

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

FILED
DEC 30 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ALL STATE TANK CO., INC.,)
)
 Plaintiff,)
)
 v.)
)
 COLUMBIAN STEEL TANK CO.,)
)
 Defendant.)

Case No. 97-CV-188-H ✓

ENTERED ON DOCKET
DATE DEC 31 1998

ORDER

This matter comes before the Court on a notice of dismissal by Plaintiff All State Tank Co., Inc., pursuant to the parties reaching a settlement (Docket # 90).

The chronology of this case includes the following:

1. Pursuant to a jury verdict on May 29, 1998, the Court entered judgment for Plaintiff and against Defendant in the amount of \$48, 925.00, plus an amount of attorneys' fees to be determined later by the Court (Docket # 60).
2. On August 10, 1998, the Court entered an order granting in part and denying in part Plaintiff's motion for attorneys' fees and prejudgment interest (Docket # 76). The Court also entered an amended judgment to reflect Plaintiff's award of attorneys' fees and prejudgment interest (Docket # 77).
3. Defendant Columbian Steel Tank Co., filed a notice of appeal with the United States Court of Appeals for the Tenth Circuit on September 8, 1998 (Docket # 78).
4. On November 23, 1998, pursuant to a stipulation of dismissal of the appeal, the Tenth Circuit dismissed Defendant's appeal, conditioned on the United States District Court for the Northern District of Oklahoma approving the settlement reached by the parties

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(Docket # 87).

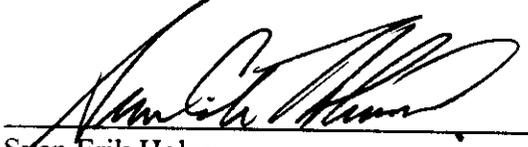
5. Pursuant to their settlement agreement, the parties filed a stipulation for vacatur of judgment on December 2, 1998, seeking vacatur of the Court's (1) judgment entered on May 29, 1998, (2) order entered on August 10, 1998, and (3) amended judgment entered on August 10, 1998 (Docket # 88).

6. On December 7, 1998, the Court entered a vacatur of judgment, vacating its (1) judgment entered on May 29, 1998, (2) order entered on August 10, 1998, and (3) amended judgment entered on August 10, 1998 (Docket # 89).

Based upon the above-articulated chronology of this case, Plaintiff's notice of dismissal which states that the parties have reached a settlement, and for good cause shown, this action is hereby dismissed with prejudice.

IT IS SO ORDERED

This 22ND day of December, 1998.


Sven Erik Holmes
United States District Judge

F I L E D

DEC 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

VALERIE GRAMM)
)
Plaintiff,)
)
vs.)
)
FLEMING COMPANIES, INC.,)
)
Defendant.)

No. 98-CV-494-B(J)

ENTERED ON DOCKET

DATE DEC 30 1998

ORDER

The Court has before it for decision Defendant's Motion to Dismiss (Docket No. 8) based upon the EEOC issuing a Right-to-Sue letter prior to the expiration of 180 days following repeated requests by Plaintiff's counsel for same. Defendant urges it was denied an opportunity to address Plaintiff's claim through a proper EEOC investigation and that this constitutes failure by Plaintiff to exhaust her administrative remedies. Plaintiff further asserts that the Oklahoma Anti-Discrimination Act does not provide a private cause of action or damages remedy for gender discrimination.

Defendant's arguments in regard to the premature issuance of the Right-To-Sue letter ("letter") stem from it's characterization that Plaintiff's counsel improperly circumvented the system by immediately requesting the letter and thereafter making two follow-up requests for same until it was issued by the EEOC. Defendant argues

Plaintiff's counsel's acts denied it the right to have the EEOC investigate and attempt to reach a resolution of the charging party's claims, a primary purpose of Congress in setting forth the procedure. Defendant states Plaintiff's counsel's meddling denied it the opportunity to respond to Plaintiff's claim and participate in the reconciliation process which could have obviated the need for this litigation. Defendant bases this argument on the fact that the letter made no reference to it being issued due to the EEOC's inability to process the claim within 180 days, as required by 29 C.F.R. §1601.28 (a) (2). The Court notes Defendant questions the validity of this administrative rule even though Defendant recognizes it provides an avenue by which the 180 day period can be bypassed. The Tenth Circuit has not addressed the validity of the regulation.

The issue of interpreting §1601.28 (a) (2) however has been addressed in this District by the Honorable Michael Burrage in *Walker v. United Parcel*, Case No. 97-CV-1042, Order dated November 12, 1998, attached to Defendant's brief as Exhibit 8. The facts *Walker* are strikingly similar to those now before the Court. In *Walker*, counsel for plaintiff requested a right-to-sue letter which was issued by EEOC Area Director Alma J. Anderson which failed to contain any certification that the EEOC would not be able to complete its investigation within 180 days but merely recited charging party's request for the letter as being the basis for same. Anderson was also the issuing Director in this case and Plaintiff's letter contains the same recitation.

In his well-reasoned opinion, Judge Burrage discussed the split in authority as to whether §1601.28 (a) (2) is valid and concludes it is not necessary for the Court to

address the issue of validity where the Director violated the agencies own regulation by failing to certify that the Commission will be unable to complete its investigation within 180 days.

Based upon noncompliance with §1601.28 (a) (2), this Court also concludes the letter in the case at bar was issued prior to the 180-day period of §2005e-(f) (1) and that Plaintiff's Title VII claims are not properly before the Court. Because Plaintiff's remaining claims are pendant state law claims, they must also be dismissed for lack of jurisdiction.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Dismiss is granted. Plaintiff's Title VII and pendant state law claims are dismissed without prejudice.

IT IS SO ORDERED THIS 28th DAY OF DECEMBER, 1998.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

DEC 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MICHAEL DELASSE,

Plaintiff,

v.

THE BAMA COMPANIES,
an Oklahoma corporation,

Defendant.

Case No. 98 CV-0202B(E)

ENTERED ON DOCKET

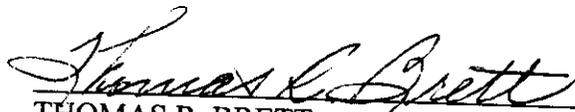
DATE DEC 30 1998

ORDER

BEFORE the Court is a Motion to Dismiss filed by Defendant, The Bama Companies, Inc. ("Defendant"). The Court finds that Plaintiff, Michael Delasse, has failed to have new counsel file an entry of appearance on or before December 4, 1998, and has failed to file an appearance *in propria persona* on or before December 4, 1998, as required in an Order of this Court entered on November 16, 1998.

Therefore, Defendant's Motion to Dismiss is granted and this case is dismissed with without ^{prejudice} prejudice with costs awarded to Defendant.

DATED this 29th day of December, 1998.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

F I L E D

DEC 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TIMOTHY M. GARRISON and)
ROYAL-T-INDUSTRIES, INC.,)
an Oklahoma corporation,)

Plaintiffs,)

v.)

Case No. 98-C-265-B(E)

ROBIN HEINEY,)

Defendant.)

ORDER

ENTERED ON DOCKET

DATE DEC 30 1998

Plaintiffs Timothy M. Garrison and Royal-T-Industries, Inc. filed this action against defendant Robin Heiney for patent infringement on April 7, 1998. On October 9, 1998, the Court entered its Notice pursuant to Federal Rule of Civil Procedure 4(m) alerting plaintiffs that they had failed to serve the defendant within 120 days as required by Rule 4(m) and directing plaintiffs to show cause in writing on or before October 23, 1998 why the Court should not dismiss the action. Plaintiffs have failed to respond to the Court's order. Accordingly, the Court dismisses the action without prejudice.

IT IS SO ORDERED, this 29th day of December, 1998.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED
DEC 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT MICHAEL GAFFNEY,)
)
 Plaintiff,)
)
 v.)
)
 RONALD CHAMPION, Warden of the)
 Dick Conner Correctional Center,)
)
 Defendant.)

Case No. 96-C-1110-B(J) ✓

ENTERED ON DOCKET
DATE DEC 30 1998

ORDER

The Court has for consideration the Report and Recommendation of the Magistrate Judge (hereinafter "R&R") filed October 30, 1998, in which the Magistrate Judge recommends granting defendant's motion for summary judgment on plaintiff Robert Michael Gaffney's claim under 42 U.S.C. §1983. No exceptions or objections have been filed, although plaintiff was granted two extensions of time to file any objection. The time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court grants defendant's motion for summary judgment on plaintiff's §1983 claim for denial of adequate medical treatment for the reasons more fully set out in the R&R.

IT IS SO ORDERED, this 29th day of December, 1998.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

DEC 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

ROBERT MICHAEL GAFFNEY,)

Plaintiff,)

v.)

Case No. 96-C-1110-B(J)

RONALD CHAMPION, Warden of the)
Dick Conner Correctional Center,)

Defendant.)

ENTERED ON DOCKET
DATE DEC 30 1998

JUDGMENT

In accordance with the order entered this date granting summary judgment to Defendant Ronald Champion on Plaintiff Robert Michael Gaffney's claim under 42 U.S.C. §1983, the Court enters judgment in favor of Defendant Ronald Champion and against Plaintiff Robert Michael Gaffney. Costs are assessed against Plaintiff if properly applied for pursuant to Local Rule 54.1. The parties are to pay their own respective attorney fees.

Dated, this 29 day of December, 1998.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

DEC 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DOLORES J. LEE,)
)
 Plaintiff,)
)
 vs.)
)
 NORTHEAST OKLAHOMA ELECTRIC)
 COOPERATIVE, INC., an Oklahoma)
 corporation,)
)
 Defendant.)

Case No. 97-C-923-BU

ENTERED ON DOCKET

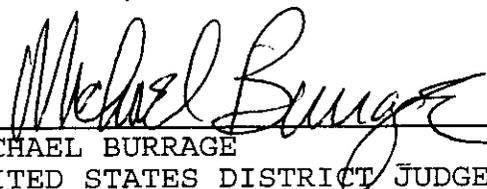
DATE DEC 30 1998

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the 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 proceedings.

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

Entered this 29th day of December, 1998.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

DEC 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MELISSA TUCKER,

Plaintiff,

vs.

SOUTHLAND FLOORING SUPPLIES
OF TULSA, INC., an Oklahoma
Corporation,

Defendant.

Case No. 98-CV-387-BU

ENTERED ON DOCKET
DATE DEC 30 1998

JUDGMENT

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

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment is entered in favor of Defendant, Southland Flooring Supplies of Tulsa, Inc., and against Plaintiff, Melissa Tucker, and that Defendant, Southland Flooring Supplies of Tulsa, Inc., recover of Plaintiff, Melissa Tucker, its costs of action, if any.

ENTERED this 29th day of December, 1998.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED
DEC 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JACK CHESBRO,

Plaintiff(s),

vs.

GROUP HEALTH SERVICE OF
OKLAHOMA, INC.,

Defendant(s).

)
)
)
)
)
)
)
)
)
)

Case No. 96-C-561-B

ENTERED ON DOCKET

ORDER DISMISSING ACTION
BY REASON OF SETTLEMENT

DATE DEC 29 1998

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

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

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

IT IS SO ORDERED this ^{28th} day of December, 1998.



THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED
DEC 28 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

FRANKLIN DAGGS,

Plaintiff,

v.

ALEXANDER & ALEXANDER SERVICES, INC.;
ALEXANDER & ALEXANDER, INC. (Oklahoma);
ALEXANDER & ALEXANDER, INC. (Maryland);
UNITED STATES BENEFIT ADMINISTRATION
COMMITTEE OF ALEXANDER & ALEXANDER
SERVICES, INC. and/or its Successors or Assigns
for the ALEXANDER & ALEXANDER PENSION
PLAN and/or the ALEXANDER & ALEXANDER
THRIFT PLAN; and ALEXANDER &
ALEXANDER SERVICES, INC. and/or Its
Successors or Assigns for the ALEXANDER &
ALEXANDER SERVICES, INC. DISABILITY
BENEFITS PLAN,

Defendants.

ENTERED ON BOOKS
DEC 29 1998

Case No. 96CV-967B

ORDER OF DISMISSAL WITH PREJUDICE

NOW on this 28th day of Dec, 1998, the Court has for its consideration
the Stipulation for Dismissal With Prejudice jointly filed in the above-styled and numbered cause
by Plaintiff and Defendant. Based upon the representations and requests of the parties as set
forth in the foregoing stipulation, it is:

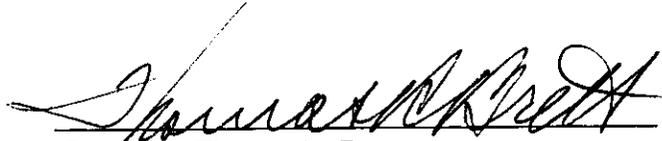
ORDERED that Plaintiff's Second Cause of Action for Breach of Contract as contained
within Plaintiff's Third Amended Complaint and claims for relief against Defendants are hereby
dismissed with prejudice.

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IT IS FURTHER ORDERED that each party shall bear its own costs and attorney fees.

IT IS SO ORDERED.



Honorable Thomas R. Brett

David L. Sobel OBA #8444
Leblang, Clay, Sobel & Ashbaugh
7615 East 63rd Place, Suite 200
Tulsa, Oklahoma 74133
(918) 254-1414

Attorneys for Plaintiff

J. Patrick Cremin OBA #2013
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON
320 S. Boston Avenue, Suite 400
Tulsa, OK 74103-3708
(918) 594-0400

Attorneys for Defendants

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 28 1998

Phil Comardi, Clerk
U.S. DISTRICT COURT

FEDERAL INSURANCE COMPANY,)
)
Plaintiff,)
)
vs.)
)
TRI-STATE INSURANCE COMPANY,)
)
Defendant.)

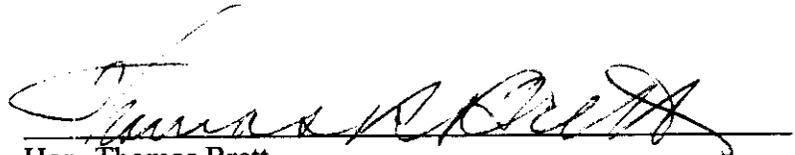
Case No. 93-C-715-B

ENTERED ON DOCKET
DATE DEC 29 1998

STIPULATION OF DISMISSAL

Upon the Joint Application of the parties pursuant to FED. R. CIV. P. 41, this lawsuit is hereby dismissed with prejudice.

Dated this 28 day of Dec, 1998.



Hon. Thomas Brett
U.S. District Court for the Northern District of Oklahoma

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

FILED

DEC 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MELISSA TUCKER,)
)
 Plaintiff,)
)
 vs.)
)
 SOUTHLAND FLOORING SUPPLIES)
 OF TULSA, INC., an Oklahoma)
 Corporation,)
)
 Defendant.)

Case No. 98-CV-387-BU

ENTERED ON DOCKET

DATE 12/30/98

ORDER

Plaintiff commenced this action against Defendant on May 27, 1998. In her Complaint, Plaintiff alleged that during her employment with Defendant, she was discriminated against on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, et seq. On July 8, 1998, Defendant filed a Motion to Dismiss, or in the Alternative, Motion for Summary Judgment. In its motion, Defendant argued that the Court lacked subject matter jurisdiction over Plaintiff's Title VII action. Plaintiff responded to the motion on July 29, 1998, and filed contemporaneously therewith a motion, pursuant to Rule 56(f), Fed. R. Civ. P., to continue a ruling on the motion until discovery had been completed. Defendant objected to the continuance. Subsequently, the Court granted Plaintiff's motion and permitted the parties to conduct discovery in regard to Defendant's motion until September 28, 1998. Upon completion of the discovery, the parties, in accordance with the Court's previous directive, filed their supplemental briefs and exhibits. Having

(23)

reviewed the parties' submissions, including the supplemental briefs and exhibits, the Court makes now its determination in regard to Defendant's motion.

In its briefing, Defendant argues that the Court lacks subject matter jurisdiction over Plaintiff's action because it is not an "employer" subject to the provisions of Title VII. Specifically, Defendant asserts that during the year of the alleged employment discrimination (1997) and the preceding year (1996), it did not employ "fifteen or more employees" as required by 42 U.S.C. § 2000e(b). Defendant asserts that since its incorporation in 1994, it has never employed more than ten employees. Defendant states that the Equal Employment Opportunity Commission dismissed Plaintiff's charge of discrimination because Defendant did not employ fifteen or more employees as required by Title VII.

Plaintiff, in response, contends that Defendant falls within the statutory definition of "employer" under Title VII. According to Plaintiff, Defendant is a small part of a larger organization operating under the Southland name. Plaintiff contends that the organization includes Southland Management Services, Inc., located in Kentucky, and several locations in a variety of states operating under the Southland Flooring Supplies' name. Plaintiff asserts that Defendant, Southland Management Services, Inc. and the other Southland Flooring Supplies' companies operate as a single entity and constitute a single employer under Title VII because Jack Trick, through his wholly owned Southland Management Services, Inc., exercises control over administrative functions and labor issues of the companies and Defendant and Southland Management

Services, Inc. have common ownership and management. Since the organization as a whole employs in excess of fifteen employees, Plaintiff contends that the jurisdictional test of Title VII is satisfied.

Title VII provides that it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to [her] compensation, terms, conditions or privileges of employment, because of such individual's . . . sex. . . ." 42 U.S.C. § 2000e-2(a). For purposes of Title VII, an employer is defined as "a person engaged in an industry affecting commerce 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. . . ." 42 U.S.C. § 2000e(b).

Courts have struggled with a variety of tests to determine whether separate entities actually constitute a single employer for Title VII purposes. The Tenth Circuit has identified three approaches: (1) the common law agency inquiry; (2) the hybrid common law-economic realities method; and (3) the single employer or true economic realities test. Lockard v. Pizza Hut, Inc., 1998 WL 863978, *5 (10th Cir. 1998). The third approach, which is known as the "single employer," "economic realities," or "integrated enterprise" test, is the approach most urged by Title VII plaintiffs. Id. Under this test, courts consider the following factors: interrelation of operations, centralized control of labor relations, common management, and common ownership or financial control. Id.

The Tenth Circuit has yet to adopt the single employer test,

having found it unnecessary to resolve the issue definitely. Id. However, even assuming that the single employer test should be applied in the instant case, the Court finds that Plaintiff has failed to raise a genuine issue of fact as to whether the organization of Defendant, Southland Management Services, Inc. and the other locations operating under the Southland Flooring Supplies' name constitute a single employer.

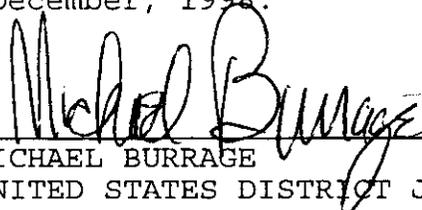
In her briefing, Plaintiff has attempted to present evidence to establish the four criteria of the single employer test. This evidence, however, addresses the relationship between Defendant and Southland Management Services, Inc. Plaintiff has failed to present evidence in regard to the four criteria as to the other Southland Flooring Supplies' companies. There is no evidence as to common ownership or common management with these companies and Defendant and Southland Management Services, Inc. There is also no evidence as to the interrelation of operations among all these companies. In her affidavit, Plaintiff states that "there are multiple locations throughout the country using the Southland Flooring Supplies' name." This testimony, however, does not establish any of the four criteria of the single employer test. Plaintiff has additionally cited to Defendant's response to her Interrogatory No. 11. In that response, Defendant states "[u]pon information and belief, there are other entities that have similar agreements with Southland Management Services, Inc. to provide financial and payroll services." However, this response does not demonstrate common ownership or management among the companies. Nor does it show centralized control over labor relations.

The key factor of the four-part test is centralized control of labor relations. Lockard, 1998 WL 863978, *6. In her submissions, Plaintiff has not shown that Jack Trick controls the hiring, firing and/or salaries of the employees of the other Southland companies. Plaintiff has not presented any evidence of Jack Trick's participation in the day to day operations of these Southland companies.

It is undisputed that Defendant and Southland Management Services, Inc. do not collectively employ fifteen (15) employees. Therefore, in order to come within the definition of an employer for Title VII, Defendant must be so interrelated with Southland Management Services, Inc. and the other Southland Flooring Supplies' companies that they should be regarded as a single employer. Having reviewed the record, the Court finds that Plaintiff has failed to present sufficient evidence to overcome summary judgment on the issue of whether Defendant, Southland Management Services, Inc. and the other Southland Flooring Supplies' locations constitute a single employer. The Court therefore finds that summary judgment is appropriate.

Based upon the foregoing, Defendant's Motion for Summary Judgment (Docket Entry #5-2) is GRANTED. In light of the Court's ruling, Defendant's Motion to Dismiss (Docket Entry #5-1) is DECLARED MOOT.

ENTERED this 29th day of December, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

DEC 29 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILLIAM CRAIG BROWNLEE,)

Plaintiff,)

vs.)

WEXFORD HEALTH SERVICES and)
TULSA COUNTY SHERIFF'S OFFICE,)

Defendants.)

