue that there was substantial evidence in the record to uphold their decision under the arbitrary and capricious standard of review.

Plaintiff, by contrast, argues that the decision to discontinue disability benefits was arbitrary and capricious because a conflict of interest was present. Specifically, Plaintiff asserts that the claims administrator, as payor, has a conflict of interest in denying as many claims as possible so that the plan administrator will continue to request its services. Plaintiff also claims a conflict of interest because of Dr. Petrie's on-going relationship with the claims administrator.⁷

⁷ Defendants contend that Plaintiff's factual basis for a conflict of interest is incorrect. Defendants state that MetLife and Raytheon do not have a financial interest in the payment of Plaintiff's claims since all payments come from employee contributions. Defendants also allege that any ongoing relationship with Dr. Petrie and MetLife is irrelevant as it is MetLife which made the claims decision in this case.

Plaintiff also argues that the decision to terminate benefits was arbitrary and capricious because it was not supported by substantial evidence. Particularly, she points to the diagnoses of Dr. Dodson, Dr. Britton, and Dr. Webb that Plaintiff suffered from Meniere's disease and the opinions of Drs. Britton and Webb that she experienced vertigo on a daily basis. Plaintiff also argues that the report of a non-examining, non-treating physician, such as Dr. Petrie, should be discounted when contradicted by the other evidence in the record.

Plaintiff further asserts that the decision was arbitrary and capricious because it was not made in good faith. Mrs. Milazzo claims that Dr. Petrie ignored the opinions of her treating physicians, Drs. Cohen, Boskin, and Combs, who considered her totally disabled from any and all occupations. Plaintiff claims that the bad faith continued in the appeals process, where Dr. Petrie made no effort to review the records of Drs. White or Rhodes and ignored or misconstrued the objective evidence of vertigo by other doctors.

Additionally, Plaintiff contends that the plan administrator's decision was unreasonable in that Dr. Petrie ignored objective evidence of vertigo, misreported the evidence Plaintiff provided to him of her bilateral hearing capacity, and denied having received an abnormal ENG. Finally, Plaintiff asserts that the administrator's decision was based on a mistake of law in that Dr. Petrie considered that to be totally disabled from one's job required a state of absolute helplessness.

The Court has reviewed the record as it stood at the time of the administrator's decision. The Court finds that the decision to terminate Mrs. Milazzo's long-term disability benefits was not arbitrary or capricious. MetLife relied on the analysis of Dr. Petrie, who concluded that in February 1995 Plaintiff was not prevented from performing "any occupation." MetLife's

surveillance of Plaintiff also supports the conclusion that she was not totally disabled, as defined in the plan. To the extent that Mrs. Milazzo relies on evidence not before the administrator at the time of the decision in February 1995, the Court notes Sandoval's declaration that a decision is not arbitrary or capricious for failing to take into account evidence developed after the decision. See Sandoval, 967 F.2d at 381. The Court also observes that Dr. Petrie did not dispute the treating physicians' diagnosis that Plaintiff suffered from Meniere's disease. Instead, Dr. Petrie merely differed as to his opinion that Plaintiff was not impaired as to prevent her from performing any occupation. For the reasons set forth above, the Court concludes that MetLife's decision in February 1995 to discontinue Mrs. Milazzo's benefits was supported by substantial evidence and was not taken in bad faith or because of an erroneous conclusion of law.⁸ Accordingly, since the administrator's decision was not arbitrary or capricious,⁹ Defendants' motion for summary judgment on this claim is hereby granted. Plaintiffs' motion for summary judgment on this motion is hereby denied

B

Defendants have next moved for summary judgment on Plaintiff's claim for intentional infliction of emotional distress under state law, arguing that this claim is preempted by ERISA. Plaintiff has claimed damages for the "severe emotional, physical, and mental harm, as well as

⁸ As Defendants note, Plaintiff is incorrect in the assertion that MetLife required a state of total helplessness for a finding of "total disability" under the plan. The record does not support a conclusion that the standard used in terminating Mrs. Milazzo's benefits was an erroneous conclusion of law.

⁹ The Court finds that Plaintiff has not demonstrated evidence of a conflict of interest with Dr. Petrie and MetLife. Assuming, arguendo, that such a conflict exists, using the "sliding scale" approach, the Court still finds that the administrator's decision was not arbitrary or capricious.

great financial distress” she has suffered as a result of the alleged wrongful termination of her disability benefits. Amended Compl. ¶ 19. In this regard, Mrs. Milazzo claims that she also developed a stress ulcer. Id.

ERISA “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan” 29 U.S.C. § 1144(a). ERISA’s preemption clause has an “expansive sweep,” and should be given its “broad common-sense meaning.” Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987).

In determining the scope of the preemption clause, the Supreme Court has further stated that:

A law relates to an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan. Under this broad common-sense meaning, a state law may relate to a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect. Pre-emption is also not precluded simply because a state law is consistent with ERISA’s substantive requirements.

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138-39 (1990) (citations and quotation marks omitted). Moreover, the Supreme Court has held that ERISA’s civil enforcement provisions must be the exclusive avenue for actions asserting improper processing of claims for benefits. Pilot Life, 481 U.S. at 52.

Defendants contend that Plaintiff’s intentional infliction of emotional distress claim is preempted by ERISA since it relates to her claim for denial of benefits. Plaintiff states, however, that “[t]he duodenal stress ulcer is a disease that is physically demonstrable, which developed remotely and tenuously enough to the termination of benefits that it is not related to the plan.” Amended Compl. ¶ 26.

In Settles v. Golden Rule Ins. Co., 927 F.2d 505 (10th Cir. 1991), the Tenth Circuit held that plaintiff's claim for outrage¹⁰ was preempted by ERISA since it "directly concern[ed] the alleged improper administration of the benefit plan. Id. at 509. Likewise, the Court finds that Plaintiff's claim for intentional infliction of emotional distress in the instant case "relate[s] to" the benefit plan since it clearly has a "connection with or reference to" the benefit plan. The factual basis for the state law claim centers around Defendants' allegedly improper denial of her claim for benefits. Although Plaintiff alleges that the development of her ulcer arose too remotely from the plan to be considered related to it, the Court is not persuaded by the attempt to distinguish this claim from the numerous cases preempting the same or similar types of state claims. As a result, Plaintiff's state law claim for intentional infliction of emotional distress "relate[s] to" and therefore is preempted by ERISA. See Pilot Life, 481 U.S. at 47 (holding that claims for tortious breach of contract, breach of fiduciary duty, and fraud in the inducement were preempted); Cannon v. Group Health Serv. of Oklahoma, Inc., 77 F.3d 1270, 1273-74 (10th Cir. 1996) (holding that a breach of fiduciary duty claim was preempted by ERISA); Peckham v. Gem State Mut. of Utah, 964 F.2d 1043, 1049 (10th Cir. 1992) (stating that state law claims for breach of duty of good faith, emotional distress, and punitive damages were preempted). Accordingly, Defendants' motion for summary judgment on this claim is hereby granted.

V

For the reasons set forth above, Plaintiffs' motion to dismiss a party (Docket # 40) is hereby granted. Plaintiff's motion for admission of exhibits not in the administrative record

¹⁰ The tort of "outrage" is simply another name for the tort of intentional infliction of emotional distress. Anderson v. Oklahoma Temporary Servs., Inc., 925 P.2d 574, 575 n.1 (Okla. Ct. App. 1996).

(Docket # 33) is hereby denied. Defendants' motion for summary judgment (Docket # 22) is hereby granted. Defendants' motion to dismiss (Docket # 28) is hereby granted. Plaintiffs' motion for summary judgment (Docket # 45) is hereby denied.

IT IS SO ORDERED.

This 9TH day of October, 1998.


Sven Erik Holmes
United States District Judge

5

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

MICHAEL CLAYTON TUCKER,

Plaintiff,

v.

AT&T WIRELESS SERVICES,

Defendant.

ENTERED ON DOCKET

DATE 10-13-98

Case No. 97-CV-878-H(E) ✓

FILED

OCT 9 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

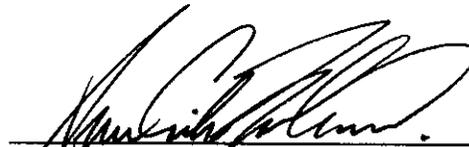
J U D G M E N T

This matter came before the Court on Defendant's Motion for Summary Judgment. The Court duly considered the issues and rendered a decision in accordance with the order filed on October 1, 1998.

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

IT IS SO ORDERED.

This 8TH day of October, 1998.



Sven Erik Holmes
United States District Judge

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

CHARLES A. ROSS,

Petitioner,

vs.

RONALD J. CHAMPION,

Respondent.

ENTERED ON DOCKET

DATE 10-13-98

Case No. 97-CV-412-H (M)

FILED

OCT 9 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court upon Respondent's motion to dismiss Petitioner's petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

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

IT IS SO ORDERED.

This 9TH day of OCTOBER, 1998.


Sven Erik Holmes
United States District Judge

9

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

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

CHARLES A. ROSS,

Petitioner,

vs.

RONALD J. CHAMPION,

Respondent.

Case No. 97-CV-412-H (M) ✓

ENTERED ON DOCKET

DATE 10-13-98

ORDER

Before the Court is Respondent's "motion to dismiss petition for habeas corpus as time barred by the statute of limitations" (Docket #4). Petitioner has filed a response to the motion to dismiss (#7). Respondent's motion is premised on 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which imposes a one-year limitations period on habeas corpus petitions. For the reasons discussed below, the Court finds that the petition was not timely filed and Respondent's motion to dismiss should be granted.

BACKGROUND

Based on information provided by Petitioner in his petition, it appears that on September 23, 1992, Petitioner was convicted by a jury of Robbery with Firearm, After Former Conviction of Two or More Felonies, in Tulsa County District Court, Case No. CF-92-873 (see #1). Petitioner was sentenced to "100 years, with a min. of 10 calender years." (#1). Petitioner appealed and on August 30, 1995, the Oklahoma Court of Criminal Appeals affirmed the conviction and sentence (#5, Ex. A). Petitioner did not seek post-conviction relief in the state courts. The instant petition for writ of habeas corpus was file-stamped in this Court on April 28, 1997. (#1).

8

ANALYSIS

The AEDPA, enacted April 24, 1996, established a one-year limitations period for habeas corpus petitions as follows:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State actions;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d). Because the limitations period generally begins to run from the date on which a prisoner's direct appeal from his conviction became final, a literal application of the AEDPA limitations language would result in the preclusion of habeas corpus relief for any prisoner whose conviction became final more than one year before enactment of the AEDPA. Recognizing the retroactivity problems associated with that result, the Tenth Circuit Court of Appeals has held that for prisoners whose convictions became final before April 24, 1996, the one-year statute of limitation does not begin to run until April 24, 1996. United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997). In other words, prisoners whose convictions became final before April 24, 1996, the date

of enactment of the AEDPA, have been afforded a one-year grace period within which to file for federal habeas corpus relief. In Simmonds, 111 F.3d at 746, the Tenth Circuit Court of Appeals expressly stated that "prisoners whose convictions became final on or before April 24, 1996 must file their § 2255 motion before April 24, 1997." Id. (citing Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir. 1996), *rev'd* on other grounds, 117 S.Ct. 2059 (1997), for the proposition that "reliance interests lead us to conclude that no collateral attack filed by April 23, 1997, may be dismissed under [28 U.S.C.] § 2244(d) and . . . 28 U.S.C. § 2255").