No. 98-CV-770-BU (M)

ENTERED ON DOCKET

DATE DEC 30 1998

ORDER

On October 7, 1998, Plaintiff submitted for filing a civil rights complaint pursuant to 42 U.S.C. § 1983 along with a motion for leave to proceed *in forma pauperis*. By order entered October 28, 1998, the Court granted Plaintiff leave to proceed *in forma pauperis* and informed Plaintiff of deficiencies in his papers. Specifically, Plaintiff was advised that this action could not proceed unless he paid the initial partial filing fee of \$17.37 by November 27, 1998. Plaintiff was also ordered to submit an amended complaint along with enough copies of the complaint, summonses, and Marshals forms for service upon the named Defendants. In addition, the Clerk of Court was directed to mail to Plaintiff the forms and information necessary for preparing the documents ordered by the Court. Plaintiff was advised that "unless by [November 27, 1998] he has either (1) paid the initial partial filing fee, or (2) shown cause in writing for the failure to pay, this action will be subject to dismissal without prejudice to refiling . . ." (#3). To date, Plaintiff has not submitted the initial partial filing fee, the requested documents or shown cause in writing for failing to do so. Further, no correspondence from the Court to Plaintiff has been returned.

Because Plaintiff has not paid the initial partial filing fee in compliance with the Court's Order of October 28, 1998, the Court finds that this action may not proceed and should be dismissed without prejudice for failure to prosecute.

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

SO ORDERED this 29th day of December, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT COURT

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

F I L E D
DEC 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PHILLIP E. HUCKANS,

Plaintiff,

vs.

MARVIN T. RUNYON, Postmaster
General,

Defendant.

No. 97-CV-894-K

ENTERED ON DOCKET

DATE 12-29-98

JUDGMENT

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

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

ORDERED THIS DAY OF 23rd DECEMBER, 1998.



TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

F I L E D

DEC 28 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GENEVA COKER,

Plaintiff,

vs.

BALL JANITOR SERVICE, INC.,
an Oklahoma corporation, d/b/a/
BALL ENVIRONMENTAL
MAINTENANCE SERVICE, INC., and
SHANNON BALL, individually and
as an agent for BALL JANITOR
SERVICE, INC.,

Defendants.

No. 98-CV-200-K ✓

ENTERED ON DOCKET

DATE 12-29-98

JUDGMENT

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

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

ORDERED THIS DAY OF 29th DECEMBER, 1998.



TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

F I L E D

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FREDRIC E. RUSSELL,
Plaintiff

v.

Case No: 98CV0296K(E)

AIR MIDWEST, INC.,
MESA AIRLINES,
doing business under the name
U.S. AIR EXPRESS, and
U.S. AIRLINES,
foreign corporations,

Defendants

F I L E D

DEC 23 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE DEC 28 1998

DISMISSAL WITHOUT PREJUDICE AS TO MESA AIRLINES

The Plaintiff, by his undersigned counsel of record, herewith dismisses this action without prejudice as to Defendant Mesa Airlines, dba U.S.Air Express, pursuant to Rule 41(a), F.R.Civ.P.

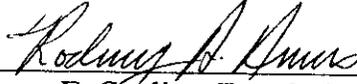
Respectfully submitted,

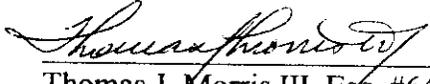


Robt. S. Coffey OBA#17001
1927 South Boston Avenue
Tulsa OK 74119
(918) 582-1249
Attorney for Plaintiff

STIPULATION

The Defendant Mesa Airlines, dba U.S. Air Express, herewith stipulates to the dismissal of this action without prejudice as to Mesa Airlines, dba U.S. Air Express.


James E. Cooling, Esq. MO#21765
Rodney A. Ames, Esq. MO#44865
Cooling & Herbers, P.C.
2400 City Center Square
1100 Main Street
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Kansas City MO 64196
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Thomas J. Morris III, Esq. #6429
1223 East Highland #311
Ponca City OK 74601
(580) 762-3100
(580) 762-3169 FAX
Attorneys for Defendant
Mesa Airlines, dba U.S. Air Express

ORDER OF DISMISSAL WITHOUT PREJUDICE

Pursuant to Rule 41(a) F.R.Civ.P., it is ordered that this action be, and hereby is, dismissed without prejudice as to Defendant Mesa Airlines, dba U.S. Air Express.

Dated at Tulsa, OK, this 22 day of December, 1998.


United States District Judge

SAR

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

FILED

DEC 23 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ZINE BOUKIKAZ,

Plaintiff,

v.

AVIS RENT A CAR SYSTEM, INC.

Defendant,

Case No. 98-CV-0141C (M)

ENTERED ON DOCKET

DATE DEC 28 1998

**JOINT STIPULATION OF
DISMISSAL WITH PREJUDICE**

COMES NOW, the Plaintiff, Zine Boukikaz, and hereby dismisses the above action against Defendant, Avis Rent A Car System, Inc. with prejudice.



Zine Boukikaz



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Attorney for Defendant, Avis Rent-A-Car System, Inc.

CT

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

ENTERED ON DOCKET

DATE DEC 28 1998

In Re:)
)
DURABILITY, INC.,)
)
SCOTT P. KIRTLEY, SUCCESSOR TRUSTEE)
OF THE ESTATE OF DURABILITY, INC.)
)
Appellant,)
)
vs.)
)
SOVEREIGN LIFE INSURANCE COMPANY OF)
CALIFORNIA,)
Appellee.)

Case No. 98-CV-232-B(J) ✓

FILED

DEC 23 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

REPORT AND RECOMMENDATION

Durability, Inc. purchased three life insurance policies on the life of Fred I. Palmer, II. The policy that is the subject of the litigation between the parties was issued by Sovereign Life Insurance Company of California ("Sovereign") to Durability, Inc. in the amount of \$500,000.00. Sovereign asserts that the premiums were not paid on the policy and declined to pay the policy. The Trustee filed a Motion to Assume Executory Contract and the parties filed cross-motions for summary judgment. The Bankruptcy Court granted summary judgment in favor of Sovereign, and the Trustee appealed. For the reasons discussed below, the United States Magistrate Judge recommends that the decision of the Bankruptcy Court be **AFFIRMED**.

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I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Sovereign filed a Brief in Support of Sovereign's Motion for Summary Judgment in the Bankruptcy Court on December 2, 1994. Sovereign listed 26 facts which Sovereign contended were not in dispute. *Record on Appeal, Volume I of II, Tab No. 291*. The Trustee filed his Response to Motion for Summary Judgment and Brief in Support of Summary Judgment for the Trustee on January 5, 1995. Trustee stated, "[t]he facts are not in dispute and are fully and completely stated in the January 5, 1995 Brief in Support of Trustee in Bankruptcy's Motion for Summary Judgment and the facts stated in December 2, 1994 Brief in Support of Sovereign Life Insurance Company's Motion for Summary Judgment." *Record on Appeal, Volume II of II, Tab No. 299*.

In the Memorandum Opinion filed by the Bankruptcy Court on January 28, 1997, the Court notes that Sovereign's statement of facts were not disputed by the Trustee. *Record on Appeal, Volume II of II, Tab No. 307, at 3 n.3*. The Bankruptcy Court additionally observed that Sovereign's Motion for Summary Judgment had been on file for three years, that the Motions were pending when the Bankruptcy Judge took the bench in June 1997, that on August 19, 1997 the Bankruptcy Court held a status hearing during which both parties were provided an opportunity to offer any additional evidence but that both parties declined to do so. *Record on Appeal, Volume II of II, Tab No. 307, at 2 n.2*. The Bankruptcy Court concluded that the Trustee agreed with the undisputed facts submitted by Sovereign and that the Trustee had no additional information to supplement the record.

The Bankruptcy Court, based on the undisputed facts in Sovereign's Brief, as agreed to by the Trustee, found the following undisputed facts.

1. The [insurance] Policy was in full force and effect as between Sovereign and Durability on September 3, 1986.
2. On September 3, 1986, a premium in the amount of \$131.75 was due.
3. The Policy did not obligate Durability to continue the insurance coverage or to make the premium payment.
4. The premium was not received on or before September 3, 1986.
5. The policy provided a thirty-one (31) day grace period within which a premium payment could be made.
6. The thirty-first (31st) day after the premium due date was October 4, 1986.
7. In September 1986, Sovereign sent a Notice of Premium Due and Notice of Returned Check to Durability. The Notice of Returned Check stated that the grace period would expire October 4, 1986.
8. The premium due September 3, 1986, was not received by Sovereign on or before October 4, 1986.
9. This bankruptcy proceeding was initiated by the filing of an Involuntary Petition on October 6, 1986. On October 7, 1986, the Court entered its order for relief and appointed the Trustee.

10. The Policy permits reinstatement within five years of the date of lapse, provided certain conditions are met. One of the conditions of reinstatement is that the insured must continue to be insurable by Sovereign's standards.

11. Sovereign has an internal corporate policy of waiving the continuing insurability condition for reinstatement of lapsed policies for seventy-five (75) days following the last premium due date.

12. Sovereign's internal corporate policy regarding reinstatement was not included within the terms of the Policy.

13. Pursuant to its internal corporate policy, Sovereign sent a mailgram dated November 5, 1986, to the Debtor advising it that the Policy had lapsed but offering to reinstate the Policy without evidence of insurability if a premium payment in the amount of \$263.50 was received on or before November 12, 1986.

14. No money was received by Sovereign or any of its agents on or before November 12, 1986.

15. Mr. Palmer had surgery on November 13, 1986.

16. The seventh-fifth (75th) day following the premium due date was November 17, 1986. Sovereign did not receive a premium payment or request for reinstatement on or before November 17, 1986.

17. Subsequent to November 17, 1986, the Trustee attempted to reinstate the Policy by delivering the past due premiums to the office of Mark Farquahr ("Farquahr").

18. Farquahr was a soliciting agent but not a general agent of Sovereign. Farquahr, as a soliciting agent, simply forwarded documents to Sovereign's general agent for approval or rejection. Farquahr had no authority to make a decision regarding the insurability of a person. That decision was made by the home office.

19. Farquahr forwarded the premiums he received from the Trustee to Sovereign but made no representation that Sovereign would reinstate the policy. Sovereign refused to accept the tendered premiums or reinstate the Policy until debtor complied with the Policy's conditions for reinstatement, including providing evidence of continued insurability.

20. By letter dated December 16, 1986, Sovereign informed the Trustee that the policy had lapsed for nonpayment of premiums.

21. After learning of the death of Fred I. Palmer, II, Sovereign sent a proof of death form to the Trustee along with instructions for making a claim. Sovereign explained that the premiums were paid on policy no 197579 and that its \$1,000,000 death benefit would be paid upon receipt and approval of the proof of death. [This policy is not the policy that is the subject of the litigation between the parties. Durability had two separate life insurance policies with Sovereign.]

22. The Trustee completed the proof of death form and made a claim on Policy No. 197579 and the Policy by letter dated March 24, 1989.

23. The Policy provides that Sovereign will pay the proceeds to the beneficiary upon receipt of due proof of the insured's death.

24. Sovereign paid the \$1,000,000 death benefit on Policy No. 197579.

25. No action has been filed for recovery of the proceeds of the Policy at issue herein.

26. All of Durability's creditors have been paid in full.

Record on Appeal, Volume II of II, Tab No. 307, at 3-6. In addition, The Bankruptcy Court found, based on the additional facts in the Trustee's Brief, that on November 5, 1986, Sovereign sent a Mailgram regarding the Policy which read, "Please be informed your Sovereign Policy 182155 has lapsed. To help you regain this valuable protection, the last payment offer you received has been extended ten days, to 11/12/86. You need not furnish evidence of good health. Payment of 263.50, which represents the monthly premiums due 9/3/86 and 10/3/86, will restore your protection, provided payment is made during the lifetime of all persons insured under this policy. Please act now to save this part of your financial security program." *Record on Appeal, Volume II of II, Tab No. 307, at 6.* The Court additionally found that the Trustee tendered all past due premiums on the Policy to Sovereign through Sovereign's agent Mark

Farquahr on November 19, 1986. The Bankruptcy Court referenced the Trustee's Brief.^{1/} *Record on Appeal, Volume II of II, Tab No. 307, at 6.*

In the Response to November 2, 1994 Requests for Admissions by Sovereign Life Insurance Company filed January 6, 1995 in the Bankruptcy Court, the Trustee made the following admissions and responses.

Request for Admission No. 5: Admit that the premium due on the subject policy no later than September 3, 1986, was not paid by that date.

Response: Denied. This premium was timely and properly paid on November 19, 1986 when James R. Adelman, Trustee in Bankruptcy of Durability, Inc. delivered a \$875.00 check payable to Sovereign Life Insurance Company of California to the office of its insurance agent, mark Farquahr.

Record on Appeal, Volume II of II, Tab No. 301 (emphasis added).

Request for Admission No. 6: Admit that, pursuant to the written policy, specifically the grace period and lapse provisions of the insurance policy at issue, the policy lapsed on October 4, 1986.

Response: Denied. The subject bankruptcy proceeding was filed on October 6, 1986. November 5, 1986 Sovereign advised Durability, Inc. by telegram, "Please be informed your Sovereign Policy 182155 has lapsed. To help you regain this valuable protection, the last payment offer you received has been extended ten days, to 11-12-86. You need not furnish evidence of Good health. Payment of 263.50, which represents the monthly premiums due 9/3/86 and 10/3/86, will restore your protection, provided

^{1/} On page 2 of Trustee's Brief, Trustee, in the Chronology of Events, notes that James R. Adelman, Trustee in Bankruptcy delivered the premium check on the Policy to Mark Farquahr on November 19, 1986. Trustee references the deposition of Mark Farquahr. *Record on Appeal, Volume I of II, Tab No. 298, at 2.* Trustee also notes that on November 19, 1996, the Trustee's agent contacted a representative of Sovereign, Mark Farquahr, and was told that if the premiums were delivered that day the policy would not lapse. Trustee notes that the premiums were delivered that day - November 19, 1996. *Record on Appeal, Volume I of II, Tab No. 298, at 4.*

payment is made during the lifetime of all persons insured under this policy. Please act now to save this part of your financial security program." November 19, 1986, James R. Adelman, Trustee in Bankruptcy of Durability, Inc., delivered \$875.00 check, payable to Sovereign Life Insurance Company of California, to the office of insurance agent Mark Farquahr. November 20, 1986, Mark Farquahr forwarded the insurance premium check of \$875.00 to Sovereign and directed them to please bill all future payments to James R. Adelman, P.O. Box 470684, Tulsa, Oklahoma 74147-0684.

Record on Appeal, Volume II of II, Tab No. 301.

Request for Admission No. 8: Admit that the first tender of past due premiums under the subject policy was made on November 19, 1986.

Response: Admitted.

Record on Appeal, Volume II of II, Tab No. 301.

In the Trustee's Response Brief, filed in the Bankruptcy Court on February 7, 1995, the Trustee notes that on September 19, 1986, Sovereign advised Durability, Inc. that their premium check for the insurance policy had been returned unpaid and that \$131.75 was due. The Trustee contends that this notice was mailed to the wrong address. The Trustee additionally notes that after receiving the "mailgram" notice from Sovereign, the Trustee went to the office of Mark Farquahr on November 19, 1986, and delivered a \$875.00 premium check. *Record on Appeal, Volume II of II, Tab No. 303.*

The Memorandum Opinion of the Bankruptcy Court was filed January 28, 1998. *Record on Appeal, Volume II of II, Tab No. 307.* The Court found that under the terms of the Policy, a premium payment of \$131.75 was due on September 3, 1986, and

that this payment was subject to a 31 day grace period. The Court found that the premium was not paid and that the grace period expired on October 4, 1986, or two days prior to the filing of the bankruptcy case. "The Court finds that the grace period under the policy terminated prior to the commencement of this case. As a result, Kirtley [Trustee] may not rely on the terms of the Policy to support his claimed right to assume." The Court additionally noted that "property of the estate" included only the "'legal and equitable interests of the debtor in property as of the commencement of the case.' If an interest in property is not in existence at the commencement of the case, the interest is not property of the estate." *Record on Appeal, Volume II of II, Tab No. 307 (citing § 541(a)(1), emphasis added by Bankruptcy Court)*. The Court then addressed whether the "mailgram" which Sovereign sent to Durability provided any greater rights of assumption to Durability or the Trustee.

The Bankruptcy Court observed that "it is undisputed that if Durability had tendered all past due premiums on the Policy on or before November 12, 1986, Sovereign would have considered the Policy to be in full force and effect. . . . it is undisputed that the Trustee tendered all past due premiums on the Policy to Sovereign through its agent Mark Farquahr, on November 19, 1986." *Record on Appeal, Volume II of II, Tab No. 307 at 11-12*. The Bankruptcy Court concluded that the offer by Sovereign was a gratuitous option and was valid for the time period stated unless revoked before acceptance. The Bankruptcy Court held that since the offer was never accepted prior to November 12, 1986, the offer expired. *Record on Appeal, Volume II of II, Tab No. 307 at 13-14*. The Bankruptcy Court additionally declined to address

a statute of limitations argument (made by Sovereign) due to the Bankruptcy Court's conclusion that the Trustee could not assume the contract. The Bankruptcy Court additionally noted that all creditors of Durability had been paid in full and that the powers granted to the Trustee were for the benefit of the estate. Because the estate would in no way benefit from the assumption of the contract, the purpose of the requested assumption was questionable. The Bankruptcy Court granted Sovereign's Motion for Summary Judgment and denied the Trustee's Motion for Summary Judgment on January 28, 1998.

On February 3, 1998, the Trustee filed a Motion to Alter or Amend Judgment and supporting Memorandum. The Trustee's Motion stated that "The Court should state the facts or documents that support the Court's Findings of Fact . . . 4. The premium was not received on or before September 3, 1986." *Record on Appeal, Volume II of II, Tab No. 309*. The Trustee, in the Motion to Alter or Amend, stated that \$131.75 was wire transferred on August 28, 1986, to Sovereign and claimed that as the "unpaid" September 3, 1986, payment. The Trustee additionally asserted that the Court should "state when the Bankruptcy Trustee . . . first had notice . . ." that the September 3, 1986 premium had not been received by Sovereign. Finally, the Trustee stated that the Court should provide the law and facts establishing that Sovereign had authority on November 5, 1986 to set a November 12, 1986 "option date." The Trustee filed a Supplement to the Motion to Alter or Amend on February 6, 1998. The Trustee attached an affidavit of James R. Adelman, the Trustee for Durability from October through December of 1986. The Adelman affidavit stated

that he delivered funds to Sovereign's agent "within the time required." *Record on Appeal, Volume II of II, Tab No. 310.* The Trustee submitted a "corrected" motion on February 9, 1998. The corrected affidavit stated that the funds were delivered to Sovereign's agent by November 12, 1996. *Record on Appeal, Volume II of II, Tab No. 312.*

By Order dated February 11, 1998, the Bankruptcy Court denied the Motion to Alter or Amend. The Bankruptcy Court observed that motions to alter or amend judgments were governed by Fed. R. Civ. Pro. 59 which was applicable to contested bankruptcy matters pursuant to Bankruptcy Rule 9023. The Bankruptcy Court noted that the grant of a new trial was permissible "for any of the reasons for which rehearings have heretofore been granted in suits in equity in courts of the United States." The Bankruptcy Court stated that this standard permitted alteration for: (1) intervening changes in controlling law, (2) the discovery of new or previously undiscoverable evidence, or (3) the prevention of clear error of law or fact to prevent manifest injustice. The Bankruptcy Court referred to its prior order and noted that the Trustee had not disputed any, but had agreed, with Sovereign's undisputed material facts. Sovereign's facts included that: (1) the September 3, 1986 premium was not paid, (2) the September and October premiums were not tendered for payment prior to November 12, 1986. The Bankruptcy Court concluded that although the Trustee apparently now "disputed" the material facts, the Trustee presented no reason, in accordance with the Fed. R. Civ. Pro. 59, for the Bankruptcy Court to alter the facts upon which the Court relied. The Court noted that "there has been no showing that

any statement of Mr. Adelman was unavailable when this matter was submitted to the Court, or that his statements constitute 'newly discovered evidence' for any reasons." *Record on Appeal, Volume II of II, Tab No. 311*. The Bankruptcy Court additionally observed that at an August 19, 1997 status hearing the Court had asked counsel for both parties if they had any additional factual or legal matters to present to the Court. The Bankruptcy Court observed that both parties answered "no." *Record on Appeal, Volume II of II, Tab No. 311*.

II. STANDARD OF REVIEW

The Bankruptcy Court's findings of fact are reviewed under the "clearly erroneous" standard. Conclusions of law are reviewed *de novo*. Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1543 (10th Cir. 1988). "When reviewing factual findings, an appellate court is not to weigh the evidence or reverse the finding because it would have decided the case differently. A trial court's findings may not be reversed if its perception of the evidence is logical or reasonable in light of the record." In re Branding Iron Motel, Inc., 798 F.2d 396 (10th Cir. 1986) (citations omitted).

III. ANALYSIS

On appeal, the Trustee argues (Propositions III and IV) that the September 3, 1986, premium was wire transferred to Sovereign on August 28, 1986, and that the disputed September and October premiums were delivered on November 12, 1986. The "undisputed material facts" were that the September 3, 1986 premium was not paid until November 19, 1986, when it was delivered by the Trustee to Sovereign's agent Mark Farquahr. The Trustee asserts (Proposition II) that the Bankruptcy Court

erred by granting summary judgment when the parties disputed material facts. The Trustee additionally asserts (Proposition I) that Sovereign had the duty to timely tell a responsible person that it was unable to wire transfer the account of Durability on or before September 3, 1986.