Application of these principles to the instant case leads to the conclusion that this habeas petition fails to meet the one-year limitations period. Because Petitioner failed to petition the United States Supreme Court for *certiorari*, his conviction became final 90 days after the Oklahoma Court of Criminal Appeals affirmed his conviction, or on November 28, 1995. See Caspari v. Bohlen, 510 U.S. 383 (1994); Simmonds, 111 F.3d at 744. Therefore, his conviction became final before enactment of the AEDPA. As a result, his one-year limitations clock began to run on April 24, 1996, when the AEDPA went into effect. Nothing in the record provided by the parties indicates the one-year period has been tolled in this case.

The petition for writ of habeas corpus is file-stamped April 28, 1997, five days beyond the termination of the one-year grace period, as defined by the Tenth Circuit Court of Appeals. Simmonds, 111 F.3d at 746. Even recognizing the filing date as the date on which Petitioner gave his petition to prison officials for mailing does not save the petition in this case. See Hoggro v. Boone, 150 F.3d 1223, 1227 n.3 (10th Cir. 1998). In his response to the motion to dismiss, Petitioner states that he gave his petition to prison officials for mailing on April 24, 1997 and

provides a copy of the prison mail log in support of his contention. (#7, Ex. II).¹ However, as previously stated, a petition for writ of habeas corpus must be filed *before* April 24, 1997, to be timely filed within the one-year grace period. Petitioner's petition, allegedly mailed *on* April 24, 1997, fails to meet the grace period parameters defined in Simmonds. See also United States v. Hutchinson, No. 97-6259, 1998 WL 94600 (10th Cir. March 5, 1998) (unpublished opinion).

Although § 2244(d) is not jurisdictional and as a limitation may be subject to equitable tolling, Miller v. Marr, 1441 F.3d 976, 978 (10th Cir. 1998), Petitioner attempts to justify his late filing by arguing that he is unable to read and write and was, therefore, forced to rely on fellow inmates for assistance in the preparation of his habeas corpus petition. The Court finds Petitioner's argument unpersuasive since he was clearly aware of the limitations deadline and had from November 28, 1995 to file his federal habeas petition in addition to the one-year grace period announced in Simmonds. Therefore, Petitioner does not offer sufficient explanation for his failure either to pursue diligently his claims or to comply with the April 23, 1997 deadline. The Court concludes that the petition for writ of habeas corpus is untimely and Respondent's motion to dismiss this petition as time-barred should be granted.

CONCLUSION

Because Petitioner failed to file his petition for writ of habeas corpus within the one-year grace period as defined in United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997), Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations should be granted.

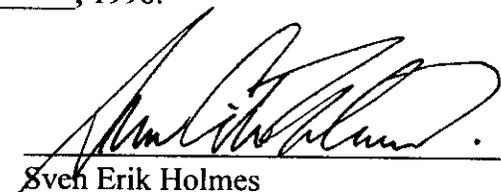
¹The Court notes that Exhibit II, attached to Petitioner's response to the motion to dismiss, appears to indicate that Petitioner gave his petition to prison officials for mailing on April 25, 1997, rather than April 24, 1997 as stated by Petitioner in his response. Furthermore, the dates on Exhibit II cannot be considered reliable evidence of the date of mailing because the dates on the copy provided for the Court's record have been altered with "white-out." However, even if Petitioner mailed his petition on April 24, 1997, it is nonetheless untimely.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations (#4) is **granted**.
2. The petition for writ of habeas corpus is **dismissed with prejudice**.

IT IS SO ORDERED.

This 9TH day of OCTOBER, 1998.


Sven Erik Holmes
United States District Judge

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

FILED

OCT 9 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARVIN SUMMERFIELD and)
ROBIN MAYES,)

Plaintiffs,)

v.)

Case No. 98-CV-0328-B(EA)

MARK MCCULLOUGH, JOEL)

THOMPSON, CHARLIE ADDINGTON,)

BOB LEWANDOWSKI, HOUSING)

AUTHORITY OF THE CHEROKEE)

NATION, BOB POWELL, HOUSING)

AUTHORITY OF THE CHEROKEE)

NATION BOARD OF COMMISSIONERS,)

ALEYENE HOGNER, in her capacity)

as a member of the Housing Authority of the)

Cherokee Nation Board of Commissioners,)

SAM ED BUSH, in his capacity as a)

member of the Housing Authority of the)

Cherokee Nation Board of Commissioners,)

STANLEY JOE CRITTENDEN, in his)

capacity as a member of the Housing)

Authority of the Cherokee Nation Board of)

Commissioners, MELVINA SHOTPOUCH,)

in her capacity as a member of the Housing)

Authority of the Cherokee Nation Board)

of Commissioners, NICK LAY, in his)

capacity as a member of the Housing)

Authority of the Cherokee Nation Board)

of Commissioners, and JOHN DOE(S),)

Defendants.)

ENTERED ON DOCKET
DATE OCT 13 1998

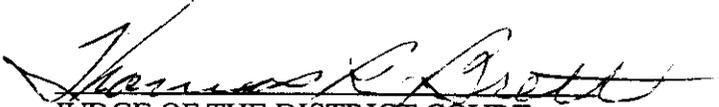
ORDER

UPON the Plaintiffs' Motion to Dismiss Without Prejudice Certain Defendants, opposed in part, filed herein, and for good cause shown,

101

IT IS HEREBY ORDERED that Defendants Lay, Shotpouch, Powell, Crittenden, Hogner and Bush are dismissed without prejudice from the First Cause of Action of the Second Amended Complaint, and it is FURTHER ORDERED that Defendants Lay, Shotpouch and Powell are dismissed without prejudice from all remaining causes of action of the Second Amended Complaint.

DATED this 9th day of October, 1998.


JUDGE OF THE DISTRICT COURT

FILED

OCT 9 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

SAM BELL,)
)
Plaintiff,)
)
vs.)
)
VENTAIRE,)
)
Defendant.)

No. 97-C-935-B(M) ✓

ENTERED ON DOCKET
DATE OCT 13 1998

ORDER

Before the Court is Defendant Venteaire's motion for summary judgment (Docket No. 27). Plaintiff Sam Bell ("Bell") alleges his former employer Venteaire discriminated against him based on his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* ("Title VII"), and his disability (congestive heart failure), in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§12101-12213. Based on the undisputed facts set forth below, the Court determines Venteaire's motion for summary judgment should be granted.

I. Undisputed Facts

Bell was hired as a draftsman by Venteaire in July of 1981. Bell worked as a draftsman, estimator and checker at Venteaire's Tulsa, Oklahoma facility until March 1996 when he was terminated from his employment with Venteaire.

During his employment, Bell received the following complaints concerning his job performance:

In May 1986, Carolyn Chapman ("Chapman"), Venteaire's Drafting Supervisor, warned

27

Phyllis

Bell that "he had been late & calling in sick far to [sic] much for us to continue paying him for 40 hrs a week" and Ventaire would start docking his time; *Ex. 1, Weaver Affidavit, Ex. A, to Ventaire's Memorandum in Support of Motion for Summary Judgment.*¹

In October 1986, Chapman gave Bell written notice that his excessive tardiness (27 times since May 1986) was negatively affecting the Drafting Department and if he continued to be late to work, he might be terminated; *Ex. 1, Weaver Affidavit, Ex. B.*

In October 1989, Chapman again warned Bell "that his attendance and/or tardiness [sic] was unacceptable & that his attitude was damaging his job performance" and "if he does not improve his work habits immediately he will be fired"; *Ex. 1, Weaver Affidavit, Ex. C.*

In June 1994, Bell was advised again that he needed to change his poor attitude and be more of a team player. He was given two weeks to improve his performance as an estimator; if he did not, Bell would return to his position as a draftsman; *Ex. 1, Weaver Affidavit, Ex. D.*

In September 1995, Bell received and signed the following memorandum from Chapman:

In reviewing your attendance records from January 2, 1995 to September 22, 1995 I find that you have worked 21 full weeks out of 38 total weeks, which is disturbing to the fact that you have worked less than 40 hrs for 17 weeks, [sic] Sam this hampers our production and drafting schedules and causes delays of jobs or we are forced to work other employees extra over time to compensate.

Sam we are to [sic] small a company and we can't afford for you to miss this much, you must make every effort to correct this absentee and tardiness problems, if you can not take on this responsibility, then Ventaire will be forced to take further action.

Ex. 1, Weaver Affidavit, Ex. E.

Bell received and signed a second memorandum from Chapman on October 19, 1995 stating:

¹ All further references are to exhibits to Ventaire's memorandum in support of motion for summary judgment.

We can not stress enough the importance, to morale, of being on time. We gave you written and verbal notice, that we would not tolerate tardiness on September 28, 1995. Since that date, we have given you three (3) tardy slips. If this happens again without you giving notice by phone, we will have to terminate your employment.

Ex. 1, Weaver Affidavit, Ex. F.

Five days later, Bell provided Ventaire with a note from Dr. Patrick VanSchoyck informing that Bell had been over-sedated due to a change in medications and the side effects would wear off in approximately two weeks. *Ex. 1, Weaver Affidavit, Ex. G.* Bell did not provide Ventaire with any further written documentation from his physician which excused or explained his failure to report to work on time. Consequently, in February 1996, Jeff Weaver sent the following memo to Bell:

I have reviewed your drafting and bill of material detailing performance on nine projects over the past two months. I have found there to be a very high rate of careless errors on your part.

I have also reviewed your attendance record since the first of the year and have noticed you have been absent six days. I have also been informed that you have made a habit of calling in on any given morning and requesting vacation for that day. (From now on you must give your supervisor a minimum of one week notice for vacation.)

There are some of the same problems Bruce discussed with you on September 28, 1995. We can no longer tolerate your poor job performance and your lack of dependability.

Therefore, we will not even begin to consider you for a checking position we may need to establish shortly. You are hereby put on notice that if the above mentioned issues are not rectified within the next 30 days your services with Ventaire will no longer be needed. You and I should plan on reviewing your performance on approximately March 7, 1996.

Ex. 1, Weaver Affidavit, Ex. H.

Regarding Bell's ADA claim, Bell contends that in or about mid-1995, he developed congestive heart failure. Bell, however, never provided Ventaire with any medical documentation of his alleged condition. *Ex. 1, Weaver Affidavit, para. 15.* Bell concedes it was

an essential function of his draftsman job to be accurate and to stoop, bend, and climb to the top of buildings to measure canopies, and that following his alleged heart failure, he was not able to be accurate in his work or perform these physical functions. *Ex. 2, Bell's Deposition, pp. 13, 46-48, 100-101.* Bell further concedes his alleged condition played no role in Venteaire's failure to promote him or provide training opportunities. *Ex. 2, Bell's Deposition, pp. 31, 39, 62-63, 80.*

In March 1996, Venteaire terminated Bell's employment. *Ex. 1, Weaver Affidavit, para. 17-18.*

II. 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); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342, 345 (10th Cir. 1986). 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 sufficient to raise a "genuine issue of material fact." *Anderson*, 477 U.S. at 247-48.

The 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 v. Zenith*, 475 U.S. 574, 585 (1986).

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 must construe the evidence and inferences therefrom in a light most favorable to the nonmoving party. *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992).

III. Analysis

Bell alleges Venteaire discriminated against him based on his race and disability by discharging him and denying him training opportunities, promotions, wages and other employment benefits in violation of Title VII and the ADA. Venteaire contends Bell was discharged for uncorrected performance and attendance problems.