APPEAL OF THE MOTION TO ALTER OR AMEND

Sovereign filed a Motion for Summary Judgment on December 2, 1994. Sovereign's undisputed material facts included the facts that: (1) the September 3, 1986 premium payment was not made, and (2) the September and October premium payments were not made prior to November 12, 1986. The Trustee did not object or dispute any of Sovereign's undisputed material facts. In the Trustee's Response Brief the Trustee stated that "the facts are not in dispute and are more fully and completely stated" in the Trustee's Brief in Support of Summary Judgment and in Sovereign's December 2, 1994 Brief in Support of Summary Judgment.

The Trustee, in answer to Requests for Admissions, admitted that the September 3, 1986 premium was "timely and properly paid on November 19, 1986." The Trustee additionally admitted that the first tender of past due premiums under the subject policy was made on November 19, 1986. In the Trustee's Response Brief filed February 7, 1995, the Trustee states that the Trustee delivered a \$875.00 premium check to Mark Farquahr on November 19, 1986.^{2/}

^{2/} Sovereign contends that this was not part of the record in the Bankruptcy Court. The Magistrate Judge disagrees. The affidavit submitted by the Trustee was attached to a Motion to Alter or Amend and therefore is part of the Bankruptcy Court record and has been included in the Record on Appeal. The Magistrate Judge believes that the more appropriate question is whether and under what circumstances the
(continued...)

In addition, Sovereign's Motion was pending for three years. The Bankruptcy Court set a status hearing in the matter, and asked for additional evidence or information from the parties. Neither party offered additional information or evidence.

Based on the representations of the parties, the Bankruptcy Court found, as undisputed facts, that the September 3, 1986 payment on the premium was not made, that the November 12, 1986 payment was not made, and that no payment was offered until November 19, 1986.

The Trustee filed a Fed. R. Civ. Pro. 59 Motion to Alter or Amend Judgment. The Trustee asserted that the September 3, 1986 payment was made in August, and that the November 12, 1996 payment was made on that date.

The Trustee now asks this Court to consider the "disputed material facts" based on the Trustee's assertion in the Motion to Alter or Amend that the September 3, 1986 payment and the November 12, 1996 payments were made. However, the Bankruptcy Court denied the Trustee's Motion to Alter or Amend. This Court can only consider the facts urged by the Trustee if the Bankruptcy Court erred in denying the Trustee's Motion to Alter or Amend.

Fed. R. Civ. Pro. 59 provides that a new trial may be granted to a party on all or part of the issues "in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States." Fed. R. Civ. Pro. 59(a). A motion such as that filed by the Trustee is

^{2/} (...continued)

information in the affidavit should be considered by this Court because it was part of a Motion to Alter or Amend which was denied by the Bankruptcy Court.

generally permissible only if (1) the movant demonstrates that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based, or (2) the movant has discovered new and previously unavailable evidence, or (3) the motion is necessary to prevent manifest injustice, or (4) there has been an intervening change in the law. See Brumark Corp. v. Samson Resources Corp., 57 F.3d 941, 948 (10th Cir. 1995); Webber v. Mefford, 43 F.3d 1340, 1345 (10th Cir. 1994) ("A postjudgment motion to reconsider summary judgment based on subsequently produced evidence is treated as a motion to alter or amend the judgment under Fed. R. Civ. Pro. 59(e)."); 11 C. Wright & A. Miller, Federal Practice and Procedure, §2810.1 (1995).

The decision of the Bankruptcy Court is reviewed for an abuse of discretion. Webber v. Mefford, 43 F.3d 1340, 1345 (10th Cir. 1994). A party presenting a motion to alter or amend judgment has the burden of showing either (1) that the evidence is newly discovered, or (2) if the evidence was available at the time summary judgment was granted, that counsel made a diligent yet unsuccessful attempt to discover the evidence." Id.

In presenting the Motion to Alter or Amend to the Bankruptcy Court, the Trustee did not assert that any of the requisites for granting reconsideration were present. Initially, the Trustee requested that the Bankruptcy Court state its support for finding that the September 3, 1986 payment on the policy was not received by Sovereign. The Bankruptcy Court noted that this was an "undisputed material fact," and that the Trustee's request was therefore improper. The Trustee additionally submitted an

affidavit stating that the funds were delivered on November 12, 1986, rather than November 19, 1986. The Bankruptcy Court stated "there has been no showing that any statement of Mr. Adelman was unavailable when this matter was submitted to the Court, or that his statements constitute 'newly discovered evidence' for any reason. The submission of these affidavits is not cause for the Court to reconsider its ruling." *Record on Appeal, Volume II of II, Tab No. 311.*

In asserting that the Bankruptcy Court erred, the Trustee does not argue how any of the requirements for granting reconsideration are present and does not explain how the Bankruptcy Court abused its discretion in failing to grant the Trustee's Motion to Alter or Amend. The Bankruptcy Court concluded that the Trustee had presented no reason for the Court to consider the additionally submitted evidence. The Trustee, on appeal, presents no reason to this Court, and does not argue how the Bankruptcy Court abused its discretion. The Magistrate Judge recommends that the District Court affirm the decision of the Bankruptcy Court to deny the Trustee's Motion to Alter or Amend.

An argument could be advanced that the Trustee changed its position with respect to the September 3, 1986, payment prior to the grant of summary judgment by the Bankruptcy Court. In the Trustee's Supplemental Response Brief, filed March 8, 1995 in the Bankruptcy Court, the Trustee asserts that the records of Richard R. Sullivan indicate that Sovereign was paid \$131.75 on August 28, 1986. *Record on Appeal, Volume II of II, Tab No. 305 at 2-3, 22.* Trustee does not otherwise indicate that this is contrary to its previous position, or that it disputed any of Sovereign's

undisputed material facts. Trustee does not develop this argument in Trustee's appeal. Regardless, the Court concludes that even if the Court assumes, for the purpose of this appeal, that the September 3, 1986 payment was made in August, the outcome of this appeal must remain the same.

The parties agree that a premium payment was due on September 3, 1986, and on October 3, 1986. *Record on Appeal, Volume II of II, Tab No. 303.* Trustee acknowledges that the October 3, 1986 payment was not made. *Record on Appeal, Volume II of II, Tab No. 303.* Assuming that the September 3, 1986, payment had been made, failure to pay the October 3, 1986, payment would result in a lapse in the policy. Pursuant to statutory and contract law, the Trustee would have 31 days to cure this lapse. The Bankruptcy petition was filed October 6, 1986. Both parties admit that no funds were paid on the policy until November 19, 1986.^{3/} Therefore, even if the September payment had been made by the Trustee, the policy would still have lapsed 31 days after the due date for the October payment due to the Trustee's failure to make that payment.^{4/} The filing of the bankruptcy would not have stayed or otherwise precluded the termination of the policy. See Trigg v. United States of

^{3/} Trustee asserts, in Trustee's Motion to Alter or Amend that the premium was paid November 12, 1986. However, that date is also later than 31 days after the due date of the October payment.

^{4/} Sovereign sent a mailgram to Durability extending the date on which Durability could pay all past due premiums to November 12, 1986. The parties agree that this extension was in accordance with the corporate policy of Sovereign. The Bankruptcy Court interpreted the mailgram as a gratuitous option which could be accepted if not revoked prior to acceptance. Because the offer was never accepted, it expired. Arguably, if Sovereign had been paid in September, and the first non-payment had been made in October, the "mailgram" offer would not have been made until after the expiration of the 31 day grace period and would have permitted continuation of the policy if payment was received sometime before a date in December. Theoretically, this would permit a continuation of the insurance policy. However, as noted by the Bankruptcy Court, the mailgram offer was corporate policy but was not required. Sovereign had no duty to make such an offer, and, for obvious reasons, such an offer was not made.

America, Dep't of the Interior, 630 F.2d 1370, 1373, 1375 (10th Cir. 1980) ("A contract that provides for termination on the default of one party may terminate under ordinary principles of contract law even if the defaulting party has filed a petition under the Bankruptcy Act. . . . Since the debtors failed to tender the delay rentals and to properly petition for reinstatement of the federal leases, the terminated leases could not be reinstated. The general equitable powers of the bankruptcy court cannot create for the debtors a right to property they have lost through an incurable default."). See also Good Hope Refineries, Inc. v. R. Benavides, 602 F.2d 998, 1003 (1st Cir. 1979) (Finding that § 108(b) did not provide additional time because no contractual "default" had occurred when the option expired of its own terms).^{5/}

Furthermore, Appellee asserts that the Bankruptcy Court erred in concluding that the insurance policy constituted an executory contract that could be assumed. The Court concludes that Appellee's argument has merit and provides an additional reason supporting the Bankruptcy Court's ultimate conclusion that the Trustee could not enforce the insurance contract. The Trustee argued that the insurance contract was an executory contract and therefore could be accepted or rejected by the Trustee. Appellee asserts that it is not an executory contract. Several courts have concluded that the determination of this issue depends on timing. A contract which expires prior to the request for approval or rejection is not executory. See B&K Hydraulic Co. v. Loyal American Life Insurance Co., 106 B.R. 131 (E.D. Mich. 1989) citations omitted

^{5/} Neither party discusses the filing by the Trustee of Trustee's Notice of Intent to Abandon Property of the Estate on May 6, 1988.

("[T]he generally accepted view [is] that an executory contract is one under which substantial performance remains on both sides. . . . By definition, a contract which has expired by its own terms does not require any further performance by either party and is therefore not an executory contract."); Texscan Corp. v. Commercial Union Ins. Companies, 107 B.R. 227 (B.A.P. 9th Cir. 1989) ("If a contract has expired by its own terms then there is nothing left to assume or reject."); B&K Hydraulic Co. v. Loyal American Life Ins. Co., 1991 WL 93191 (6th Cir. June 4, 1991) citations omitted ("The trustee fares no better under the executory contract and the automatic stay provisions of the Bankruptcy Code. The courts and legal scholars hold as a general proposition that contracts of insurance that are simply allowed to expire by their own terms during the contract period, like other expired contracts, do not create further duties of performance and are not characterized as 'executory' for purposes of § 365 of the Bankruptcy Code."). The Trustee filed a Motion for Ex Parte Order on December 4, 1986, to extend the time within which to assume or reject the "unexpired" contracts and leases. By this date, the insurance contract had already expired.

For these reasons, the Magistrate Judge recommends that the District Court affirm the decision of the Bankruptcy Court.

DUTY TO INFORM THAT THE POLICY WAS NOT PAID

The Trustee asserts that Sovereign sold the insurance policy to Durability and entered an oral agreement to permit Sovereign to wire transfer money from the account of Durability to pay the premium due on the policy. The Trustee asserts that

there is or should be an implied covenant in the oral agreement that if, for any reason Sovereign was unable to transfer the funds, it would timely advise Durability.

The Trustee's briefs to the Bankruptcy Court do not indicate that the Trustee presented this specific argument to the Bankruptcy Court.^{6/} Generally, the failure to present an argument to the Bankruptcy Court results in a waiver of the right to raise the argument on appeal. Regardless, in this case, the Bankruptcy Court specifically found that failure of either party to perform excused the performance of the other party. In addition, the Trustee presents no authority to this Court requiring the Court to imply a duty on behalf of Sovereign to inform Durability of Durability's lack of funds to pay the policy.^{7/}

SOLICITING VERSUS POLICY WRITING AGENT

The Trustee asserts that the Bankruptcy Court erroneously found that the November 12, 1986 payment was not binding because Mark Farquahr was a soliciting agent and could not change the terms of the life insurance policy. The Trustee does

^{6/} The closest the Trustee comes to asserting this argument is in the Trustee's Response Brief. "Sovereign, having assumed the duty to pay the insurance premium, Sovereign cannot claim forfeiture by reason of its own default." *Record on Appeal, Volume II of II, Tab No. 303*. The Trustee does not specifically argue that Sovereign had a duty to inform Durability of the inability to transfer funds.

^{7/} Trustee filed an amended brief on September 23, 1998 referring the Court to two cases from the 1930s. In each case, the duty to pay the premium was on the employer and the insurance company was required to notify the insured when the employer did not continue to pay life insurance premiums. In the case currently before the Court, the insured had the duty to pay the premium. See, e.g., Lewis State Bank vs. Travelers Insurance Co., 356 So. 2d 1344, 1345 (Fla. 1978) ("The general rule regarding an insurer's duty to notify an assignee of premiums due or of policy lapses may be found in 5 Couch on Insurance 2nd sec. 30.143, as follows: 'In the absence of any statute or contract of the insurer to the contrary or conduct of the insurer giving rise to a duty to notify the assignee, there is no duty on the insurer to notify an assignee of the policy of premiums or assessments due thereon'). The Court additionally notes that Appellee asserts that notice was given.

not further expand on this argument, but does reference case and statutory law. The Trustee states, in the Trustee's Brief, that the "trial court erroneously found that the November 12, 1986 \$263.50 payment was not binding on Sovereign Life insurance Company of California in that Mark Farquahr was only a soliciting agent and not a policy writing agent and that a soliciting agent could not change the terms of the life insurance policy." See Appellant's Brief at 9. This misstates the conclusion of the Bankruptcy Court. The Bankruptcy Court found, based on the undisputed material facts, that no payment was made on November 12, 1986, and that the policy therefore lapsed. The record does not indicate that the Trustee's current argument was presented to the Bankruptcy Court. Generally, arguments which are not presented to a trial court are considered waived on appeal. In addition, as noted above, the Trustee's assertion that the payments were made on November 12, 1986 was not made until after the entry by the trial court of summary judgment against the Trustee. Such arguments were proper only if the information was previously not available. The Trustee presents no such arguments. Regardless, the Magistrate Judge concludes that the Trustee's argument^{8/} does not require reversal of the Bankruptcy Court. First, the Trustee presents no case law requiring a finding that the Farquahr had the authority to modify the terms of the policy.^{9/} Second, as explained above, the

^{8/} The initial argument by the Trustee was that the telephone call from the Trustee's agent to Farquahr occurred on November 19, 1986. This is the argument which was presented by the Trustee in the Trustee's Motion to Assume Executory Contracts filed January 20, 1987 in the Bankruptcy Court. This argument was not presented in the Trustee's Motion for Summary Judgment filed in the Bankruptcy Court.

^{9/} Some of the cases referenced by Trustee note that a soliciting agent has no power or authority to bind the company.

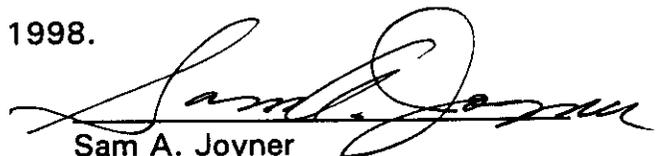
policy terminated prior to the telephone call between Farquahr and the Trustee's agent. Farquahr could not modify a policy which had expired.

The Magistrate Judge recommends that the District Court **AFFIRM** the decision of the Bankruptcy Court.

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 23 day of December 1998.

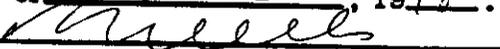

Sam A. Joyner
United States Magistrate Judge

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

28 Day of December, 1998.

-- 22 --



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

PHILLIP E. HUCKANS,

Plaintiff,

vs.

MARVIN T. RUNYON, Postmaster
General,

Defendant.

ENTERED ON DOCKET

DATE DEC 28 1998

No. 97-CV-894-K ✓

FILED

DEC 23 1998

Phil Lombardi, C
U.S. DISTRICT COURT

ORDER

Before the Court is the Defendant's (United States Postal Service, hereinafter "USPS") Motion to Dismiss And, Alternatively For Summary Judgment And Brief In Support Thereof. This case was originally filed on September 30, 1997, pursuant to the Rehabilitation Act of 1973, codified 29 U.S.C. §§709 et seq. The Plaintiff ("Huckans") claims that Defendant violated the Act by discriminating against him based on physical disability; denying Plaintiff's request for advanced sick leave on or about April 29, 1996; denying Plaintiff's request for donated annual leave on or about May 16, 1996; and denying Plaintiff light duty from April 30, 1996 until May 16, 1996 and denying Plaintiff appropriate light duty from May 16, 1996 until June 6, 1996.

I. Motion to Dismiss:

The Defendant moves this Court to dismiss the action based on improper service pursuant to Fed.R.Civ.Proc. 4(i) and 4(m). The Defendant contends, first, that the Plaintiff has failed to effect proper service upon the United States Attorney for the Northern District of Oklahoma. Rule 4(i)(2) requires that service upon an agency of the United States shall be effected by serving the United

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States as set forth in Rule 4(i)(1) and by sending a copy of the summons and complaint by registered or certified mail to the agency. Rule 4(i)(1) requires that Plaintiff deliver or mail by certified or registered mail a copy of the summons and complaint to the United States Attorney for the district in which the action is brought. Defendant is correct that, at the time of the filing of this Motion, the docket sheet in this case indicated that proper service had not been effected on Stephen Lewis, United States Attorney. An entry made on September 16, 1998, demonstrates, however, that the U.S. Attorney was, in fact, served on October 2, 1997. Therefore, service of process was proper in this instance, and cannot serve as a grounds for dismissal.

The Defendant contends, additionally, that the Plaintiff must also send by certified or registered mail, a copy of the summons and complaint to the Attorney General of the United States. Fed.R.Civ.Proc. 4(i). Without proper service, the district court does not acquire jurisdiction to consider the plaintiff's complaint. Furthermore, the Defendant asserts that all defendants must be properly served within 120 days of the filing of the action, or the district court shall dismiss the action without prejudice as to that defendant or direct that service be effected within a certain period of time. Fed.R.Civ.Proc. 4(m). The Defendant asserts that a Rule 4(m) extension is not mandatory, and may only be granted where the Plaintiff has shown good cause.

The Plaintiff contends, however, that Rule 4(m) gives the Court the option of dismissing the action or extending time for service. In the case of Espinoza v United States, 52 F.3d 838 (10th Cir. 1995) the Tenth Circuit established a two-step approach to extensions of time for service:

The preliminary inquiry to be made under Rule 4(m) is whether the plaintiff has shown good cause for the failure to timely effect service. In this regard, district courts should continue to follow the cases in this circuit that have guided that inquiry. If good cause is shown, the plaintiff is entitled to a mandatory extension of time. If the plaintiff fails to show good cause, the district court must still consider whether a permissible extension of time may be warranted. At that point the district court

may in its discretion...extend the time for service. Espinoza at 841.

The Court of Appeals for the Tenth Circuit directed trial courts to take into consideration the rather complex requirements of multiple service in actions against the United States. Id. at 842, note 7. The Espinoza Court determined that Rule 4(i)(3), a provision added by the 1993 amendments, provides an exception to Rule 4(m) where the plaintiff has failed to serve process on the United States.¹ That rule functions as an exception by extending the 120 day limit for service for a “reasonable time “ in cases where the plaintiff has properly effected service on either the United States Attorney or the Attorney General, within the 120 day period.

Here, the Plaintiff did effect proper service on two of the Defendants, the USPS and the US Attorney, within the 120 day period allowed by Federal Rules of Civil Procedure. The Plaintiff failed only to effect proper service on the Attorney General of the United States. And, while a one year delay does, indeed, seem excessive, this Court is bound by the Tenth Circuit’s mandate that district courts consider the complexities of the service requirements when the United States is a defendant, as well as whether dismissal of the case will result in it being barred by the statute of limitations. This Court finds that it would not be in the interest of justice to dismiss this case for failure to serve the Attorney General, with the result being that this case would be time-barred and the Plaintiff precluded from bringing this action in the future. Furthermore, the Plaintiff has, since the filing of this motion, effected proper service on the Attorney General. For these reasons, the Motion to Dismiss is overruled.

¹“The court shall allow a reasonable time for service of process under this subdivision for the purpose of curing the failure to serve multiple officers, agencies, or corporations of the United States if the plaintiff has effected service on either the United States Attorney or the Attorney General of the United States.” Fed.R.Civ.P. 4(i)(3).

II. Motion for Summary Judgment

A. 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). Concerning the quantum of proof necessary to defeat summary judgment, the court is to consider "whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Mares* at 494 (10th Cir. 1992), quoting *Anderson* at 252.

B. Discussion

The Rehabilitation Act of 1993 prohibits discrimination against "disabled" persons who are "otherwise qualified individuals" for employment by programs receiving federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal

Service. 29 U.S.C. §794(a).¹ The Tenth Circuit has enumerated the elements of a prima facie case for actions brought under §501 of the Rehabilitation Act.² In order to qualify for relief under §501, a plaintiff must demonstrate: (1) they are a disabled person within the meaning of the Act; (2) they are otherwise qualified for the job; and (3) they were discriminated against because of the disability.³

Under the Rehabilitation Act, a disability is defined as one that substantially limits one or more major life activities. 29 U.S.C §706(8)(B). The EEOC regulations identify these major life activities as “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 29 C.F.R. §1630.2(i). The appendix to the regulations provides that “other major life activities include, but are not limited to, sitting, standing, lifting, reaching.” 29 C.F.R. Pt. 1630, Appendix to Part 1630--Interpretive Guidance to Title I of the ADA, §1630.2(i) (citing S.Rep. No. 116, 101st Cong., 1st Sess. 22 (1989); H.R.Rep. No. 485 part 2, 101st Cong., 2d Sess. 52 (1990); H.R.Rep. No. 485 part 3, 101st Cong., 2d Sess. 28 (1990)). The regulations promulgated by the EEOC define “substantially limited” as follows:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity. 29 C.F.R. §

¹The Rehabilitation Act was amended in 1992, changing the term “individual with a handicap” to “individual with a disability.” 29 U.S.C. § 794(a). In the relevant discussion, this Court will use the term “disabled.”

²In distinguishing cases brought under §504 and §501 of the Act, the Tenth Circuit held: “We can discern no reason why the elements of prima facie case should differ between sections 501 and 504.” Woodman v. Runyon, 132 F.3d 1330, 1338 (10th Cir. 1997). Recently, however, the Court has expanded on one major difference, explaining: “...the meaning of ‘reasonable accommodation’ may vary due to the heightened duties ascribed to federal employers under §501.” Smith v. Midland Brake, Inc., 138 F.3d 1304, 1311 (10th Cir. 1998).

³The Tenth Circuit adopted the same test for actions brought under the Americans with Disabilities Act in White v. York Int'l Corp., 45 F.3d 357, 360-61 (10th Cir. 1995).

1630.2(j)(1)(i)-(ii).

Under 29 C.F.R. § 1630.2(j)(2), the following factors should be considered in determining whether an individual is substantially limited in a major life activity:

- (i) The nature and severity of the impairment;
- (ii) The duration or expected duration of the impairment; and
- (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

When the Plaintiff began employment with the USPS in 1988, he was a disabled veteran with a 10 point preference, having disability ratings of ten percent related to a cervical spine problem, ten percent related to the palm of his hand, and ten percent related to a hiatal hernia, for a total disability rating of thirty percent.⁴ On December 6, 1995, Plaintiff fell while on duty and injured his right hip and suffered upper thigh strain. Due to this work related injury, Huckans' spinal stenosis, disk herniation and degenerative joint disease ultimately resulted in his inability to perform any work from March 9, 1996, to April 30, 1996. His doctors released him for light duty on April 30, 1996, with the following restrictions: no prolonged walking, standing, sitting, stooping, squatting or running, no lifting over twenty (20) pounds, and no driving. Furthermore, upon returning to full duty on June 6, 1996, Huckans' activity remained restricted, and the doctor released him "[w]ith instruction not to lift greater than 35 lb."

The Defendant asserts that summary judgment should be granted because the Plaintiff is not "disabled" within the meaning of the Act as a matter of law. The Defendant argues that Plaintiff's injuries, though disabling at the time, were temporary injuries, and do not constitute disability for

⁴Although Plaintiff states in his Affidavit that his VA cervical spine disability rating was increased in 1996, he neither states nor shows evidence whether this rating covered the period of time relevant to this law suit or whether it was prior to or subsequent to his unrelated October, 1996 accident. Furthermore, the Plaintiff states in his own deposition that he had a *ten percent* disability rating related to cervical spine problems.

purposes of the Rehabilitation Act. Mustafa v. Clark County School Dist., 157 F.3d 1169, 1174 (9th Cir. 1998); Hileman v. City of Dallas, Texas, 115 F.3d 352 (5th Cir. 1997). Defendant contends that the only permanent injury which could qualify the Plaintiff for “disabled” status is the 35 (thirty-five) pound restriction on Plaintiff’s lifting. A restriction on lifting, Defendant argues, is not sufficient to satisfy the definition of “disabled” under the Act. In support of this proposition, Defendant cites Paegle v. Department of Interior, 813 F. Supp. 61, 64 (U.S.D.Ct., D.C. 1993). In Paegle, the Plaintiff had fallen in March of 1988, returned to full duty in June 1988, reinjured his back in July 1988, and was placed on limited duty from July 1988 through March 1989. The Court held that a temporary back injury was not a handicap under the Rehabilitation Act.

Huckans asserts, however, that his back injury is not “temporary,” but was pre-existing, chronic, and severe, and there is little hope for full recovery in the future. Huckans argues that the exacerbation of his spinal stenosis, disk herniation and degenerative joint disease ultimately resulted in his inability to perform the major life function of working, between March 9, 1996 and April 30, 1996. Plaintiff cites Masterson v Runyon, 1994 WL 675268 (E.D. Pa. Nov. 17, 1994) in support of the proposition that working is itself a major life activity. The Court does not take issue with that assertion. The Plaintiff cites a host of other cases, however, wherein parties have been found to have established a prima facie case pursuant to the Rehabilitation Act with similar fact patterns. The Defendant has responded that all of the cases cited by Plaintiff can be distinguished on the grounds that they all involved circumstances wherein the disabled party was limited by a weight restriction in lifting in addition to other major life activities.

The Tenth Circuit has determined that lifting is a major life activity. Lowe v. Angelo’s Italian Foods, Inc., 87 F.3d 1170, 1172 (10th Cir. 1996). They have not, however, held that a

restriction against lifting more than 35 pounds is a substantial limitation of that life activity. Many circuit courts have found that a heavy-weight lifting restriction does not substantially limit a major life activity. Pryor v. Trane, 138 F.3d 1024, 1027 (5th Cir. 1998); Thompson v. Holy Family Hospital, 121 F.3d 537 (9th Cir. 1997); Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311, 1319 (8th Cir. 1996); McKay v. Toyota Motor Manufacturing U.S.A., Inc., 110 F.3d 369 (6th Cir. 1997).

Per Order dated December 2, 1998, this Court ordered the Plaintiff to present evidence, if such evidence exists, of the substantial and permanent nature of Plaintiff's back injury. In response to that Order, the Plaintiff produced additional notations and letters by Plaintiff's doctors, detailing the pain and trauma Plaintiff was experiencing due to a history of serious back problems. From those additional documents, it is clear that the Plaintiff has suffered intense pain related to a series of back injuries. He is, nevertheless, not "disabled" for purposes of the Rehabilitation Act. As stated *supra*, the Rehabilitation Act defines "disability" as a problem which substantially limits one or more major life activities. 29 U.S.C §706(8)(B). Furthermore, lifting is one such major life activity according to the EEOC regulations appendices, as well as the Tenth Circuit. However, a restriction on lifting over 35 pounds is not considered to be a limitation substantial enough to qualify one as "disabled" under the Act. And, while Plaintiff has complained of other very serious back-related problems, he has had absolutely no restrictions placed on his ability to work other than the limitation on lifting.

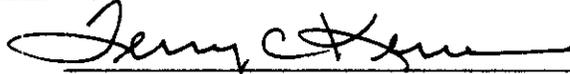
This Court has given the Plaintiff a full and fair opportunity to present evidence that he faced additional physical limitations in performing his job duties. He has failed to do so. Nothing presented to the Court indicates that his doctor did, indeed, intend to limit any of his physical

activities other than a requirement that he not lift over 35 pounds. That does not qualify Plaintiff as disabled under the Act. The Motion for Summary Judgment must be sustained.

C. Conclusion

For the foregoing reasons, the Defendant's Motion for Summary Judgment (#7) is GRANTED as to each of Plaintiff's claims.

ORDERED this 22 day of December, 1998.



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

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

ROBERT ROBINSON,)
)
Plaintiff,)
)
vs.)
)
MARNIE BROCKMAN and)
SGT. JEFF DAVIS,)
)
Defendants.)

ENTERED ON DOCKET
DATE DEC 28 1998

No. 98-CV-793-K (M) ✓

FILED
DEC 23 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On October 13, 1998, Plaintiff submitted for filing a civil rights complaint pursuant to 42 U.S.C. § 1983 along with a motion for leave to proceed *in forma pauperis*. By order entered October 30, 1998, the Court granted Plaintiff's motion for leave to proceed *in forma pauperis* and informed Plaintiff of deficiencies in his papers. Plaintiff was advised that this action could not proceed unless he paid the initial partial filing fee of \$5.17 by November 30, 1998. Plaintiff was also ordered to submit enough copies of the summons and USM forms for service upon the named Defendants. In addition, the Clerk of Court was directed to mail to Plaintiff the forms and information necessary for preparing the documents ordered by the Court. Plaintiff was also advised that these deficiencies were to be cured by November 30, 1998, and that "[f]ailure to comply . . . may result in dismissal of this action without prejudice and without further notice." On November 18, 1998, Plaintiff submitted the service documents as ordered. However, to date, Plaintiff has neither submitted the initial partial filing fee nor shown cause in writing for failing to do so. Further, no correspondence from the Court to Plaintiff has been returned.

Because Plaintiff has not paid the initial partial filing fee in compliance with the Court's Order of October 30, 1998, the Court finds that this action may not proceed and should, therefore, be dismissed without prejudice for failure to prosecute.

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

SO ORDERED this 21 day of December, 1998.


TERRY C. KERN, Chief Judge
United States District Court

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

FILED
DEC 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICHARD LEE POTTS,)
)
Plaintiff,)
)
vs.)
)
TULSA COUNTY JAIL;)
JERRY QUINTON; CLIFF BUFF;)
ANDRE LEWIS; and)
DUSTIN HASBROUCK,)
)
Defendants.)

No. 98-CV-832-H (J)

ENTERED ON DOCKET

DATE DEC 23 1998

ORDER

On October 22, 1998, Plaintiff submitted for filing a civil rights complaint pursuant to 42 U.S.C. § 1983 along with a motion for leave to proceed *in forma pauperis*. By order entered November 10, 1998, the Court informed Plaintiff of deficiencies in his papers. Specifically, Plaintiff was advised that this action could not proceed unless he submitted an amended complaint, identifying each defendant separately and describing how each defendant violated his constitutional rights. Further, Plaintiff was directed to submit a certified copy of the trust fund account statement or institutional equivalent for the 6-month period immediately preceding the filing of the complaint. In the event Plaintiff had not been incarcerated for all of the 6-month period, then the Required Certification should be completed by a prison official, indicating the dates of incarceration. Plaintiff was also ordered to submit enough copies of the summons and amended complaint for service upon the named Defendants. In addition, the Clerk of Court was directed to mail to Plaintiff the forms and information necessary for preparing the documents ordered by the Court. Plaintiff was also advised that these deficiencies were to be cured by December 2, 1998, and that "failure to comply . . . may

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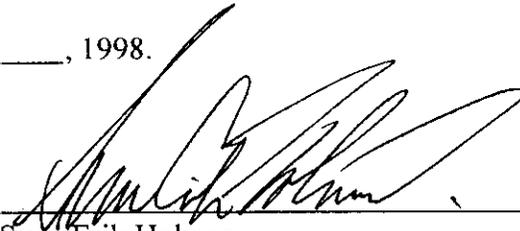
result in dismissal without prejudice of Plaintiff's complaint." To date, Plaintiff has not submitted the amended petition, copies or service documents, nor has he shown cause for failing to do so. Further, no correspondence from the Court to Plaintiff has been returned.

Because Plaintiff has failed to comply with the Court's Order of November 10, 1998, the Court finds that this action may not proceed and should, therefore, be dismissed without prejudice for failure to prosecute.

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

IT IS SO ORDERED.

This 22ND day of DECEMBER, 1998.


Sven Erik Holmes
United States District Judge

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

FILED

DEC 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AARON HABBEN,)
)
Plaintiff,)
)
vs.)
)
STANLEY GLANZ,)
FRED JEAN MORGAN, II,)
)
Defendants.)

No. 98-CV-306-H (J)

ENTERED ON DOCKET
DEC 23 1998
DATE _____

ORDER

Plaintiff, a federal inmate appearing *pro se*, has paid the filing fee to commence this civil action. For the reasons discussed below, the Court finds this action should be dismissed without prejudice for failure to state a claim.

Plaintiff filed this action on April 22, 1998, alleging that Defendants Stanley Glanz, Sheriff of Tulsa County, and Fred Jean Morgan, II, an Assistant District Attorney for Tulsa County, caused a defamatory statement¹ concerning Plaintiff to be published in Case No. 95-CV-1194-B, a civil rights action filed by Plaintiff in this district court.

Plaintiff alleges that this Court has jurisdiction of this action based on 28 U.S.C. § 1332, diversity of citizenship. Plaintiff states that he is incarcerated in federal prison in Lexington,

¹The allegedly defamatory statement appeared in the "motion to stay proceedings pending preparation of a 28 USC 1915(D) frivolity review report and for enlargement of time to answer" filed by the defendant in Case No. 95-CV-1194-B, Stanley Glanz. The statement complained of reads as follows:

4. Defendants state that this Application for Enlargement of Time is not sought for the purpose of delay and will not act to the detriment of the Plaintiff. Plaintiff is *pro se* and is currently serving a life sentence for Murder in the First Degree to which he entered a plea of guilty. The Defendants assume that the Plaintiff objects to the Defendant's Motion.

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Kentucky, and that he is a citizen of Lincoln, Nebraska. According to Plaintiff, both Defendants are residents of Tulsa, Oklahoma. In his prayer for relief, Plaintiff requests that this Court award actual damages in the amount of \$225,000 and punitive damages in the amount of \$275,000. Plaintiff states that "[t]he requested amount of actual and compensatory damages are inclusive of fees, costs and the estimable damage done to the good name and reputation of the plaintiff while the punitive amount requested, being intangible is in keeping with the nature of the spirit of which charged, and is in its full amount only the minimum that will be adequate to fulfill the requirement of its purpose." Based on the face of the complaint, the Court finds that Plaintiff has alleged an amount in controversy in excess of \$75,000, exclusive of interest and costs, that the controversy is between citizens of different States and that this Court has jurisdiction to consider Plaintiff's complaint based on diversity of citizenship.

Plaintiff contends that Defendant Morgan's statement that Plaintiff "is currently serving a life sentence for Murder in the First Degree to which he entered a plea of guilty" made in the pleading filed in Case No. 95-CV-1194-B is libelous. Plaintiff attaches as exhibits to his complaint copies of Judgments and Sentences demonstrating that he pled guilty to and was convicted of Count I, Bank Burglary, and Count II, Receipt of Stolen Securities and Aiding & Abetting (Case No. 95-CR-127-001-H) and Count I, Conspiracy, and Count II, Interstate Transportation of Property Taken by Fraud and Causing a Criminal Act (Case No. 95-CR-089-001-H). Therefore, Plaintiff implies that the statement that he had been convicted of Murder in the First Degree is false. Plaintiff further states that Defendant's statement was "a premeditated act, cunningly designed to immobilize an adversary whom, it was perceived to be helpless as to the protection of his own cause." (#1 at 8). Plaintiff contends his reputation has been damaged as a result of Defendant's statement. (#1 at 15).

This court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote omitted)). A court reviewing the sufficiency of a complaint presumes all of plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Although dismissals under Rule 12(b)(6) typically follow a motion to dismiss, giving plaintiff notice and opportunity to amend his complaint, a court may dismiss sua sponte "when it is 'patently obvious' that the plaintiff could not prevail on the facts alleged, and allowing him an opportunity to amend his complaint would be futile." Hall, 935 F.2d at 1109-1110 (citation omitted).

Libel is defined under the law of Oklahoma as "a false or malicious unprivileged publication by writing, printing, picture, or effigy . . . which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation" Okla. Stat. tit. 12, § 1441. Furthermore, under Oklahoma law, a communication is privileged if it is made "[i]n any legislative or judicial proceeding or any other proceeding authorized by law." Okla. Stat. tit. 12, § 1443.1(A)(First). Any publication which would be privileged under Okla. Stat. tit. 12, § 1443.1 shall not be punishable as libel. Okla. Stat. tit. 12, § 1443.1(B).

In the instant case, Plaintiff complains of an allegedly false statement made by Defendants in a pleading filed in a civil rights action commenced by Plaintiff in this federal district court. Pursuant to Okla. Stat. tit. 12, 1443.1, the allegedly false statement, made in the course of a judicial

proceeding, is privileged. See Joplin v. Southwestern Bell Telephone Co., 753 F.2d 808, 810 (10th Cir. 1983). As a result, even after construing Plaintiff's complaint liberally given his *pro se* status, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972), the Court finds that the statement cannot be punishable as libel under Oklahoma law. See Okla. Stat. tit. 12, § 1443.1. Therefore, Plaintiff has failed to state a claim upon which relief may be granted and this case should be dismissed without prejudice for that reason. Fed. R. Civ. P. 12 (b)(6). Further, the Court finds that allowing Plaintiff an opportunity to amend his complaint would be futile. See Hall, 935 F.2d 1106, 1110.

ACCORDINGLY, IT IS HEREBY ORDERED that this action is **dismissed without prejudice** for failure to state a claim upon which relief may be granted.

IT IS SO ORDERED.

This 22ND day of December, 1998.



Sven Erik Holmes
United States District Judge

SAC
12/18/98

F I L E D

DEC 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

MICHAEL READ,)
)
 Plaintiff,)
)
 vs.)
)
 HONORABLE ALLEN KLEIN, Associate)
 District Judge; HONORABLE RUSSELL P.)
 HASS, Associate District Judge; CHUCK)
 RICHARDSON, District Attorney;)
 SHAWNA READ, now DUNN; and)
 SHANNON DAVIS,)
)
 Defendants.)

Case No. 98-CV-937-H ✓

ENTERED ON DOCKET
DATE DEC 23 1998

ORDER

NOW on this 14th day of December, 1998, the above styled and captioned cause comes for hearing before the Undersigned Judge of the District Court upon Plaintiff's Application for Temporary Restraining Order. The Plaintiff appears in person, represented by his attorney of record, David H. Sanders. Dick Blakeley, Jerry Truster and Rebecca Brett Nightingale appear on behalf of Defendant, Chuck Richardson. Shannon Davis appears on behalf of Defendant, Shawna Dunn. Mitchell M. McCune appears on behalf of Defendant, Shannon Davis. The Honorable Judge Allen Klein and the Honorable Russell P. Hass appear not. The Court, having accepted the evidence offered by Plaintiff, hearing argument of counsel, and accepting the facts in the complaint, as well as those facts stated by Mr. Sanders as true, finds as follows:

1. There is no possibility of the Plaintiff prevailing on the merits in this case, and his Application for Temporary Restraining Order should therefore be denied.

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2. Defendants, Judge Klein and Judge Hass, are subject to judicial immunity under Morales v. Waco, 502 U.S. 9 (1991).

3. Defendant, Chuck Richardson, is not subject to suit under the circumstances of this case under Imbler v. Pachtman, 424 U.S. 409 (1976), and as applied in England v. Hendricks, 880 F.2d 281 (10th Cir. 1991).

4. The sole basis upon which the Plaintiff basis his claim against Defendants, Shawna Dunn and Shannon Davis, is by virtue of their bringing a complaint and prosecuting that complaint in the legal system. Under James v. Grand Lake, 1998 WL 664315, this is an insufficient basis upon which to claim that these Defendants are state actors subject to liability under section 1983.

5. There is overwhelming authority to support the dismissal of each of the Defendants, and the case, lacking any proper defendants should be dismissed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court that Plaintiff's Application for Temporary Order is denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that Allen Klein, Russell P. Hass, Chuck Richardson, Shawna Dunn and Shannon Davis are hereby dismissed as defendants in this action.

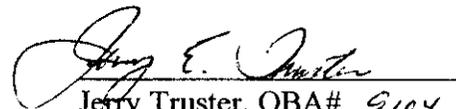
IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that due to the overwhelming authority supporting the dismissal of each of the Defendants, this case, lacking any defendants, is hereby dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that the Court will reserve the issue of attorneys' fees, to be heard at the appropriate date pursuant to appropriate motion(s)


Sven Erik Holmes
United States District Judge

Approved as to form:


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

FILED

DEC 21 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARION LYNN DEAL,)
)
Petitioner,)
)
vs.)
)
STATE OF OKLAHOMA,)
)
Respondent.)

No. 98-CV-946-E (E)

ENTERED ON DOCKET

LATE DEC 23 1998

ORDER OF TRANSFER

Petitioner, a state prisoner appearing pro se, has filed a motion for leave to proceed in forma pauperis and an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

A prisoner in custody pursuant to the judgment and sentence of a State court which has two or more Federal judicial districts may file a petition for writ of habeas corpus in either the district court for the district wherein such person is in custody or in the district court for the district within which the conviction was entered. 28 U.S.C. § 2241(d). Each of such district courts shall have concurrent jurisdiction over the petition and the district court wherein the petition is filed may, in the exercise of its discretion and in furtherance of justice, transfer the petition to the other district court for hearing and determination. Id.

In this case, Petitioner was convicted in Stillwater, Payne County, Oklahoma, and is presently incarcerated at Cimarron Correctional Facility, Cushing, Payne County, Oklahoma. Payne County is located within the jurisdictional territory of the United States District Court for the Western District of Oklahoma. 28 U.S.C. § 116(c). Pursuant to 28 U.S.C. § 2241(d), this Court may not properly consider this petition. The Court finds that the appropriate forum for judicial review of the

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issues raised in this petition would be the Western District of Oklahoma. Therefore, in the furtherance of justice, this matter should be transferred to the United States District Court for the Western District of Oklahoma.

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's application for a writ of habeas corpus is **transferred** to the United States District Court for the Western District of Oklahoma for all further proceedings. See 28 U.S.C. § 2241(d).

SO ORDERED THIS 18th day of December, 1998.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

F I L E D

DEC 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ARROW TRUCKING COMPANY, an Oklahoma)
corporation,)

Plaintiff,)

vs.)

C.L. TRUCKING CO., a Kansas corporation,)
CONTINENTAL CASUALTY COMPANY,)
d/b/a CNA COMMERCIAL INSURANCE)
COMPANY and LEROY KERSHEN, an)
individual,)

Defendants.)

Case No. 98-C-597-E

ENTERED ON DOCKET

DATE DEC 23 1998

ORDER

Now before the Court is the Motion to Remand (docket # 7) of the plaintiff, Arrow Trucking Company.