A. Title VII claim

"To establish a prima facie case on a claim of discriminatory discharge, where the plaintiff was discharged for the purported violation of a work rule, the plaintiff must show that (1) he is a member of a protected class, (2) that he was discharged for violating a work rule, and (3) that similarly situated non-minority employees were treated differently." *Aramburu v. The Boeing Co.*, 112 F.3d 1398, 1403 (10th Cir. 1997)(citing *EEOC v. Flasher Co., Inc.* 986 F.2d 1312, 1316 (10th Cir. 1992). To establish a prima facie case for discrimination in the denial of training opportunities and promotions, the plaintiff must show (1) he belongs to a protected class; (2) he was qualified for training opportunities and promotions; (3) he was denied training

opportunities and promotions; and (4) the training opportunities and promotions were given to those outside the protected class. *Reynolds v. School Dist. No. 1*, 69 F.3d 1523, 1533-34 (10th Cir. 1995). If the plaintiff establishes a prima facie case, the burden of persuasion then shifts to the defendant to articulate and evidence a legitimate, nondiscriminatory reason for the discharge and failure to promote or provide training. *Id.*; see also *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993). If the defendant meets this burden, the plaintiff must submit evidence raising a genuine issue that his discharge and denial of promotion and training were racially motivated, or the defendant's offered reason was a pretext. *Id.*; see also *Corneveaux v. Cuna Mutual Ins. Group*, 76 F.3d 1498, 1502-03 (10th Cir. 1996). At the summary judgment stage, the Court should allow the case to go to the jury only if "plaintiff can show a prima facie case of discrimination and present evidence that the employer's proffered nondiscriminatory reason is a mere pretext." *Id.*; *Jones v. Unisys Corp.*, 54 F.3d 624, 630 (10th Cir. 1995).

The only evidence cited by Bell in support of his prima facie case and as evidence of pretext is his own deposition testimony which Bell argues establishes he was the only black employee in his job classification; other white employees were given training opportunities and promotions denied him; and similarly situated white employees with attendance and tardiness histories were not discharged.

Regarding his allegation of discriminatory denial of training, Bell claims Venteaire denied him "Auto CAD 9" drafting training, citing in support the following deposition testimony:

A. Yes. AutoCAD, C-A-D. But that was through the supplier, and the company was supposed to submit the names of the people who were going into the class. Carolyn went, Larry went, I did not.

Ex. 2, Bell Deposition, p. 40 ll 8-11. To provide context, the Court includes the surrounding

deposition testimony:

Q. Do you believe that you were denied drafting training because of your race?

A. I didn't then.

Q. Why do you believe you were denied drafting training at that time?

A. Because they only had one station.

Q. Can you explain that to me.

A. They only had one terminal, one computer.

Q. And what effect did that have on the ability to provide drafting training?

A. Well, everybody in the department was supposed to be able to know how to use the system. And it was – you know, I didn't know how to use the system. Carolyn did, and I believe Larry. There were only three of us.

Q. Was there a specific drafting training session or class offered for this Auto CAD 9?

A. Yes. AutoCAD, C-A-D. But that was through the supplier, and the company was supposed to submit the names of the people who were going into the class. Carolyn went, Larry went, I did not.

Q. And Carolyn was your supervisor; is that correct?

A. Yes.

Q. Who was Larry?

A. He was another draftsman.

Q. Had he been with the company longer than you?

A. No.

Q. Had he been hired at the same time?

A. No.

Q. Had you been there substantially less than Larry?

A. He had been there substantially less than myself.

Q. Did you have more computer skills than he at the time this training was offered?

A. Yes.

Q. At the time the training was offered, had you been provided verbal warnings about your job performance by the company?

A. Yeah, I had gotten a few over the years.

Q. Did you request the opportunity to go to the drafting class provided by the supplier?

A. No.

Q. And at the time that Carolyn and Larry went, your testimony is you did believe that you were denied that opportunity because of your race?

A. Not at that time, no.

Q. At some point since then, have you formed the opinion or belief that you were denied the opportunity to go to the supplier's drafting training class because of your race?

A. Yes.

Q. What caused you to form that belief?

A. The accumulation of incidents.

Ex. 2 Bell's Deposition, pp. 39-41.

This testimony is clearly insufficient to raise a genuine issue that Ventaire denied Bell this training opportunity, element three of his prima facie case of race discrimination. According to Bell's own testimony, he never requested to attend the supplier's drafting class; there was only one terminal on which to train; and the other non-supervisory employee, Larry Owen, who did attend, was in greater need of training than Bell.

Bell also claims he was denied a promotion to be the head of drafting based on his race, citing the following deposition testimony:

Q. Mr. Bell, in your complaint, paragraph 4C, you allege you were denied promotional opportunities based upon your race. What promotions did you seek and were denied?

A. The head of drafting.

Q. When did you seek a promotion to be the head of drafting?

A. I didn't have to seek it, it was a matter of seniority.

Q. Can you explain to me when the head of drafting became a matter of seniority during your employment at Ventaire.

A. When Carolyn Chapman moved over to project management.

Q. Had Carolyn been the head of drafting?

A. Yes.

Q. And do you know when it was that Carolyn Chapman left and went to project management?

A. No, I don't know a specific date.

Q. How long had you been in the company at that time; do you know?

A. I think I had been there at least ten years.

Q. And do you believe that simply because you had been there ten years you should have been given the title head of drafting?

A. I had the seniority for it, I had the experience for it. And the person I trained got it.

Ex. 2, Bell's Deposition, pp. 60-61. Again, Bell's testimony is insufficient to defeat summary judgment on Ventaire alleged denial of promotion. Bell offers no evidence that he met the job requirements for head of drafting. His assertion that the position should have been his because

of his seniority and experience, without more, is insufficient to raise a fact question as to whether he was qualified for the position so as to establish element two of his prima facie case of race discrimination.