This matter, which arises out of an accident between two trucks which occurred on May 16, 1997, near Fredonia, Kansas, was originally brought in the District Court for Tulsa County, state of Oklahoma. Defendants removed to this Court, and then sought dismissal of the suit, arguing that this Court does not have personal jurisdiction over either C.L. Trucking Co. or Leroy Kershen. In the alternative, defendants sought a transfer from the United States District Court for the Northern District of Oklahoma to the United States District Court in Kansas. The Court, at the status and scheduling conference, denied the motions to dismiss and transfer. The sole issue now before the Court is the timeliness of the removal.

Defendant C.L. Trucking was served on July 1, 1998. CNA was added as a party in an Amended Petition filed on July 7, 1998, and served on July 9, 1998. The Notice of Removal was filed on August 10th, 1998, more than 30 days after C.L. Trucking was served, and plaintiff contends that the removal is therefore untimely under the requirements of 28 U.S.C. §1446(b). That section provides:

The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

In arguing that remand is appropriate, plaintiff relies on the majority of published decisions that have held that the thirty day period commences with service on the first served defendant. *See, Henderson v. Holmes*, 920 F.Supp. 1184, 1187, n.3 (D.Kan. 1996). Defendant, in turn, cites the cases wherein the courts have rejected the "first-served" rule. *Garside v. Osco Drug, Inc.*, 702 F.Supp. 19 (D. Mass. 1998), *Ford v. New United Motors Mfg., Inc.*, 857 F. Supp 707 (N. D. Cal. 1994).

The "first-served" rule is based on the idea that removal statutes should be "strictly construed against removal," with all doubts "resolved in favor of remand." *Wakefield v. Olcott*, 983 F.Supp. 1018, 1020 (D. Kan. 1997). Moreover, the statutes should be interpreted narrowly with the presumption that plaintiff is entitled to choose his or her forum. *Id.* Lastly, the "first-served" rule is consistent with the unanimity requirement. The second defendant's position is the same as if the first defendant refused consent. *Patel v. Moore*, 968 F.Supp. 587, 589 (D.Kan. 1997). This Court finds the reasoning of the majority of published decisions persuasive, particularly in light of the particular facts of this case, where the time period in question is small, and all defendants are

represented by the same attorneys.

Plaintiff's Motion to Remand (Docket #7) is GRANTED.

IT IS SO ORDERED THIS 22nd DAY OF DECEMBER, 1998.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

DEC 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VBF, INC., an Oklahoma Corporation,
VERNON LAWSON, BILL CODAY,
and FRED SMITH,

Plaintiffs,

v.

Case No. 97-CV-535-H

CHUBB GROUP OF INSURANCE
COMPANIES, GREAT NORTHERN
INSURANCE CO., FEDERAL
INSURANCE COMPANY, and
CHUBB & SON, INC.,

Defendants.

ENTERED ON DOCKET

DATE DEC 23 1998

J U D G M E N T

This matter came before the Court on a motion for summary judgment by Defendants Great Northern Insurance Company, Federal Insurance Company, and Chubb & Son, Inc., and a motion for summary judgment by Plaintiffs VBF, Inc., Vernon Lawson, William Coday, and Fred Smith. The Court duly considered the issues and rendered a decision in accordance with the order filed on December 22, 1998, which granted Defendants' motion for summary judgment and denied Plaintiffs' motion for summary judgment.

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

IT IS SO ORDERED.

This 22ND day of December, 1998.


Sven Erik Holmes
United States District Judge

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

FILED

DEC 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VBF, INC., an Oklahoma Corporation,
VERNON LAWSON, BILL CODAY,
and FRED SMITH,

Plaintiff,

Case No. 97CV535 H (M) /

vs.

ENTERED ON DOCKET

CHUBB GROUP OF INSURANCE
COMPANIES, GREAT NORTHERN
INSURANCE CO., FEDERAL
INSURANCE COMPANY, and CHUBB &
SON, INC.,

DATE DEC 23 1998

Defendants.

ORDER

This matter is before the Court on Defendants', Great Northern Insurance Company, Federal Insurance Company, and Chubb & Son, Inc. ("Federal's"), Motion for Summary Judgment and Plaintiffs', VBF, Inc., Vernon Lawson, William Coday, and Fred Smith ("VBF's") Motion for Summary Judgment. For the reasons that follow, Federal's motion is granted, and VBF's motion is denied.

I.

This declaratory judgment action arises out of the following undisputed facts. Foster Wheeler USA Corp. ("Foster Wheeler") contracted with VBF to purchase electrical equipment for a Foster Wheeler job in China. The contract called for delivery FOB Tulsa. VBF manufactured the electrical equipment and subcontracted with Brand Export Packing of Oklahoma, Inc. ("Brand Export") to make containers for shipping the electrical equipment to China. The electrical equipment was shipped to China. Upon arrival, however, the electrical equipment was discovered to be

damaged. The damage arose from the containers. Foster Wheeler was required to replace the electrical equipment manufactured by VBF.

Foster Wheeler brought a lawsuit against VBF, styled Foster Wheeler USA Corp. v. VBF, Inc. No. 96-C-390-H (N.D. Okla) ("Foster Wheeler lawsuit"), to recover its cost in replacing the electrical equipment. Foster Wheeler made claims for breach of contract, breach of express and implied warranties, and negligently failing to follow contract specifications. VBF, in turn, brought a third-party action against Brand Export for negligently making the containers for the electrical equipment.

VBF timely requested its insurer, Federal, to defend VBF and its officers in the Foster Wheeler lawsuit under commercial general liability policy No. 3526 95 19 ("the CGL policy") and the commercial excess umbrella policy no. 7907-38-28 ("the excess umbrella policy"). Federal declined to provide a defense to VBF based on a policy exclusion. VBF then brought this declaratory judgment action for breach of the duty to defend, and later, amended their Complaint to add a claim for the breach of the duty of good faith and fair dealing.

II.

Under Oklahoma law, an insurer owes two separate duties to its insured: the duty to defend the insured and the duty to indemnify the insured for covered risks. First Bank of Turley v. Fidelity & Deposit Insurance Co. of Maryland, 928 P.2d 298, 302-03 (Okla. 1996). The duty to defend is measured by the nature and kinds of risks covered as well as by the reasonable expectations of the insured. Id. at 303. An insurer has a duty to defend an insured whenever it ascertains the presence of facts that give rise to the potential of liability under the policy. Id. Thus, the allegations against VBF in the Foster Wheeler lawsuit must be compared to the risks covered by the insurance policies.

The scope of the risks covered by an insurance policy are determined by the language of the policy and Oklahoma's rules of construction for insurance policies. An insurance policy should be interpreted according to the plain meaning of the language in the policy. Phillips v. Estate of Greenfield, 859 P.2d 1101, 1104 (Okla. 1993). A genuine ambiguity exists only when the policy contains doubtful language susceptible to two constructions without resort to and following application of general rules of construction. F.D.I.C. v. American Casualty Co. of Reading, Pa., 975 F.2d 677, 679-80 (10th Cir. 1992) (applying Oklahoma law). A provision should not be taken out of context and narrowly focused upon to create an ambiguity. Dodson v. St. Paul Insurance Co., 812 P.2d 372, 376 (Okla. 1991). A court may not rewrite the terms of a policy for the benefit of either party. Max True Plastering Co. v. U.S. Fidelity & Guar. Co., 912 P.2d 861, 869 (Okla. 1996).

Similarly, a policy's exclusionary language, if unambiguous, must be given full effect. An exclusion is a provision which eliminates coverage where, were it not for the exclusion, would have existed. Dodson v. St. Paul Ins. Co., 812 P.2d 372, 377 n. 11 (Okla. 1991). "Each exclusion eliminates coverage independently from the general grant of coverage and all prior exclusions by specifying other occurrences not covered by the policy." Id. at 377. Thus, subsequent exclusions can further limit or even remove a covered risk from coverage.

III.

The CGL policy contains the following grant of coverage:

We will pay damages the insured becomes legally obligated to pay by reason of liability imposed by law or assumed under an **insured contract** because of:

bodily injury or property damage which occurs during the policy period

We will defend any claim or **suit** against the insured seeking such damages. We will pay in addition to the applicable limit of insurance the **defense**

expense. Our obligation to defend and pay for **defense expense** is limited as described under DEFENSE OF CLAIMS OR SUIT.

The CGL policy excludes “**property damage to your product** arising out of it or any part of it.” “Your product” is defined as “any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by . . . you.” The definition for “your product” specifically includes “containers . . . furnished in connection with such goods or products.”

The Court finds the loss claimed in the Foster Wheeler lawsuit, *i.e.*, the damage to the equipment made by VBF, fits squarely within the exclusion for “damage to your product.” VBF concedes the damage to the electrical equipment arose out of the containers used to ship the electrical equipment to China. Thus, the loss claimed in the Foster Wheeler lawsuit is for property damage to VBF’s product which “arose out of” the product, *i.e.*, its containers.

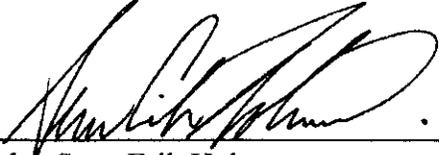
IV.

VBF claims that Jack Robinson, the agent of Federal who sold the policy to VBF, represented the loss claimed in the Foster Wheeler lawsuit was covered by the CGL policy. The affidavit of Mr. Robinson which was provided by VBF, however, did not mention the exclusion for “damage to your product.” At the hearing held on October 16, 1998, the Court granted leave to VBF to provide a supplemental affidavit from Mr. Robinson to determine whether the reasonable expectations doctrine enunciated in Max True Plastering, applied. VBF did not provide an affidavit from Mr. Robinson in its supplemental briefing. The Court also finds that the reasonable expectations doctrine does not apply because the exclusion for “damage to your product” is unambiguous as a matter of law.

The Court hereby grants summary judgment in favor of Federal and denies summary judgment in favor of VBF.

IT IS SO ORDERED.

DECEMBER 22, 1998.



Judge Sven Erik Holmes
U.S. Court for the Northern District of Oklahoma

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

FILED
DEC 22 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

AIR LIQUIDE AMERICA CORPORATION,)
a Delaware corporation,)
)
Plaintiff,)
v.)
)
CONTINENTAL CASUALTY COMPANY,)
an Illinois corporation; STAFFING RESOURCES)
OF OKLAHOMA, INC., an Oklahoma)
corporation,)
)
Defendants/Third Party Plaintiffs,)
v.)
)
CIGNA PROPERTY AND CASUALTY)
INSURANCE COMPANY, a Connecticut)
corporation, and SAMUEL CANADA,)
)
Third Party Defendants.)

Case No. 97-CV-315-H

ENTERED ON DOCKET
DATE DEC 23 1998

ORDER

This matter comes before the Court on Plaintiff Air Liquide America Corporation's ("Air Liquide") Motion for Summary Judgment (Docket # 69) and Defendants/Third-Party Plaintiffs Staffing Resources of Oklahoma ("Staffing Resources") and Continental Casualty Company's ("CNA") Motion for Summary Judgment (Docket # 68). In these cross-motions for summary judgment, both parties seek a declaration that the other's automobile insurance policy provides for defense and indemnification of all claims arising out of a 1996 automobile accident. For the reasons expressed herein, the Court finds that Plaintiff Air Liquide's Motion for Summary Judgment should be granted, and that Defendants/Third-Party Plaintiffs Staffing Resources and Continental's Motion for Summary Judgment should be denied.

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Air Liquide is a manufacturer and distributor of industrial gases. During the period of time relevant to this action, Air Liquide (or Cardox, the former name under which the Pryor depot operated) operated a depot for the distribution of carbon dioxide in Pryor, Oklahoma. Sam Canada is a former Air Liquide truck driver who was retired from his employment with Air Liquide. His last day of employment with Air Liquide was in December 1991.

In early summer 1992, Mr. Canada went to Blazer Services, a temporary employment service, to secure employment. In July 1995, Staffing Resources acquired Blazer Services. After that, to and including August 1, 1996, Staffing Resources continued the employment business previously known as Blazer Services. Mr. Canada worked for Blazer Services or Staffing Resources each summer from 1992 to 1996. During each of those summers, Mr. Canada drove an Air Liquide truck. Each year, Staffing Resources represented to the federal government that Mr. Canada was a Staffing Resources employee when it issued W-2 and W-4 forms for Mr. Canada that identified Mr. Canada as a Blazer Services or Staffing Resources employee and Blazer Services or Staffing Resources as Mr. Canada's employer. Blazer classified Canada as a "payrolled" employee.

On May 13, 1994, Blazer required Mr. Canada to sign an Applicant Acknowledgment and Release that listed the conditions of Mr. Canada's employment with Blazer. As part of the Applicant Acknowledgment and Release, Blazer required Mr. Canada to sign the following statement:

I hereby acknowledge that I have read and understood the above Conditions of Employment and understand that failure to comply with any policy of condition

of employment . . . as described will result in termination of employment with Blazer Services.

On Thursday, August 1, 1996, Mr. Canada was involved in an automobile accident while making a delivery of carbon dioxide for Air Liquide pursuant to the arrangement between Staffing Resources and Air Liquide. Two individuals have filed lawsuits against Staffing Resources, Air Liquide, and Mr. Canada for bodily injuries they allegedly incurred as a result of the accident, styled Pursley v. Air Liquide, et al., Case No. CJ-96-4772 and Stringer v. Air Liquide, et al., Case No. CJ-98-0979, Tulsa County District Court ("the Underlying Actions"). Pursley also sued CIGNA Property and Casualty Company. Both underlying plaintiffs allege that Mr. Canada's negligence caused the accident and that both Air Liquide and Staffing Resources are liable for Mr. Canada's actions under the doctrine of respondeat superior.

Staffing Resources developed a risk management policy to avoid exposure to automobile liability claims as a result of actions by placed drivers. The policy, published in the "Automobiles and Drivers" section of Staffing Resources' Risk Management Manual, states that:

When we supply drivers to a client we expose ourselves to automobile liability claims unless we take steps to avoid the exposure. In the event of an accident we could be sued by:

any person who was injured or had property damaged,
an employee of our client who was injured,
the client themselves for damage to their property, or
the client's insurance companies to recover their loss from us.

If the client's own employee was driving, these actions would not be available. All of the loss would be borne by the client or their insurance companies. Our objective is to return to that position. Failure to follow proper procedures will result in claims being paid under our auto insurance which increases our premium company-wide.

Consistent with this statement, in its risk management policy concerning drivers Staffing Resources established procedures intended to shift its liability for its drivers to its clients. First, Staffing Resources' procedure called for requiring the client to sign a hold harmless agreement releasing Staffing Resources from all liability. Second, Staffing Resources' procedure called for requiring the client to include Staffing Resources as a named insured on the clients' automobile insurance policies. However, Staffing Resources did not follow its own procedures with respect to Mr. Canada. Specifically, prior to the accident, it did not secure a hold harmless agreement or an additional insured endorsement from Air Liquide.

Defendant CNA issued an automobile insurance policy No. 1 57349071 to Staffing Resources, in effect on the date of the accident, which afforded the following coverage for Staffing Resources' employees:

Any employee of yours is an "insured" while using a covered "auto" you don't own, hire or borrow in your business or your personal affairs.

The CNA Policy also provided that anyone liable for the conduct of an insured is an insured under the policy. The CNA Policy obligated CNA to defend insureds and to indemnify them for all sums an insured becomes legally obligated to pay as damages because of bodily injury caused by an accident to which the insurance applied. The CNA Policy provided primary coverage for all losses unless there was "other collectible insurance" available for a loss.

Third-party defendant CIGNA Property and Casualty Insurance Company ("CIGNA") issued an automobile insurance policy No. H07124028 to Air Liquide also in effect on the date of the accident. That policy defined as an insured any driver while driving a covered auto with Air Liquide's permission, and anyone liable for the conduct of an insured. The CIGNA policy

was a "fronting policy" - in other words, its limits are equal to its deductible. The fronting policy included an MCS-90 endorsement, which provided that

the insurer (company) agrees to pay, within the limits of liability contained herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980[.]

The MCS-90 endorsement further stated "[t]he insured agrees to reimburse [CIGNA] . . . for any payment that [CIGNA] would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement."

II

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

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

477 U.S. at 322.

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

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

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

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

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

III

Air Liquide first argues that Air Liquide and Mr. Canada are insureds under the CNA policy because Mr. Canada was an employee of Staffing Resources and Air Liquide is potentially liable for Mr. Canada's alleged negligence in the underlying state lawsuits. In response, CNA and Staffing Resources argue that Mr. Canada was in fact an employee of Air Liquide, not

Staffing Resources, at the time of the August 1, 1996 accident; accordingly, neither Mr. Canada nor Air Liquide would be an insured as defined by the CNA policy.

Based on a careful review of the record, the Court finds that both Mr. Canada and Air Liquide are insureds as defined by the CNA Auto Policy. The CNA Auto Policy provided coverage for “any employee” of Staffing Resources, as well as “anyone found liable for the conduct of an insured.” Giving the words of the policy their plain, ordinary, and popular meaning, see Torres v. Sentry Ins., 558 P.2d 400, 401 (Okla. 1976), the Court finds, based on the undisputed facts of this case, that Mr. Canada was an employee of Staffing Resources as required by the CNA Auto Policy for insured status. At all times relevant to this action, Staffing Resources represented that Mr. Canada was its employee to several entities, including the federal government, the State of Oklahoma, Air Liquide, and Mr. Canada himself. Thus, Staffing Resources and CNA’s assertions that Mr. Canada was an Air Liquide employee during the relevant time period are controverted by Staffing Resources’ own admissions and representations to government entities and are legally insignificant for purposes of policy interpretation. Based on the record, the Court further finds that Mr. Canada was driving the Air Liquide truck in connection with Staffing Resources’ business. Though Staffing Resources asserts that it merely provided a payroll function and that in all other respects Mr. Canada drove in connection with Air Liquide’s business, it is undisputed that Mr. Canada’s relationship with Air Liquide following his retirement was made possible by Staffing Resources and that Staffing Resources hired him and directed him to drive for Air Liquide. Further, it is undisputed that Air Liquide, not Staffing Resources, owned the truck Mr. Canada was driving when the accident occurred. Accordingly, the Court concludes that Mr. Canada was an employee of Staffing Resources, using

a covered auto Staffing Resources did not own, hire or borrow in its business affairs. Moreover, because Air Liquide is alleged to be liable for Mr. Canada's alleged negligence in the underlying state actions, Air Liquide is or may be liable for the conduct of Mr. Canada, an insured under the CNA policy, and is thus also insured under the CNA Auto Policy.

Next, Air Liquide argues that the CNA Auto Policy afforded primary coverage for the losses arising from the August 1, 1996 accident. Conversely, CNA and Staffing Resources assert that the CIGNA business auto insurance policy purchased by Air Liquide afforded primary coverage for the August 1, 1996 accident. It is undisputed that the CNA policy by its terms afforded primary insurance for covered losses unless "other collectible insurance" was available for such a loss, and that the claims arising from the August 1996 accident were covered losses as defined by the CNA policy. It is further undisputed that the CIGNA policy by its terms provided primary insurance for losses arising from Mr. Canada's operation of an Air Liquide vehicle. Accordingly, the question before the Court is whether the CIGNA policy constitutes "other collectible insurance" and thus renders the CNA policy excess.

Based on a review of the undisputed facts of this case, the Court finds that the CIGNA policy does not constitute "other collectible insurance." By its express terms, the CIGNA policy has a deductible of \$1 million and a limit of \$1 million; the policy is, therefore, a "fronting policy" because CIGNA has no liability in excess of the deductible and Air Liquide retains all risk of liability. It is settled law that the language of insurance policies is to be afforded its generally understood or plain meaning. See Torres, 558 P.2d at 401. It is equally settled law that the essence of "insurance" is the shifting of risk of loss from an insured to an insurer. See, e.g., Helvering v. Le Gierse, 312 U.S. 531, 539 (1941); Beech Aircraft Corp. v. United States,

797 F.2d 920, 922 (10th Cir. 1986); United States v. Newton Livestock Auction Market, Inc., 336 F.2d 673, 676 (10th Cir. 1964). Thus, Air Liquide's retention of the risk of loss is more appropriately characterized as self-insurance. Though no Oklahoma court has addressed the question whether self-insurance constitutes "other collectible insurance," after an exhaustive review the Court concludes that Oklahoma courts would follow the overwhelming majority of jurisdictions which reason that the retention of an insurable risk through such an arrangement is self-insurance and is not "other collectible insurance" as would be required to render the CNA policy excess. See, e.g., St. John's Regional Health Ctr. v. American Cas. Co. of Reading, 980 F.2d 1222, 1224 (8th Cir. 1992) (pooled liability fund); Physicians Insurance Co. v. Grandview Hospital and Medical Center, 542 N.E.2d 706, 707 (Ohio Ct. App. 1988) (indemnity agreement); Parker v. Depriest, 666 So.2d 433, 439-440 (La. Ct. App. 1995) (retained risk in excess policy); Idaho v. Continental Cas. Co., 879 P.2d 1111, 1114-1117 (Idaho 1994) (retained risk program); see also United States Elevator Corp. v. Associated Int'l Ins. Co., 215 Cal. App. 3d 636, 641 (Cal. Ct. App. 1990) (fronting policy); American Nurses Assn. v. Passaic Gen. Hospital, 484 A.2d 670, 673 (N.J. 1984) (deductible); cf. Wake County Hospital Sys., Inc. v. National Cas. Co., 804 F. Supp. 768, 774-75 (E.D.N.C. 1992) (insurance contemplates written policy, and there being no written policy of self-insurance, self insurance not "insurance" for purposes of "other insurance" clause); but see Hillegass v. Landwehr, 499 N.W.2d 652, 654-55 n.4 (Wis. 1993) (citing majority and minority rule cases).

CNA and Staffing Resources respond that the MCS-90 endorsement contained in the CIGNA policy negates the effect of the deductible and explicitly renders the CIGNA policy primary. The Court disagrees. First, the MCS-90 endorsement does not negate or otherwise

relieve CNA's obligation to provide primary coverage absent other collectible insurance. See Empire Fire and Marine Ins. Co. v. Guaranty Nat'l Ins. Co., 868 F.2d 357, 367 (10th Cir. 1989). Second, the MCS-90 endorsement does not convert the CIGNA policy into "other collectible insurance," nor could it given that the endorsement cannot create new obligations for an insurer beyond those undertaken within the policy terms. See id. at 363. In fact, the express language of the endorsement reaffirms that Air Liquide retained the risk of liability under the policy, as CIGNA agreed only to pay the insured "within the limits of liability contained herein" and required Air Liquide to "reimburse the company . . . for any payment that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement." Thus, the terms of the endorsement make clear CIGNA has no liability in excess of the deductible and has an absolute right to indemnification from Air Liquide in the event CIGNA tenders payment in excess of the policy limits in satisfaction of judgment against an insured. Accordingly, Air Liquide retains all risk of loss and is not "insured" as the term is commonly understood under either the CIGNA policy's terms or the MCS-90 endorsement. Since the CIGNA policy does not constitute "other collectible insurance," the CNA policy afforded primary coverage.

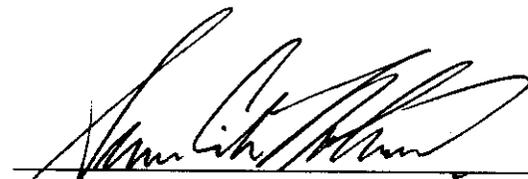
Finally, Air Liquide asserts that CNA has the primary duty to defend Staffing Resources, Air Liquide, and Mr. Canada and that CIGNA has no duty to defend according to the express terms of the deductible endorsement to the CIGNA policy, which provided that CIGNA "shall not have any duty to defend any . . . suit" arising under the CIGNA policy. Staffing Resources and CNA respond that the primary CIGNA policy obliged CIGNA to defend its insureds, including Mr. Canada and Staffing Resources. Based on the record, the Court finds that CNA

has the primary duty to defend. First, though CIGNA's primary policy provided for defense of insureds, the defense deductible endorsement explicitly modified the primary policy to eliminate CIGNA's duty to defend. Second, as previously noted, the MCS-90 deductible endorsement cannot be relied upon to create a duty to defend where none exists according to the terms of the policy. See, e.g., Harco Nat'l Ins. Co. v. Bobac Trucking Inc., 107 F.3d 733, 735 (9th Cir. 1997); Canal Ins. Co. v. First General Ins. Co., 889 F.2d 604, 612 (5th Cir. 1989), mandate recalled and reformed on other grounds, 901 F.2d 45 (5th Cir. 1990). Finally, even if CNA's "other insurance" clause could be interpreted to limit CNA's duty to defend, see Continental Cas. Co. v. Fireman's Fund Ins. Co., 403 F.2d 291, 322-23 (10th Cir. 1968), as previously expressed, CIGNA's policy does not constitute "other insurance" for purposes of rendering the CNA policy excess.

Based on the above, Plaintiff Air Liquide's Motion for Summary Judgment (Docket #69) is hereby granted, and Defendants/Third-Party Plaintiffs Staffing Resources and Continental's Motion for Summary Judgment (Docket #68) is hereby denied. The parties shall submit a proposed judgment agreed upon as to form consistent with this order on or before Friday, January 8, 1999.

IT IS SO ORDERED.

This 22ND day of December, 1998.



Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

DEC 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RAMONA L. GRAY ex rel.)
CHRISTOPHER GRAY, a minor,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
Commissioner, Social)
Security Administration,)
)
Defendant.)

Case No. 97-CV-780-J ✓

ENTERED ON DOCKET

DATE DEC 23 1998

ORDER

On October 7, 1998, this court reversed an earlier denial of Plaintiff's claim for Social Security disability insurance benefits.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of \$3,818.75 for attorney fees for all work done before the district and circuit courts, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees in the amount of \$3,818.75 for a total award of \$3,818.75 under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986).

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It is so ORDERED THIS 22 day of December 1998.



Sam A. Joyner
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney



CATHRYN McCLANAHAN, OBA #14853
Assistant United States Attorney
333 West 4th Street., Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DORETTA LETBETTER,
an individual plaintiff,

Plaintiff,

vs.

Case No. 98 CV 327 Bu (J)

AFTON PUBLIC SCHOOLS
DISTRICT I-26 & RANDY
GARDNER, as its superintendent,

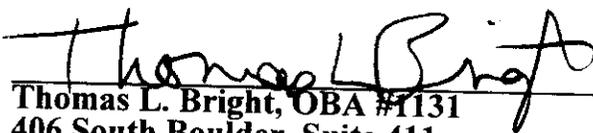
Defendants.

DATE 12/23/98

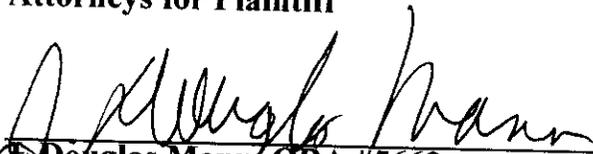
JOINT STIPULATION OF DISMISSAL
WITH PREJUDICE

The plaintiff, Doretta Letbetter, and the defendants, Afton School District and Randy Gardner, advise the court of a settlement agreement between the parties and pursuant to Rule 41(a)(1)(ii), FED. R. CIV. P. jointly stipulate that the plaintiff's action against the defendants, Afton School District and Randy Gardner, be dismissed with prejudice, the parties to bear his, her or its respective costs, including all attorney's fees and expenses of this litigation.

Dated this 22nd day of Dec., 1998.


Thomas L. Bright, OBA #1131
406 South Boulder, Suite 411
Tulsa, OK 74103
(918) 582-2233
(918) 582-6106 (fax)

Attorneys for Plaintiff


S. Douglas Mann, OBA #5663
ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 700
Tulsa, OK 74103
(918) 585-9211

Attorneys for Defendant

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65-17-98
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DEC 23 1998
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IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

GEORGE ROBERTS)

Plaintiff,)

vs.)

Case No. 96-CV-1096B /

INSURANCE MANAGEMENT CORP., and)
LLOYD'S OF LONDON, a.k.a.)
LLOYD'S INSURANCE)

ENTERED ON DOCKET

AGREED ORDER

DATE DEC 23 1998

CAME before this Court on this 27nd day of December, 1998, the Motion of Defendant Insurance Management Corporation's Motion for Failure to State a Claim.

The Court finding Insurance Management Corporation is not a party to the contract or an insurer of the Plaintiff finds Insurance Management Corporation should be dismissed in this uninsured/underinsured benefits action. The Court hereby dismisses Defendant Insurance Management Corporation without prejudice.

It is therefore ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Failure to State a Claim is sustained.

It is ordered this 22nd day of Dec, 1998.


The Honorable Judge Brett
Judge of the District Court

APPROVED AS TO FORM AND CONTENT:


Michael C. Bell, OBA #15972
Attorney for Plaintiff

Margaret Clarke

Walter D. Haskins, OBA #3964
Margaret M. Clarke, OBA #16952
Attorneys for Defendant IMC and
Lloyd's of London, a.k.a.
Lloyd's Insurance

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

FILED

DEC 22 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STEVEN CORBIN,

Plaintiff,

vs.

QUIK-TRIP CORPORATION and
AIR EXPERT,

Defendants.

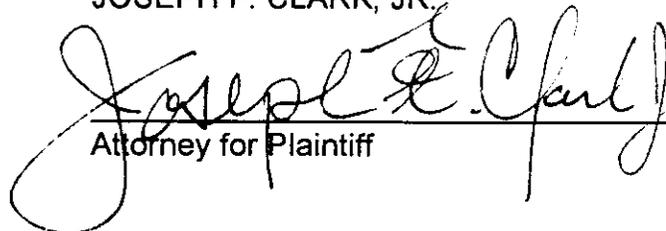
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) Case No. 96 CV 238 C
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ENTERED ON DOCKET
DATE DEC 23 1998

STIPULATION OF DISMISSAL

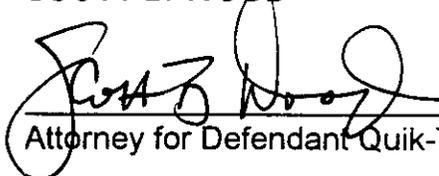
COMES NOW the Plaintiff, Steven Corbin, and the Defendant Quik-Trip Corporation, by and through their respective attorneys, and in accordance with Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedures, hereby stipulate to the dismissal with prejudice of all claims and causes of action involved herein against the Defendant Quik-Trip Corporation, with prejudice for the reason that all matters, causes of action and issues in the case between the Plaintiff and Defendant Quik-Trip Corporation, have been settled, compromised and released herein, including post and pre-judgment interest.

JOSEPH F. CLARK, JR.



Attorney for Plaintiff

SCOTT B. WOOD



Attorney for Defendant Quik-Trip Corporation

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 21 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

R. J. MEYER,
SSN: 496-44-3559,

Plaintiff,

v.

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

Defendant.

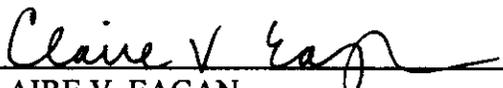
Case No. 97-CV-467-EA

DEC 21 1998

JUDGMENT

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

It is so ordered this 21st day of December 1998.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

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

~~FILED~~

~~DEC 17 1998~~

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

HOMeward BOUND, INC., et al.,)
)
Plaintiffs,)
)
vs.)
)
HISSOM MEMORIAL CENTER, et al.,)
)
Defendants.)

No. 85-C-437-E

FILED

DEC 21 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEC 22 1998
CLERK'S OFFICE

ORDER AND JUDGMENT

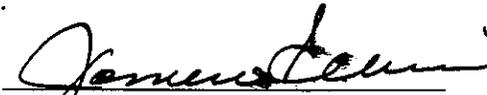
Plaintiffs' counsel, Bullock & Bullock, filed Attorney Fee Applications on December 8, 1998, for an award of attorney fees and expenses in accordance with the December 23, 1989 order and stipulation of the parties.

The Court has reviewed the applications for fees and the Stipulation of the parties.

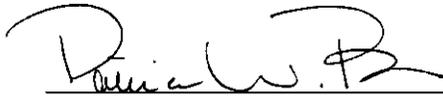
The Court hereby awards the firm Bullock & Bullock uncontested attorney fees and expenses in the amount of \$41,543.44.

IT IS THEREFORE ORDERED that the Department of Human Services, the Department of Rehabilitation Services, and the Oklahoma Health Care Authority, are each jointly and severally liable for the payment of Plaintiffs' counsel, Bullock & Bullock, for attorney fees and expenses in the amount of \$41,543.44, and judgment in the amount of \$41,543.44 is hereby entered on this day.

ORDERED this 18th day of Decernber, 1998.


JAMES O. ELLISON
Senior Judge
United States District Court

847



LOUIS W. BULLOCK
PATRICIA W. BULLOCK
BULLOCK & BULLOCK
320 South Boston, Suite 718
Tulsa, OK 74103-3783
(918) 584-2001

FRANK LASKI
JUDITH GRAN
**PUBLIC INTEREST LAW CENTER
OF PHILADELPHIA**
125 S. 9th Street, Suite 700
Philadelphia, PA 19107
(215) 627-7100

ATTORNEYS FOR PLAINTIFFS



MARK LAWTON JONES
ASSISTANT ATTORNEY GENERAL
4545 N. LINCOLN, SUITE 260
Oklahoma City, OK 73105-3498
(405) 521-4274

**ATTORNEYS FOR DEFENDANTS
DEPARTMENT OF HUMAN SERVICES
DEPT. OF REHABILITATION SERVICES**



LYNN RAMBO-JONES
DEPUTY GENERAL COUNSEL
Drawer No. 18497
Oklahoma City, OK 73154-0497
(405) 530-3403

**ATTORNEY FOR DEFENDANT
OKLAHOMA HEALTH CARE AUTHORITY**

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

FRANKLIN DAGGS,

Plaintiff,

v.

ALEXANDER & ALEXANDER SERVICES, INC.;
ALEXANDER & ALEXANDER, INC. (Oklahoma);
ALEXANDER & ALEXANDER, INC. (Maryland);
UNITED STATES BENEFIT ADMINISTRATION
COMMITTEE OF ALEXANDER & ALEXANDER
SERVICES, INC. and/or its Successors or Assigns
for the ALEXANDER & ALEXANDER PENSION
PLAN and/or the ALEXANDER & ALEXANDER
THRIFT PLAN; and ALEXANDER &
ALEXANDER SERVICES, INC. and/or Its
Successors or Assigns for the ALEXANDER &
ALEXANDER SERVICES, INC. DISABILITY
BENEFITS PLAN,

Defendants.

FILED

DEC 21 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96CV-967B

ENTERED ON DOCKET
DATE DEC 22 1998

STIPULATION FOR DISMISSAL WITH PREJUDICE

Plaintiff and Defendants, by and through their respective counsel of record, hereby stipulate and agree as follows:

1. This Court may enter an order, without further notice to the parties, dismissing Plaintiff's Second Cause of Action for Breach of Contract contained within Plaintiff's Third Amended Complaint with prejudice as against Defendants.

2. This agreement is made by Plaintiff and Defendants solely for the purpose of dismissing the Breach of Contract cause of action involved in this matter.

3. Plaintiff further states that counsel for Plaintiff and Defendants have entered into a stipulation that this Breach of Contract action is being dismissed based upon the fact that counsel for Defendants represent that the alleged contract action is, indeed, governed by ERISA.

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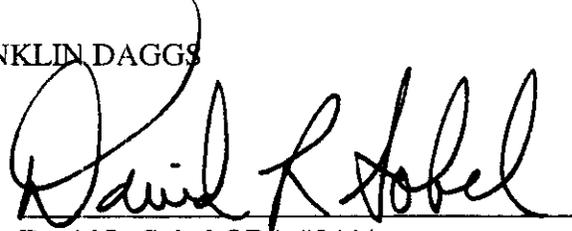
CT

Defendants further state that the Employee Benefit Plans administered by Defendants and/or their successors or assigns as alleged in the Third Amended Complaint are governed by ERISA and, therefore, the contract action is governed by ERISA.

Respectfully Submitted,

FRANKLIN DAGGS

By:



David L. Sobel OBA #8444
Leblang, Clay, Sobel & Ashbaugh
7615 East 63rd Place, Suite 200
Tulsa, Oklahoma 74133
(918) 254-1414

Attorneys for Plaintiff

and

ALEXANDER & ALEXANDER SERVICES, INC.;
ALEXANDER & ALEXANDER, INC. (Oklahoma);
ALEXANDER & ALEXANDER, INC. (Maryland);
UNITED STATES BENEFIT ADMINISTRATION
COMMITTEE OF ALEXANDER & ALEXANDER
SERVICES, INC. and/or its Successors or Assigns
for the ALEXANDER & ALEXANDER PENSION
PLAN and/or the ALEXANDER & ALEXANDER
THRIFT PLAN; and ALEXANDER & ALEXANDER
SERVICES, INC. and/or Its Successors or Assigns for the
ALEXANDER & ALEXANDER SERVICES, INC.
DISABILITY BENEFITS PLAN,

By:



J. Patrick Cremin OBA #2013
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON
320 S. Boston Avenue, Suite 400
Tulsa, OK 74103-3708
(918) 594-0400

Attorneys for Defendants

FILED
DEC 17 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

MEL A. THEUS,)
)
 Plaintiff,)
)
 vs.)
)
 DR. FRANKLIN, et al.,)
)
 Defendants)

No. 98-CV-649-C (E) ✓

ENTERED ON DOCKET
DATE DEC 22 1998

ORDER

On August 25, 1998, Plaintiff submitted for filing a civil rights complaint pursuant to 42 U.S.C. § 1983. By order entered September 15, 1998, the Court informed Plaintiff of deficiencies in his papers. Specifically, Plaintiff was advised that this action could not proceed unless he paid the \$150.00 filing fee or submitted an amended motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. §1915(a). Plaintiff was also ordered to submit copies of the complaint, additional summons and USM forms for service upon the named Defendants. In addition, the Clerk of Court was directed to mail Plaintiff the forms and information necessary for preparing the documents ordered by the Court. Plaintiff was also advised that these deficiencies were to be cured by October 16, 1998, and "failure to comply . . . will result in dismissal without prejudice of Plaintiff's *Complaint*."

The Clerk of Court attempted to mail Plaintiff the September 15, 1998 Order; however, that correspondence was returned to the Court unopened on September 21, 1998, marked "not in custody." As of the date of this Order, Plaintiff has failed to cure the deficiencies as ordered and has

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failed to notify the Court of his current address. It is well established that a plaintiff has the duty to keep the Court informed at all times of address changes.

Because Plaintiff has failed to pay the filing fee or show cause for his failure to do so, the Court finds that this action may not proceed and should, therefore, be dismissed without prejudice for failure to prosecute.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's civil rights complaint is **dismissed without prejudice** for lack of prosecution. Any pending motion is **denied as moot**.

SO ORDERED THIS 17th day of December, 1998.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
DEC 21 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DORAN L. VAN WINKLE,

Defendant.

)
)
)
)
) CIVIL ACTION NO.
98CV572H(E) ✓
)
)
)
)

ENTERED ON DOCKET .

DEC 21 1998

DATE _____

AGREED JUDGMENT

This matter having come on for hearing this 3rd day of December, 1998 with Cathryn McClanahan, Assistant United States Attorney, appearing on behalf of the Plaintiff, United States of America, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, and the Defendant, Doran L. Van Winkle, appearing pro se.

The Court, being fully advised and having examined the court file, finds that the Defendant, Doran L. Van Winkle, acknowledged receipt of Summons and Complaint on August 28, 1998. The Defendant has not filed an Answer but a hearing was held wherein the Defendant agreed that he is indebted to the Plaintiff in the amount alleged in the Complaint and that judgment may accordingly be entered against Doran L. Van Winkle in the principal amount of \$9,303.60, plus accrued interest in the amount of \$6,165.37, plus interest thereafter at the rate of 8% per annum until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the current legal rate until paid, plus the costs of this action.

SPZ
12/18/98

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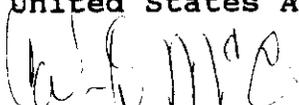
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the defendant in the principal amount of \$9,303.60, plus accrued interest in the amount of \$6,165.37, plus interest thereafter at the rate of 8% per annum until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the current legal rate until paid, plus the costs of this action.

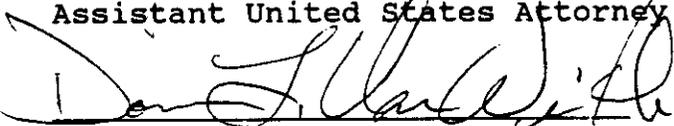

UNITED STATES DISTRICT JUDGE

APPROVED;

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney


CATHRYN McCLANAHAN
Assistant United States Attorney


DORAN L. VAN WINKLE

LFR/llf

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 21 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

R. J. MEYER,
SSN: 496-44-3559,

Plaintiff,

v.

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

Defendant.

Case No. 97-CV-467-EA

ENTERED ON DOCKET

DEC 21 1998

JUDGMENT

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

It is so ordered this 21st day of December 1998.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

DEC 21 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLES DOVER,
SSN: 454-08-3646,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 97-CV-0295-EA

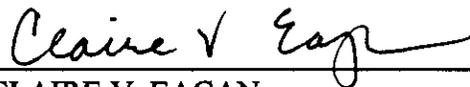
ENTERED ON DOCKET.

DATE **DEC 22 1998**

JUDGMENT

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

It is so ordered this 21st day of December 1998.



CLAIRE V. EAGAN,
UNITED STATES MAGISTRATE JUDGE

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

THOMAS ROLAND JONES,)
)
Plaintiff,)
)
vs.)
)
ALLEN KENDRICK, and INTEGRITY)
HEALTH CARE, INC.,)
)
Defendants.)

No. 98-CV-665-K (J)

F I L E D

DEC 21 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff, an inmate at the Tulsa County Jail appearing *pro se* and *in forma pauperis*, has filed an amended civil rights complaint pursuant to 42 U.S.C. § 1983 against Allen Kendrick, a licensed practical nurse, and Integrity Health Care, Inc. (Docket #7). For the reasons discussed herein, the Court finds Plaintiff's complaint should be dismissed for failure to state a claim upon which relief may be granted pursuant to 28 U.S.C. § 1915A.