Finally, Bell claims he was treated differently than other similarly situated white employees when he was discharged for his tardiness and absenteeism. In support he cites the following lines from his deposition testimony:

A. Well, it seems as if she [Chapman] singled me out on several occasions. She would – she was the one who kept the time before we went to a time clock, and on several occasions she counseled me or chided me about being late, and other members of the drafting department, primarily – I can't think of her name, the woman who was there, and David Kauble, both of them were white and they were late periodically, too. It seems as if she was more lenient toward them than she was toward me.

And in her checking practices, she would check my work more severely and more – I don't know what the word would be, picky or – I guess that would be the word picky. That's not the word I want, though. And she would let other people get away with things more readily than she would me.

In fact, David Kauble and I had finally gotten together and we would trick her. He would do something and then I would do something on a drawing in such a way that we would actually change her checking procedure to get things done the way we knew they had to be.

And when she had – she had a bout with Graves disease, which is a disease of the thyroid. She was late all the time. She had no mental capabilities whatsoever, her brain was not functioning half the time, but everybody seemed to be more lenient of her than they were of me.

Ex. 2, Bell's Deposition, p.45 l. 3 - p. 46 l. 5.

By itself, Bell's testimony that Chapman was "more lenient" toward two white coworkers who were "late periodically," and that "everybody seemed to be more lenient" of Chapman's tardiness due to her illness is insufficient to raise a genuine issue as to whether similarly situated non-minority employees were treated differently. Bell presents no evidence to support his "impressions" as to Chapman's leniency toward David Kauble or the other employee, or

“everybody’s” leniency to Chapman. In addition, according to Bell, Chapman’s situation is not analogous to Bell’s as she allegedly was late to work due to an illness. Even if Bell offered the physician’s note stating that Bell was “oversedated” to excuse Bell’s tardiness, the note was dated October 23, 1995 and states the side effects of this over-sedation “will wear off in 2 weeks.” *Ex. I Weaver’s Affidavit, Ex. G.* As noted above, the undisputed facts establish Bell’s problem with tardiness and absences extended over several years of his employment with Ventaire and continued after the two weeks of projected side effects from over-sedation.

Based on the above, the Court finds Bell has failed to establish a prima facie case of race discrimination in violation of Title VII. However, even if Bell had established his prima facie case for race discrimination, he has not met his burden to show Ventaire’s employment decisions regarding Bell were not in fact based on Bell’s history of performance issues, absences and tardiness. All Bell offers is his subjective belief that he was treated more harshly than other non-minority employees who had similar problems at work. The only evidentiary support Bell cites is the following:

A. Well, as illustration, the letter that he gave me, Jeff Weaver, 30 days before I was terminated, I am the only employee of Ventaire Corporation who was ever given a letter like that.

Q. How do you know that?

A. Because most of the people who worked at Ventaire when I was there are still – were still there and the ones that have left, I know. And so they were not given a letter like that.

Q. Mr. Bell, if you’re wrong and someone else, a non-black man, had been given a letter similar to the one that you received talking about job performance and attendance problems, would that change your belief as to why you were terminated?

A. Well, the two people I talked to that were terminated were not given a letter like that, and that’s Veronica and Beverly.

Q. Did Veronica and Beverly have attendance problems or job errors?

A. Well, Veronica has another issue.

Q. What’s her issue?

A. Accounting practices.

Q. And the other woman?

A. Beverly, she was there before I came. She was Venteire's rock, but, you know, they terminated her.

Ex. 2, Bell's Deposition, p.76 l. 16 - p. 77 l. 15. The cited testimony not only fails to raise a genuine issue of fact regarding pretext but fails to support Bell's subjective belief of discriminatory treatment. According to Bell's own testimony (and assuming the women identified as Veronica and Beverly are white), Veronica was discharged for reasons other than attendance problems or job errors, and Beverly was discharged even though she was "Venteire's rock." Further, the Court has reviewed Bell's deposition in its entirety and concludes his testimony provides nothing more than Bell's subjective belief that Venteire's proffered reasons for its employment actions regarding him are a pretext. Bell's subjective belief of race discrimination alone, however genuine, does not create a genuine issue "concerning the sincerity of the proffered reasons" for Venteire's employment decisions regarding him. *Cone v. Longmont United Hospital Assoc.*, 14 F.3d 526, 530 (10th Cir. 1994).

B. ADA claim

To establish a prima facie case of disability discrimination, Bell must demonstrate (1) he is disabled; (2) he could perform the essential functions of an available job with or without reasonable accommodation; (3) an adverse employment action occurred; and (4) the action raises an inference of unlawful discrimination because of disability. *See White v. York Int'l Corp.*, 45 F.3d 357, 360-61 (10th Cir. 1995). Only if Bell establishes a prima facie case does the burden of production shift to Venteire to establish non-discriminatory reasons for its employment actions. Once Venteire comes forth with evidence of its non-discriminatory actions, the burden shifts back to Bell to show Venteire's proffered reasons were a pretext. *Id.* "As with discrimination

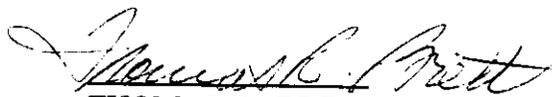
cases generally, the plaintiff at all times bears the ultimate burden of persuading the trier of fact that he has been the victim of illegal discrimination based on his disability.” *Id.* at 361.

In his response, Bell does not even address his ADA claim that Venteaire discriminated against him because of his congestive heart failure, let alone dispute any of Venteaire’s undisputed facts.² Based on these undisputed facts set forth above, the Court concludes Bell has failed to establish he was disabled, that he could perform the essential functions of his job with or without accommodation, or that Venteaire’s employment actions raise an inference of unlawful discrimination because of disability. Further, as noted above, even if Bell had established his prima facie case of disability discrimination, he has failed to raise a genuine issue of fact that Venteaire’s proffered reasons for its actions were a pretext.