BACKGROUND

According to Plaintiff, both Defendants are employed to provide medical services for Tulsa County Jail. During the July 18, 1998 "pill call," Plaintiff alleges that Nurse Kendrick intentionally gave him the wrong medication. Plaintiff claims he drank about half of the medication before detecting a "funny taste as well as the strange sensation" left in his mouth and that he immediately became sick to his stomach and spit out the medication. Plaintiff also alleges Kendrick knew the medication was hydrogen peroxide mouth rinse and not "Doxipane" as Kendrick had stated. As a result of Kendrick's "malpractice in administering perscribed [sic] medicines and medical treatment," Plaintiff alleges Defendants exhibited deliberate indifference to his welfare, safety, and

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“personal dignity,” and that because of Defendants’ “willfull [sic] and wanton negligence” he has suffered bodily harm and discomfort. Plaintiff seeks compensatory damages in excess of \$10,000, attorney fees, punitive damages, and dismissal of all state charges and court costs incurred.¹

ANALYSIS

The “Screening” provision of the in forma pauperis statute, 28 U.S.C. § 1915A, requires the Court to review a complaint brought by a prisoner seeking redress from a governmental entity or officer or employee of a governmental entity to determine if the complaint is frivolous, malicious, or fails to state a claim upon which relief may be granted; or seeks monetary relief from a defendant who is immune from such relief. In addition, a district court may dismiss an action filed in forma pauperis “at any time” if the court determines that the action is frivolous, malicious, or fails to state a claim on which relief may be granted; or seeks relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B).

In this case, Plaintiff states that he was being held at the Tulsa County Jail and that the treatment he received violated his Eighth and Fourteenth Amendment rights. To state a § 1983 claim for a violation of a convicted prisoner’s Eighth Amendment rights or a pretrial detainee’s Fourteenth Amendment rights to adequate medical care, the prisoner must allege facts evidencing a deliberate indifference to his serious medical needs. Estelle v. Gamble, 429 U.S. 97, 104 (1976). The same level of constitutional violation is required under each amendment -- “deliberate indifference to

¹As part of his “Request for Relief,” Plaintiff writes: “In state court dismiss the following charges: CF98-2328 DUI/APC; Display (susp, rev, cancelled) drivers license; CF98-605 knowingly concealing stolen property, driving w/license (susp/rev/cam/d); taxes due state not paid; possession of controlled drug.”

“In state court dismiss court costs and fines in the following cases: CF90-189; TR97-8375; CF90-2037; CF91-706; CF93-4733; CF93-3585; CFR87-111; TR87-6707; TR87-6706; TR87-6705; TR87-7636; TR87-7634; CF93-3185; CF81-1428; CF87-1863; TR87-12996; TR87-12997.” (#7)

serious medical needs.” Meade v. Grubbs, 841 F.2d 1512, 1530 (10th Cir. 1988); see also Garcia v. Salt Lake County, 768 F.2d 303, 307 (10th Cir. 1985). “Deliberate indifference” is defined as knowing and disregarding an excessive risk to an inmate’s health or safety. Farmer v. Brennan, 511 U.S. 825, 827, 114 S.Ct. 1970 (1994). In Wilson v. Seiter, 501 U.S. 294 (1991), the Supreme Court clarified that the deliberate indifference standard under Estelle has two components: (1) an objective requirement that the pain or deprivation be sufficiently serious; and (2) a subjective requirement that the offending officials act with a sufficiently culpable state of mind. Id. at 298-99. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. Estelle, at 106; see also El’ Amin v. Pierce, 750 F.2d 829, 832-33 (10th Cir. 1984) (proper forum for medical malpractice is the state court); Daniels v. Gilbreath, 668 F.2d 477, 488 (10th Cir. 1983) (deliberate indifference “is more severe and exacting charge than malpractice”). Nor does negligence state a claim under § 1983 for deliberate indifference to medical needs. Hicks v. Frey, 992 F.2d 1450, 1455 (6th Cir. 1993).

First, the Court must look to see if Plaintiff’s illness or injury is *sufficiently serious*. The Tenth Circuit Court of Appeals, in Clemmons v. Bohannon, 856 F.2d 1523, 1527 (10th Cir. 1992), provided examples of the types of injuries which have been found to be sufficiently serious: four knife stab wounds, Reed v. Dunham, 893 F.2d 185 (10th Cir. 1990); broken bones rendering limbs useless or the plaintiff unconscious, Mandel v. Doe, 888 F.2d 783 (11th Cir. 1989)(cracked hipball joint); Brown v. Hughes, 894 F.2d 1533 911th Cir.) (broken foot); Simpson v. Hines, 903 F.2d 400 (5th Cir. 1990) (neck trauma); symptoms of a heart attack, Miltier v. Beorn, 896 F.2d 848 (4th Cir. 1990) (chest pains, shortness of breath, dizziness); or chronic illness, White v. Napoleon, 897 F.2d 103 (3d Cir. 1990)(epilepsy); Greason v. Kemp, 891 F.2d 829 (11th Cir. 1990)(schizophrenic with

suicidal tendencies).

In the instant case, other than the immediate regurgitation of the questionable medicine, Plaintiff has not alleged any adverse physical symptoms or subsequent injury as a result of the incident on July 18, 1998. Therefore, after liberally construing Plaintiff's amended complaint, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court finds that Plaintiff's injury, if any, does not compare to the serious medical needs expatiated by the Tenth Circuit in Clemmons. Plaintiff has failed to satisfy the first prong of the Estelle test: he does not have a *serious medical need*. Without more, Plaintiff's allegations of inadequate medical treatment do not rise to the level of an Eighth or Fourteenth Amendment violation.

Furthermore, the negligent administration of medication may state a claim for medical malpractice but does not support a claim of deliberate indifference. Here, where Plaintiff alleges Kendrick gave him hydrogen peroxide rather than "Doxipane," he has, at best, alleged a claim for medical negligence or malpractice. See Estelle, 429 U.S. at 107. Thus, the Court finds that even with amendment, Plaintiff has failed to overcome this defect in his claim, and therefore, it should be dismissed.

Lastly, the Court finds that Plaintiff has failed to state a claim against Integrity Healthcare, Inc. When a private entity like Integrity Healthcare, Inc., contracts with a county to provide medical services to inmates, it performs a function traditionally within the exclusive prerogative of the state. Buckner v. Toro, 116 F.3d 450, 452 (11th Cir. 1997). In so doing it becomes the functional equivalent of the municipality. It is well established that in order to state a claim against a municipality under section 1983, a plaintiff must show that the municipality itself, through custom

or policy, caused the alleged constitutional violation. Monell v. Dept. of Social Servs., 436 U.S. 658 (1978). There are two requirements for liability based on custom or policy: (1) the custom or policy must be attributable to the county through actual or constructive knowledge on the part of the policy-making officials; and (2) the custom must have been the cause of and the moving force behind the constitutional deprivation. *Respondeat superior* does not give rise to a section 1983 claim. Monell, 436 U.S. at 692-94; see also Jenkins v. Wood, 81 F.3d 988, 993-94 (10th Cir. 1996) (citing City of Canton v. Harris, 489 U.S. 378, 385 (1989); McDuffie v. Hopper, 982 F.Supp. 817 (M.D. Ala. 1997) (citing Buckner v. Toro, 116 F.3d 450, 452 (11th Cir. 1997), and discussing Monell, *supra*)). Plaintiff's claims against Integrity Healthcare, Inc., fail to establish either of these essential elements.

CONCLUSION

The Court concludes that Plaintiff has failed to state a claim upon which relief can be granted and that this action must be dismissed pursuant to 28 U.S.C. § 1915A(b)(1). This dismissal should count as a “prior occasion” under 28 U.S.C. § 1915(g).²

²28 U.S.C. § 1915(g) provides as follows:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's amended 42 U.S.C. § 1983 complaint is **dismissed with prejudice**, pursuant to 28 U.S.C. § 1915A(b)(1), for failure to state a claim upon which relief can be granted.
2. The Clerk is directed to **flag** this as a dismissal pursuant to 28 U.S.C. § 1915A for failure to state a claim upon which relief can be granted. As a result, this dismissal counts as a "prior occasion" for purposes of 28 U.S.C. § 1915(g).
3. The Clerk may return the extra copies of the original and amended complaint to Plaintiff along with the summons and U.S. Marshals service forms.

SO ORDERED THIS 18 day of December, 1998.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET
DATE 12-22-98

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

F I L E D

MIKE G. BRENNAN, as Father and
next friend for GRANT BRENNAN,)
)
Plaintiff,)
)
vs.)
)
STEIN MART, INC.,)
)
Defendant.)

DEC 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-C-827-K

F I L E D

DEC 19 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

O R D E R

Before the Court is the objection of the plaintiff to removal, which the Court construes as a motion to remand. On June 17, 1998, the plaintiff filed an action against the defendant in the District Court of Tulsa County, State of Oklahoma, for alleged negligence. The state court petition alleges that defendant overloaded some store fixtures with items of clothing, and that one such fixture fell and struck Grant Brennan on June 22, 1996. The petition alleges "great pain of body and mind", "significant expenses for medical care", and "future medical and dental care", which will result in "additional pain and suffering". The petition requests damages "in excess of \$10,000" as well as punitive damages.

Defendant removed the action to this Court on October 23, 1998, asserting without contradiction that it was not served until September 23, 1998, and therefore removal was accomplished in a timely fashion. In the notice of removal, defendant does not rely upon the allegations in the complaint, but rather upon a letter

sent from plaintiff's counsel to defendant's insurance carrier, offering to settle the claim for \$104,748.30. The date of the letter is September 30, 1996. Defendant asserts in the notice of removal that this letter "demonstrates that the diversity jurisdictional amount is satisfied." Plaintiff has responded that the letter in question was one of several letters sent in the negotiation process. Plaintiff brings to the Court's attention a letter dated May 27, 1997, again from plaintiff's counsel to defendant's insurance carrier, in which plaintiff's counsel offers to settle the claim for \$15,000.

This case presents difficult questions under the analytic model binding this Court, set forth in Laughlin v. Kmart Corp., 50 F.3d 871 (10th Cir.), cert. denied, 516 U.S. 863 (1995). It is quite common for a state court petition in Oklahoma to merely seek damages "in excess of \$10,000", as this is in compliance with 12 O.S. §2008(2). In Laughlin, the Tenth Circuit summarized applicable principles:

The amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal. The burden is on the party requesting removal to set forth, in the notice of removal itself, the "underlying facts supporting [the] assertion that the amount in controversy exceeds \$50,000." Moreover, there is a presumption against removal jurisdiction.

50 F.3d at 873 (citations omitted).

After Laughlin was decided, Congress has since raised the jurisdictional amount to \$75,000. The dilemma posed by Oklahoma cases is that a claim for damages "in excess of \$10,000",

considered in isolation, will never be dispositive of jurisdictional amount. Thus, it could be argued that, under Laughlin, the Court must always resort to the petition for removal to determine if removal is appropriate. Defendant places sole reliance upon a settlement offer made soon after the alleged accident, and almost two years before the filing of the state court action. Plaintiff has pointed out that a subsequent letter implicitly superseded the \$100,000 offer, and only requested \$15,000 in settlement. In his objection to removal, plaintiff's counsel affirmatively states "in no way do the damages meet or exceed the sum of \$75,000". The Court concludes that defendant has failed in its burden of proof.¹

Defendant has not made an alternative argument, but the Court will do so as part of its duty to independently inquire into its own jurisdiction. As stated, the state court petition mentions pain and suffering, medical expenses, and punitive damages. How liberally may the district court read the complaint to arrive at a probable damages figure? In Angus v. Shiley, Inc., 989 F.2d 142, 146 (3rd Cir.1993), the Third Circuit stated "the amount in controversy is not measured by the low end of an open-ended claim, but rather by a reasonable reading of the value of the rights being litigated." See also Allen v. R & H Oil Gas Co., 63 F.3d 1326,

¹The Tenth Circuit has not specified the precise nature of that burden, but this Court finds persuasive those courts of appeals which have adopted the preponderance of the evidence standard. Gafford v. General Elec. Co., 997 F.2d 150, 158 (6th Cir.1993); Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1335 (5th Cir.1995).

1335 (5th Cir.1995) (court can determine if removal is proper if it is facially apparent that the claims are likely above the jurisdictional amount). However, in Laughlin, the Tenth Circuit stated that the petition did not establish the requisite jurisdictional amount, because it "merely alleges that the amount in controversy is in excess of \$10,000 for each of two claims." 50 F.3d at 873. This passage could be read as forbidding district courts from looking beyond the "in excess of \$10,000" damage claim in Oklahoma state court petitions. Another district judge of this Court has, it appears, adopted this interpretation. See Maxon v. Texaco Ref. & Marketing Inc., 905 F.Supp. 976, 978 (N.D.Okla.1995).

This Court reserves the right, in other litigation, to consider the allegations of a state court petition, beyond its "in excess of \$10,000" damages claim, in considering a motion to remand. In the case at bar, plaintiff's counsel has stated, subject to Rule 11 F.R.Cv.P. and as an officer of the Court, that the damages "in no way" exceed \$75,000. Defendant protests that this does not constitute a stipulation, and that plaintiff's counsel may only be referring to actual damages.² First, it is this Court's view that plaintiff's counsel has stipulated as to damages, and that his statement in this Court may be used for binding or estoppel effect in state court. Second, the statement by plaintiff's counsel refers to "damages", which the Court takes

²A similar statement by plaintiff's counsel was taken into account in Maxon v. Texaco Ref. & Marketing Inc., 905 F.Supp. 976, 979 (N.D.Okla.1995). Other courts have considered post-removal stipulations in similar circumstances. See e.g., Gwyn v. Wal-Mart Stores, Inc., 955 F.Supp. 44, 46 (M.D.N.C.1997).

to refer to both actual and punitive damages. Once this case is remanded, this Court loses jurisdiction. However, should plaintiff's counsel attempt to renege upon this stipulation in state court, the Court would request that defense counsel notify the Court by letter. This Court would then notify the appropriate disciplinary authorities.

It is the Order of the Court that the objection of the plaintiff to removal (#4), construed as a motion to remand, is hereby GRANTED. Pursuant to 28 U.S.C. §1447(c), this action is hereby remanded to the District Court for Tulsa County, State of Oklahoma, for further proceedings.

ORDERED this 17 day of December, 1998.



TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE DATE 12-22-98
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
on behalf of the Secretary of Housing and Urban)
Development,)

Plaintiff,)

v.)

THE UNKNOWN HEIRS, EXECUTORS,)
ADMINISTRATORS, DEVISEES,)
TRUSTEES, SUCCESSORS AND)
ASSIGNS OF ELLEN K. FLEAR)
aka Ellen Kimball Flear, Deceased;)
HOWARD C. WHITE;)
JOANN GRANBERRY WHITE;)
STATE OF OKLAHOMA *ex rel.*)
Oklahoma Tax Commission;)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)

Defendants.)

F I L E D

DEC 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

) CIVIL ACTION NO. 98-CV-0437-K (J)

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 17 day of December, 1998.

The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; that the Defendant, State of Oklahoma *ex rel.* Oklahoma Tax Commission, appears by Kim D. Ashley, Assistant General Counsel; that the Defendants, Howard C. White and JoAnn Granberry White, appear not, having previously filed their Disclaimers; and the Defendants, The Unknown

Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Ellen K. Flear aka Ellen Kimball Flear, Deceased, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Howard C. White, was served by certified mail, return receipt requested, delivery restricted to the addressee on June 26, 1998.

The Court further finds that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Ellen K. Flear aka Ellen Kimball Flear, Deceased, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning October 5, 1998, and continuing through November 9, 1998, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(C)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Ellen K. Flear aka Ellen Kimball Flear, Deceased, and service cannot be made upon said Defendants by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants,. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting on behalf of the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully

exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on August 20, 1998; that the Defendant, State of Oklahoma *ex rel.* Oklahoma Tax Commission, filed its Answer on July 29, 1998; that the Defendants, Howard C. White and JoAnn Granberry White, filed their Disclaimers on August 12, 1998; and that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Ellen K. Flear aka Ellen Kimball Flear, Deceased, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that Matthew White and David C. White are brothers of Ellen K. Flear aka Ellen Kimball Flear and learned of the subject foreclosure action through their father and mother, Defendants, Howard C. White JoAnn Granberry White. Matthew White and David C. White filed their Disclaimers on August 12, 1998.

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

Lot Ten (10), J.M. GILLIAN RESUBDIVISION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that this a suit brought for the further purpose of judicially determining the death of Ellen K. Flear aka Ellen Kimball Flear, Deceased, and judicially determining the heirs of Ellen K. Flear aka Ellen Kimball Flear, Deceased.

The Court further finds that John M. Flear and Ellen K. Flear became the record owners of the real property involved in this action by virtue of that certain Joint Tenancy Deed dated May 16, 1990, from Jack Kemp, Secretary of Housing and Urban Development, of Washington, D.C., to John M. Flear and Ellen K. Flear, husband and wife, as joint tenants, and not as tenants in common, with the survivor to take the whole in the event of the death of either, which Joint Tenancy Deed was filed of record on May 18, 1990, in Book 5254, Page 80, in the records of the County Clerk of Tulsa County, Oklahoma.

The Court further finds that on May 16, 1990, John M. Flear and Ellen K. Flear executed and delivered to Commercial Federal Mortgage Corporation, their mortgage note in the amount of \$46,600.00, payable in monthly installments, with interest thereon at the rate of 8.75 percent per annum.

The Court further finds that as security for the payment of the above-described note, John M. Flear and Ellen K. Flear, husband and wife, executed and delivered to Commercial Federal Mortgage Corporation, a real estate mortgage dated May 16, 1990, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on May 18, 1990, in Book 5254, Page 81, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 16, 1990, Commercial Federal Mortgage Corporation assigned the above-described mortgage note and mortgage to BancOklahoma Mortgage Corporation. This Assignment of Mortgage was recorded on September 24, 1990, in Book 5278, Page 2699, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 23, 1994, BancOklahoma Mortgage Corp. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development. This Assignment of Mortgage was recorded on June 1, 1994 in Book 5629, Page 0599, in the records of Tulsa County, Oklahoma.

The Court further finds that on John M. Flear and Ellen K. Flear were divorced as evidenced by Decree of Divorce, Case No. FD-92-4211, dated April 13, 1993 and filed on June 4, 1993 in District Court, Tulsa County, State of Oklahoma. Subject real property was awarded to Ellen K. Flear. On April 27, 1993, John M. Flear, a single person, quitclaimed all his right, title or interest in the subject real property to Ellen K. Flear, single.

The Court further finds that Ellen K. Flear also known as Ellen Kimball Flear died on September 12, 1995 in the City of Tulsa, Tulsa County, Oklahoma. Upon the death of Ellen Kimball Flear, the subject property vested in her heirs by operation of law. Certificate of Death No. 023004 issued by the Oklahoma State Department of Health certifies Ellen Kimball Flear's death.

The Court further finds that Ellen K. Flear aka Ellen Kimball Flear, now deceased, made default under the terms of the aforesaid note and mortgage by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the note and mortgage, after full credit for all payments made, the principal sum of \$45,324.28, plus administrative charges in the amount of \$90.48, plus penalty charges in the amount of \$546.29, plus accrued interest in the amount of \$11,930.69 as of January 29, 1997, plus interest accruing thereafter at the rate of 8.75 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that Plaintiff, United States of America, is entitled to a judicial determination of the death of Ellen K. Flear aka Ellen Kimball Flear, and to a judicial determination of the heirs of Ellen K. Flear aka Ellen Kimball Flear.

The Court further finds that the Defendants, Howard C. White and JoAnn Granberry White, disclaim any right, title or interest in the subject real property.

The Court further finds that Matthew White and David C. White (who are brothers of Ellen K. Flear aka Ellen Kimball Flear) disclaim any right, title or interest in the subject real property.

The Court further finds that the Defendant, State of Oklahoma *ex rel.* Oklahoma Tax Commission, claims no estate tax lien against the property by virtue of the death of Ellen K. Flear aka Ellen Kimball Flear.

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

The Court further finds that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Ellen K. Flear aka Ellen Kimball Flear, Deceased, are in default and therefore have no right, title or interest in the subject real property.

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the death of Ellen K. Flear aka Ellen Kimball Flear be and the same hereby is judicially determined to have occurred on September 12, 1995 in the City of Tulsa, Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the only known heirs of Ellen K. Flear aka Ellen Kimball Flear, Deceased, are Howard C. White, JoAnn Granberry White, Matthew White, and David C. White, and that despite the exercise of due diligence by Plaintiff and its counsel, no other known heirs of Ellen K. Flear aka Ellen Kimball Flear, Deceased, have been discovered and it is hereby judicially determined that Howard C. White, JoAnn Granberry White, Matthew White, and David C. White are the only known heirs of Ellen K. Flear aka Ellen Kimball Flear, Deceased, and that Ellen K. Flear aka Ellen Kimball Flear, Deceased, has no other known heirs, executors, administrators, devisees, trustees, successors and assigns; and the Court approves the Certificate of Publication and Mailing filed on November 13, 1998 regarding said heirs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against all named and unnamed Defendants in the principal sum of \$45,324.28, plus administrative charges in the amount of \$90.48, plus penalty charges in the amount of \$546.29, plus accrued interest in the amount of \$11,930.69 as of January 29, 1997, plus interest accruing thereafter at the rate of 8.75 percent per annum until judgment, plus interest thereafter at the current legal rate of 4.513 percent per annum until fully paid, plus the costs of this action accrued and accruing, plus any additional sums advanced

or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property, plus any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, State of Oklahoma ex rel. Oklahoma Tax Commission, has no estate tax lien against the subject real property by virtue of the death of Ellen K. Flear aka Ellen Kimball Flear.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, The Unknown Heirs, Executors, Administrators, Devisees, Trustees, Successors and Assigns of Ellen K. Flear aka Ellen Kimball Flear, Deceased; Howard C. White; JoAnn Granberry White; and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Matthew White and David C. White (who are brothers of Ellen K. Flear aka Ellen Kimball Flear) have no right, title, or interest in the subject real property.