IV. Conclusion

In accordance with the above, the Court grants Venteaire’s motion for summary judgment (Docket No. 27).

ORDERED this 9th day of October, 1998.


THOMAS R. BRETT
UNITED STATES DISTRICT COURT

² In his response, Bell asserted Venteaire’s motion for summary judgment should be denied as untimely. To insure Bell was not solely relying on the untimeliness of the motion as the basis for his response, the Court granted Bell additional time within which to supplement his response. *See Order dated September 24, 1998.* Bell did not file any supplement.

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

HOUSING AUTHORITY OF THE)
CITY OF TULSA,)
)
Plaintiff,)
)
vs.)
)
SAMUEL J. WILDER,)
)
Defendant.)

Case No. 98-CV-747-BU

FILED

OCT 9 - 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

OCT 13 1998

ORDER

On October 1, 1998, Defendant, Samuel J. Wilder, filed a pleading entitled "Defendant's Amended Motion for Removal of Civil Action from Tulsa County District Court" which the Court has construed as a notice of removal. In the notice of removal, Defendant asserts that this Court has jurisdiction over this action pursuant to certain federal statutes.

The Court notes that previously, on June 9, 1998, Defendant, filed a Notice of Removal of Civil Action, removing the same above-entitled action to this Court. See, Housing Authority of the City of Tulsa v. Samuel J. Wilder, Case No. 98-CV-409-BU. On July 14, 1998, this Court entered an Order remanding the action to the District Court of Tulsa County, State of Oklahoma. The Court specifically found that no original jurisdiction existed over the above-entitled action under 28 U.S.C. § 1331 or 28 U.S.C. § 1332(a). With no original jurisdiction existing, removal of the above-entitled action was clearly improper. See, 28 U.S.C. §

1441(a).

In the new removal notice filed on October 1, 1998, Defendant alleges the same grounds for jurisdiction that he alleged in the previous removal notice filed on June 9, 1998. However, Defendant does not set forth any reason why the Court's prior ruling in Case No. 98-CV-409-BU regarding a lack of original jurisdiction was in error or set forth any circumstance which would somehow change the Court's ruling.

From a review of the new removal notice, it appears to this Court that Defendant is still relying upon his assertion of a federal defense or a federal counterclaim to remove the action from state court. As previously stated in the July 14, 1998 Order in Case No. 98-CV-409-BU remanding the action to state court, neither a defendant's assertion of a federal defense nor a defendant's assertion of a federal counterclaim is a proper basis for removal of an action from state court. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987) (federal defense); 14A Wright, Miller, & Cooper, Federal Practice and Procedure, § 3731 (2d ed. 1985); 16 Moore's Federal Practice, § 107.14(3)(a)(vi) (3d ed. 1998) (federal counterclaim).

In the new notice of removal, Defendant also alleges that the amount in controversy exceeds \$90,000, exclusive of interest and costs. However, in order to have original jurisdiction under 28 U.S.C. § 1332(a), not only must the amount in controversy exceed

\$75,000, but also, the parties involved in the controversy must be diverse in citizenship. 28 U.S.C. § 1332(a). Defendant and Plaintiff, Housing Authority of the City of Tulsa, are not citizens of different states.

Section 1447(c) of Title 28 of the United States Code provides that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). As original jurisdiction over this action does not exist under 28 U.S.C. § 1331 or 28 U.S.C. § 1332(a), the Court finds that it lacks subject matter jurisdiction over this action. Consequently, the Court again finds that remand of this action to the District Court of Tulsa County, State of Oklahoma, is required.

Accordingly, this matter is hereby REMANDED to the District Court of Tulsa County, State of Oklahoma. The Clerk of the Court is DIRECTED to effect the remand of this action to the District Court for Tulsa County, State of Oklahoma.

Entered this 9th day of October, 1998.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

OCT - 9 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WARREN F. KRUGER, an individual, and
JULIE S. KRUGER, an individual,

Plaintiffs,

vs.

WILLIAM O. INMAN, III, d/b/a
THE INMAN COMPANY,

Defendant.

Case No. 98-CV-0153-BU

ENTERED ON DOCKET

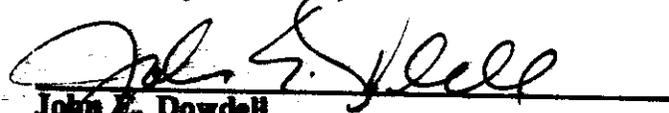
DATE OCT 13 1998

STIPULATION OF DISMISSAL

Pursuant to Fed.R.Civ.P. 41(a)(1)(ii), the parties to this action, Warren F. Kruger and Julie S. Kruger (the "Krugers"), the plaintiffs, and William O. Inman, III, d/b/a the Inman Company ("Inman"), the defendant, hereby stipulate and agree that the parties' claims shall be dismissed with prejudice. Specifically, it is stipulated and agreed that (i) the Krugers' claims against Inman are hereby dismissed with prejudice, and (ii) Inman's counterclaims against the Krugers are hereby dismissed with prejudice.

It is further agreed that each party shall bear his or her own costs and attorneys' fees incurred in connection with this action.

Respectfully submitted,



John E. Dowdell
NORMAN WOHLGEMUTH CHANDLER
& DOWDELL
2900 Mid-Continent Tower
Tulsa, Oklahoma 74103
(918) 583-7571

ATTORNEY FOR PLAINTIFFS, WARREN F. KRUGER and JULIE S. KRUGER



James P. McCann, Esq.
Doerner, Saunders, Daniel & Anderson, L.L.P.
320 South Boston Avenue, Suite 500
Tulsa, Oklahoma 74108-8725

ATTORNEY FOR DEFENDANT WILLIAM O. INMAN, III d/b/a THE INMAN COMPANY

22



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

FILED

OCT 9 - 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

Case No. 98-CV-66-BU(E)

ONE FANCY DANCER KACHINA DOLL)

CONTAINING PROTECTED BIRD)

FEATHERS; and ONE TURQUOISE)

AND SILVER NECKLACE CONTAINING)

PROTECTED BIRD TALONS,)

Defendants,)

ENTERED ON DOCKET
DATE OCT 13 1998

JUDGMENT OF FORFEITURE

This cause having come before this Court upon the Plaintiff's Motion for Judgment of Forfeiture as to the Defendant Kachina Doll with Protected Bird Feathers and Silver and Turquoise Necklace Containing Protected Bird Talons, as to all entities and/or person interested in the Defendant Properties, the Court finds as follows:

The verified Complaint for Forfeiture In Rem was filed in this action on the 23rd day of January, 1998, alleging that the Defendant Properties are subject to forfeiture pursuant to 16 U.S.C. §706 because they contain bird parts which were taken, sold or offered for sale, bartered or offered for barter, purchases, shipped, transported, carried, imported, exported, or possessed contrary to Title-16 U.S.C. §§701-712 and are subject to seizure and forfeiture to the United States.

A Warrant of Arrest and Notice In Rem was issued on the 26th day of January, 1998, by the Clerk of this Court to the United States Fish and Wildlife Service for the Northern District of

Oklahoma for the seizure and arrest of the Defendant Properties and for publication of notice of arrest and seizure once a week for three consecutive weeks in the Tulsa Daily Commerce & Legal News, Tulsa, Oklahoma, 8545 East 41st Street, Tulsa, Oklahoma, a newspaper of general circulation in the district in which this action is pending and in which the Defendant Properties were located, and further providing that the United States Fish and Wildlife Service personally service the Defendant Properties and all known potential owners thereof with a copy of the Complaint for Forfeiture In Rem and that immediately upon the arrest and seizure of the Defendant Properties the United States Fish and Wildlife Service take custody of the Defendant Properties and retain the same in its possession until the further order of this Court.

On the 3rd day of February, 1998, the United States Fish and Wildlife Service served a copy of the Complaint for Forfeiture In Rem, the Warrant of Arrest and Notice In Rem, and the Order on the Defendant Kachina Doll containing Protected Bird Feathers and the Silver and Turquoise Necklace with Protected Bird Talons.

Jack Phillips was determined to be the only potential claimant in this action with possible standing to file a claim to the Defendant Properties. The United States Fish and Wildlife Service served a copy of the Complaint for Forfeiture In Rem, the Warrant of Arrest and Notice In Rem, and the Order on the Defendant Properties as follows:

Jack Phillips, served by serving his attorney, Kathy S. Fry, on February 5, 1998.

Jack Phillips filed a claim and answer as to the Defendant Properties on February 10, 1998.

USMS 285 reflecting the service upon the Defendant Properties and all known potential claimants is on file herein.

All persons or entities interested in the Defendant Properties were required to file their

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

No other person or entities upon whom service was effected more than thirty (30) days ago have filed a claim, answer or other response or defense herein.

The United States Fish and Wildlife Service gave public notice of this action and arrest to all persons and entities by advertisement in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in the district in which this action is pending and in which the defendant vehicle was located, on February 16, 123 and March 2, 1998. Proof of Publication was filed May 18, 1998.

No other claims in respect to the Defendant Properties have been filed with the Clerk of the Court, and no other persons or entities have plead or otherwise defended in this suit as to said Defendant Properties, and the time for presenting claims and answers, or other pleadings, has expired.

The plaintiff, United States of America, and the claimant, Jack Phillips, entered into a Stipulation for Forfeiture, of the forfeiture of the Kachina Doll containing Protected Bird Feathers and Protected Bird Talons from the Silver and Turquoise Necklace after removal by the United States Fish and Wildlife Service; and the return of the Silver and Turquoise Necklace after removal of the Protected Bird Talons by the United States Fish and Wildlife Service, in the condition it was when seized, within fourteen (14) days of the entry of this Judgment of Forfeiture. The Stipulation was filed on the 16th day of September, 1998.

IT IS THEREFORE ORDERED, ADJUDGE AND DECREED that the following described Defendant Properties:

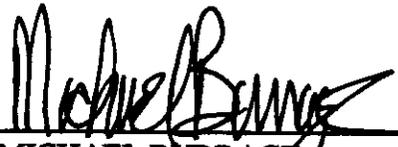
One Fancy Dancer Kachina Doll with Protected Bird Feathers, and

the Protected Bird Talons removed from the Silver and Turquoise Necklace by the United States Fish and Wildlife Service

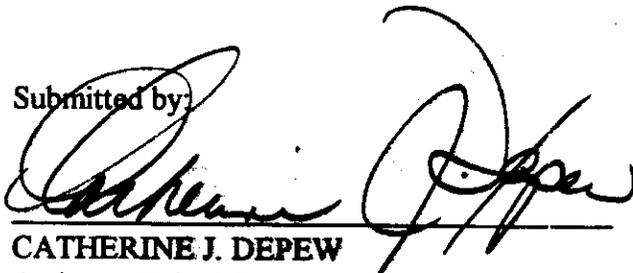
be, and hereby are, forfeited to the United States of America for disposition according to law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Silver and Turquoise Necklace, after removal by the United States Fish and Wildlife Service of the Protected Bird Talons, be returned to Claimant, Jack Phillips, in the condition it was when seized, within fourteen (14) days of the entry of this Judgment of Forfeiture by delivering, mailing, or otherwise releasing it to him, or his attorney.

Entered this 9th day of October, 1998.


MICHAEL BURRAGE
Judge of the District Court for the
Northern District of Oklahoma

Submitted by:


CATHERINE J. DEPEW
Assistant United States Attorney

N:\UDD\JOHNSON\FORFEITUPHILLIPS\JUDGMENT.FOR