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

First:

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

Second:

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

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

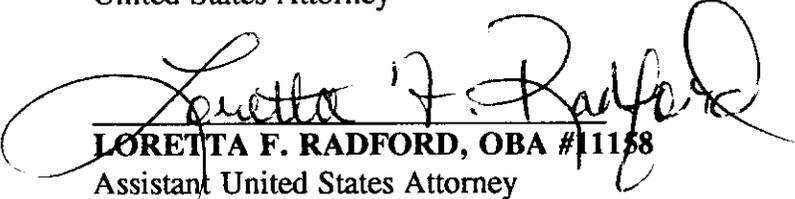
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

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


UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


LORETTA F. RADFORD, OBA #11158

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

Judgment of Foreclosure
Case No. 98-CV-0437-K (J) (Flear)



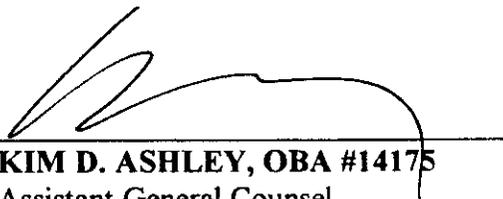
DICK A. BLAKELEY, OBA #852

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406 Tulsa County Courthouse
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Attorney for Defendants,
County Treasurer and Board of County Commissioners,
Tulsa County, Oklahoma

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DICK BLAKELEY
406 OKLAHOMA

Judgment of Foreclosure
Case No. 98-CV-0437-K (J) (Flear)



KIM D. ASHLEY, OBA #14175

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Oklahoma City, Oklahoma 73152-3248

(405) 522-5555

Attorney for Defendant,

State of Oklahoma ex rel. Oklahoma Tax Commission

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Judgment of Foreclosure

Case No. 98-CV-0437-K (J) (Flear)

LFR:css

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

DATE 12-22-98

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

v.)
)

SHARON L. SALISBURY WASHINGTON)
aka Sharon Washington aka Sharon Salisbury)
aka Sharon L. Salisbury, a single person;)
DELORISE A. RENFRO;)
SPOUSE, IF ANY, OF DELORISE A. RENFRO;)
THE TULSA DEVELOPMENT AUTHORITY)
OF TULSA, OKLAHOMA;)
COUNTY TREASURER, Tulsa County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Tulsa County, Oklahoma,)

Defendants.)

FILED

DEC 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 98-CV-0455-K (J) /

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 17 day of December

1998. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathryn D. McClanahan, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, The Tulsa Development Authority of Tulsa, Oklahoma, appears by its attorney Darven L. Brown; and the Defendants, Sharon L. Salisbury Washington aka Sharon Washington aka Sharon Salisbury aka Sharon L. Salisbury, a single person, Delorise A. Renfro, and Spouse of Delorise A. Renfro who is one and the same person as Jim Renfro, appear not, but make default.

9

The Court being fully advised and having examined the court file finds that the Defendant, Sharon L. Salisbury Washington aka Sharon Washington aka Sharon Salisbury aka Sharon L. Salisbury, a single person, was served with Summons and Complaint by a United States Deputy Marshal on August 26, 1998; that the Defendant, Delorise A. Renfro, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on or about July 2, 1998; that the Defendant, Spouse of Delorise A. Renfro who is one and the same person as Jim Renfro, was served with Summons and Complaint by certified mail, return receipt requested, delivery restricted to the addressee on July 10, 1998.

It appears that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, filed their Answers on August 20, 1998; that the Defendant, The Tulsa Development Authority of Tulsa, Oklahoma, filed its Answer and Cross-Complaint on July 29, 1998; and that the Defendants, Sharon L. Salisbury Washington aka Sharon Washington aka Sharon Salisbury aka Sharon L. Salisbury, a single person, Delorise A. Renfro, and Spouse of Delorise A. Renfro who is one and the same person as Jim Renfro, have failed to answer and their default has therefore been entered by the Clerk of this Court.

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

Lot Eight (8), Block One (1), YAHOLA HEIGHTS
ADDITION to the City of Tulsa, Tulsa County, State of
Oklahoma, according to the recorded plat thereof.

The Court further finds that on October 29, 1973, Ross M. Thornton and Loretta R. Thornton executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, their mortgage note in the amount of \$10,500.00, payable in monthly installments, with interest thereon at the rate of 7 percent per annum.

The Court further finds that as security for the payment of the above-described note, Ross M. Thornton and Loretta R. Thornton, husband and wife, executed and delivered to the United States of America, acting on behalf of the Administrator of Veterans Affairs, now known as Secretary of Veterans Affairs, a real estate mortgage dated October 29, 1973, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on November 1, 1973, in Book 4094, Page 592, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, Sharon L. Salisbury Washington aka Sharon Washington aka Sharon Salisbury aka Sharon L. Salisbury, a single person, currently holds the fee simple title to the property via mesne conveyances.

The Court further finds that the Defendant, Sharon L. Salisbury Washington aka Sharon Washington aka Sharon Salisbury aka Sharon L. Salisbury, a single person, made default under the terms of the aforesaid note and mortgage by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, Sharon L. Salisbury Washington aka Sharon Washington aka Sharon Salisbury aka Sharon L. Salisbury, a single person, is indebted to the Plaintiff in the principal sum of \$4,845.88, plus administrative charges in the amount of \$590.00, plus penalty charges in the

amount of \$20.16, plus accrued interest in the amount of \$357.02 as of July 22, 1996, plus interest accruing thereafter at the rate of 7 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of \$10.00 (fee for recording Notice of Lis Pendens).

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of 1997 cleaning and mowing taxes in the amount of \$225.00, plus penalties and interest; and by virtue of 1998 ad valorem taxes in the amount of \$258.00, plus penalties and interest. Said liens are superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, The Tulsa Development Authority of Tulsa, Oklahoma, has a lien on the property which is the subject matter of this action in the amount of \$12,000.00, together with a reasonable sum for attorney's fees and costs by virtue of a mortgage recorded on July 29, 1992 in Book 5423, Pages 668-675 in the records of Tulsa County, Oklahoma. Said lien is inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendants, Sharon L. Salisbury Washington aka Sharon Washington aka Sharon Salisbury aka Sharon L. Salisbury, a single person, Delorise A. Renfro, and Spouse of Delorise A. Renfro who is one and the same person as Jim Renfro, are in default and therefore have no right, title or interest in the subject real property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, on behalf of the Secretary of Veterans Affairs, have and recover judgment in rem against the Defendant, Sharon L. Salisbury Washington aka Sharon Washington aka Sharon Salisbury aka Sharon L. Salisbury, a single person, in the principal sum of \$4,845.88, plus administrative charges in the amount of \$590.00, plus penalty charges in the amount of \$20.16, plus accrued interest in the amount of \$357.02 as of July 22, 1996, plus interest accruing thereafter at the rate of 7 percent per annum until judgment, plus interest thereafter at the current legal rate of 4.513 percent per annum until paid, plus the costs of this action in the amount of \$10.00 (fee for recording Notice of Lis Pendens), plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property and any other advances.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment for 1997 cleaning and mowing taxes in the amount of \$225.00, plus penalties and interest; and for 1998 ad valorem taxes in the amount of \$258.00, plus penalties and interest, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, The Tulsa Development Authority of Tulsa, Oklahoma, have and recover judgment in personam in the amount of \$12,000.00, together with a reasonable sum for attorney's fees and costs, by virtue of a mortgage recorded on July 29, 1992 in Book 5423, Pages 668-675 in the records of Tulsa County, Oklahoma.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Sharon L. Salisbury Washington aka Sharon Washington aka Sharon Salisbury aka Sharon L. Salisbury, a single person; Delorise A. Renfro; Spouse of Delorise A. Renfro who is one and the same person as Jim Renfro; Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

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

First:

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

Second:

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

Third:

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

Fourth:

In payment of the judgment rendered herein in favor of Defendant, The Tulsa Development Authority of Tulsa, Oklahoma.

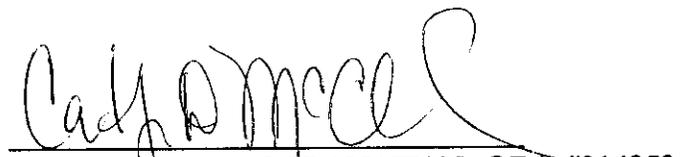
The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

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

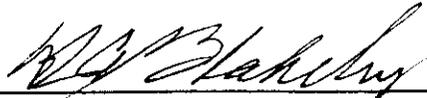

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


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

Judgment of Foreclosure
Case No. 98-CV-0455-K (J) (Salisbury)



DICK A. BLAKELEY, OBA #852

Assistant District Attorney

406 Tulsa County Courthouse

Tulsa, Oklahoma 74103

(918) 596-4841

Attorney for Defendants,

County Treasurer and Board of County Commissioners,

Tulsa County, Oklahoma

Judgment of Foreclosure

Case No. 98-CV-0455-K (J) (Salisbury)

CDM:css

ENTERED ON BOOKS.
DATE 12-21-98

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

MURIEL D. BURCH, as parent and)
next friend of;)
DARA JONES, a minor;)
DALE JONES, a minor;)
DANA JONES, a minor;)
DESEREE JONES, a minor;)
and LAYTHATCHER JONES, a minor,)

Plaintiffs,)

vs.)

LA PETITE ACADEMY, INC.,)
a Delaware corporation;)
STATE OF OKLAHOMA)
COMMISSION FOR HUMAN)
SERVICES;)
and STATE OF OKLAHOMA)
DEPARTMENT OF HUMAN)
SERVICES,)

Defendants.)

No. 97-CV-898-K

FILED
DEC 18 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Now before the Court is Defendants', Commission for Human Services of the State of Oklahoma ("Commission") and the Department of Human Services of the State of Oklahoma ("DHS"), Motion for Summary Judgment pursuant to Rule 56(c), on the grounds that there is no genuine issue of material fact for trial, and this case must be decided as a matter of law.

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I. Statement of the Case:

Plaintiffs filed their Amended Complaint in this action alleging, in part, that the Defendants Commission and DHS have utilized federal money to subsidize intentional racial discrimination by La Petite Academy, and that the Defendants Commission and DHS failed to enact standards to ensure compliance with public policy prohibiting racial discrimination in violation of 42 U.S.C. §2000d and "supplemental claims under Oklahoma statutes and the common law." The Plaintiffs seek compensatory damages for emotional pain and suffering along with injunctive relief. The injunctive relief sought by the Plaintiffs includes the request for the Defendants Commission and DHS to adopt new standards for child care which prohibit discrimination and the adoption of educational programs to eliminate racial discrimination.

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

The Defendants move this Court for summary judgment, alleging that Plaintiffs do not have standing to bring a Title VI claim, and, secondly, that Plaintiffs have failed to demonstrate the existence of a Title VI violation on the part of Defendants.

In their first argument, Defendants move for summary judgment against Plaintiffs on the grounds that Plaintiffs do not have standing to sue Defendants under Title VI. In support of this argument, Defendants have shown that the State Defendants do have enumerated policies against discrimination in place. DHS requires that, upon receipt of federal funds, day care centers must agree to abide by a Non-Discrimination Policy. The agency also maintains a separate division of the Office of Civil Rights which assures compliance with the contract terms on discrimination along with assuring compliance with Title VI of the Civil Rights Act of 1964. The agency further provides avenues which allow clients who believe they have been subject to discrimination to complain and have their complaints investigated.

In light of these policies, Defendants contend that the Plaintiffs have not satisfied Article III standing requirements. They assert that Plaintiffs have not made any showing that the alleged failure to enact additional non-discrimination policies in day care centers caused their alleged injuries, nor have they shown that enacting additional requirements of non-discrimination would prevent any alleged future harm.

Plaintiffs respond that they have successfully pleaded that they have standing in this case. Plaintiffs allege that DHS is responsible for the discriminatory treatment suffered by the Plaintiffs

because DHS failed to enact sufficient minimum non-discrimination policies for day care centers. Plaintiffs argue that, as a recipient of federal funds, La Petite agreed to comply with the anti-discrimination requirements of Title VI. They assert that DHS has failed to monitor the compliance of day care centers receiving federal funds with the anti-discrimination requirements of Title VI, and this failure on the part of DHS, Plaintiffs contend, led to the discriminatory treatment of Plaintiffs. Plaintiffs are seeking both injunctive relief and compensatory damages from DHS and the Commission.

Standing is the determination of whether a specific person is the proper party to bring a particular matter to a federal court for adjudication. To demonstrate standing, a plaintiff must prove three things: (1) "injury in fact"-- an invasion of a protected interest; (2) "causation"-- whether the injury is fairly traceable to the defendant's challenged conduct; and (3) "redressability"-- whether there is a likelihood that a favorable decision by the court will redress plaintiff's injury. Northeastern Florida Chapter of Assoc. General Contractors of America v. City of Jacksonville, 508 U.S. 656 (1993).

Plaintiffs have clearly alleged that they suffered an "injury in fact," namely that they were discriminated against based upon their race.¹ Cf., Sierra Club v. Morton, 405 U.S. 727 (1972), holding that Sierra Club had no standing to sue where no members had alleged a personal injury in fact.

Once Plaintiffs have established injury, they have satisfied a necessary, but not sufficient,

¹Because this Court granted Muriel Burch's Motion to Dismiss Claims Without Prejudice per Order dated December 4, 1998, this Court need not examine the "injury in fact" prong in relation to Muriel Burch. All claims are now brought on behalf of her Plaintiff children. See Jackson v. Katy Independent School District, 951 F.Supp. 1293 (S.D.Tex. 1996).

requirement of standing. The plaintiff must also establish *causation*– that the defendant’s conduct caused the harm; and *redressability*– that a favorable court decision is likely to remedy the injury. Both causation and redressability are constitutional requirements for standing. Allen v. Wright, 468 U.S 737 (1984).

Before addressing the issue of causation, this Court finds that Plaintiffs in this action do not have standing to bring a claim for injunctive relief against the Defendants, because they have failed to demonstrate redressability. In City of Los Angeles v. Lyons, 461 U.S. 95, 105-106 (1983), the Supreme Court held that a plaintiff seeking injunctive or declaratory relief must show a likelihood that he or she will be injured in the future. Lyons involved a suit to enjoin an unconstitutional use of choke-holds by the Los Angeles Police Department in instances where the police were not threatened with death or serious bodily injury. Lyons, a twenty-four year old African-American man, was stopped by the police and put in a choke-hold during the course of a normal traffic stop. The Supreme Court ruled that Lyons did not have standing to seek injunctive relief. Although Lyons could bring a suit seeking damages for his injuries, he did not have standing to enjoin the police because he could not demonstrate a substantial likelihood that he, personally, would be injured in the future.

The case at hand is similar. Although Plaintiffs claim they are seeking new minimum standards for child care facilities which include: "the prohibition of racial discrimination, the adoption of an educational program geared toward eliminating racial discrimination, and the requirement of sensitivity training for all child care facility employees,"² the Plaintiffs have not

²Plaintiff’s Response to the Motion for Summary Judgment at 15.

shown that the injunctive relief will address their injuries, or will prevent future injuries for them personally. Lyon specifically prohibits claims by Plaintiffs where the equitable relief sought is ideological, aspirational, and fails to redress the alleged injury of the plaintiff. The Plaintiffs do not have standing to bring a suit against Defendants for injunctive relief under Title VI .

The inquiry does not end here, however. Although Defendants contested Plaintiffs' standing to bring a Title VI claim for injunctive relief, they have not addressed standing for damages. Plaintiffs' failure to satisfy standing requirements for injunctive relief is not dispositive of their ability to satisfy standing in a suit for damages. In Lyon, for example, the Supreme Court held that Lyon could not bring a suit for equitable relief, but he was not barred by standing requirements in his claim for damages. Similarly, in this case, Plaintiffs have clearly alleged that they suffered an injury in fact, and an award of damages to Plaintiffs would compensate them for their injuries. This meets the standard required for redressability, which examines the causal connection between the alleged injury and judicial relief requested. See Allen v Wright, 468 U.S. 737 (1984).

The remaining question, then, is one of causation. That is, Plaintiffs must show that it was the conduct of the Defendants which caused the injury. The Supreme Court has expanded on the causation requirement, applying the "fairly traceable" test. The "fairly traceable" component of constitutional standing examines the causal connection between the assertedly unlawful conduct and the alleged injury. Allen v. Wright, 468 US 737 (1984). The Court in Allen denied standing, holding that the plaintiff's claim did not demonstrate "causation" sufficient for Article III standing. Although the Court held that: "There can be no doubt that this sort of noneconomic injury [the stigmatizing injury often caused by racial discrimination] is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing,"

they nevertheless concluded the plaintiffs did not have standing to bring the claim. Allen at 754. The illegal conduct challenged by the plaintiffs in Allen was the IRS's grant of tax exemptions to some racially discriminatory schools. The Court reasoned that the line of causation between that conduct and desegregation of respondents' schools was "attenuated at best." The Court held that the injury to the plaintiffs was the "result of the independent action of some third party not before the court." Id. at 757.

In the case before this Court, Plaintiffs claim that Defendants are responsible for the discriminatory treatment suffered by Plaintiffs because DHS failed to enact sufficient minimum non-discrimination policies for day care centers. As a recipient of federal funds, La Petite agreed to comply with the anti-discrimination requirements of Title VI, but DHS' failure to monitor the compliance of the day care centers with Title VI promoted the discrimination. Plaintiffs claim that DHS may prohibit racial discrimination, but it does nothing to ensure that the day care centers it licenses comply with Title VI anti-discrimination requirements. Plaintiffs also allege that their injury is traceable to DHS because (1) DHS failed to investigate Plaintiffs' claims and (2) DHS failed to redress the affects of racial discrimination on Plaintiff Children and other children who witnessed the discriminatory treatment.

This Court is persuaded that Plaintiffs have sufficiently pleaded facts supporting a theory of causation to satisfy standing requirements. Under this standard, Plaintiffs must demonstrate in the pleadings that there existed some causal connection between Defendants' actions and Plaintiffs' injury. Plaintiffs' claim that the failure of DHS to ensure that day care centers it licenses comply with Title VI creates a sufficient nexus to Plaintiffs' injuries to satisfy Article III standing in the pursuit of damages. DHS oversees child care facilities in Oklahoma, and has the responsibility of

implementing and maintaining Title VI anti-discrimination policies. Child care centers, through DHS, are only licensed once they have agreed to adopt and adhere to these policies. Additionally, DHS holds itself out as an agency which also conducts investigations of discrimination and implements remedial action. The absence of any monitoring or managing of child care centers, such as La Petite, to ensure they are operating pursuant to DHS guidelines, prior to and simultaneous with the injury to Plaintiffs, does create a link between DHS' activities or omissions and Plaintiffs' suffered harm. Without determining whether DHS did, in fact, have a duty to monitor La Petite Academy, which it failed to fulfill, this Court concludes that there exists a sufficient nexus between DHS and Plaintiffs' injuries to satisfy causation, and, therefore, standing.

As a second argument, Defendants contend that Plaintiffs' claims brought pursuant to 42 U.S.C. §2000d should be dismissed because Plaintiffs' Amended Complaint reveals that Plaintiffs are alleging discrimination by La Petite Academy, and does not allege they have been subjected to discrimination at the hands of the Commission and DHS. Thus, Defendants argue that Plaintiffs have failed to make the necessary preliminary showing by way of properly pleading that Plaintiffs are in fact an intended beneficiary of the "program or activity" which is receiving federal funds. Defendants further contend that courts have also required plaintiffs to allege that there is a nexus between the program receiving funding and the actions of the agency to intentionally discriminate. Defendants assert there must exist an affirmative action to be responsible for §2000d violation. *Association of Mexican-American Educators v. California*, 836 F.Supp. 1534, 1542-43 (N.D. Cal. 1993). Because, Defendants contend, Plaintiffs have not met the minimum standard required to sustain the claim by failing to plead facts sufficient to show that Defendants knew of the alleged

discrimination and failed to act, liability does not attach. *Canutillo Independent School Dist. v. Leija*, 101 F.3d 393 (5th Cir. 1996).

Plaintiffs have responded that their Amended Complaint clearly states the necessary nexus between federal funding and the use of that money to subsidize intentional racial discrimination against Plaintiffs in programs in which Plaintiffs were the intended beneficiaries.³ Furthermore, Plaintiffs assert that Defendants' claim of ignorance as to the uses of the funds they distributed is no defense to their claims. Plaintiffs claim Defendants have disregarded the fact that they have an affirmative duty to enforce the maintenance of minimum standards for the care and protection of children away from their homes. See *Young v. Pierce*, 628 F.2d 1219, 1225 (6th Cir. 1981).

42 U.S.C. §2000d provides: "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." In order to maintain a private action under this section prohibiting discrimination based on race by recipients of federal assistance, a plaintiff must be the intended beneficiary of, an applicant for, or a participant in a federally funded program. *Simpson v. Reynolds Metals Co., Inc.*, 629 F.2d 1226 (7th Cir. 1980).

The Plaintiffs' pleadings sufficiently state that they are, indeed, the intended beneficiaries of the federal funds. *Simpson* requires that the Plaintiffs demonstrate a relationship between the

³Plaintiffs' Amended Complaint States:

"Defendants Oklahoma Commission for Human Services and Oklahoma Department of Human Services are State agencies that received federal funds on behalf of the Children and paid such federal funds to La Petite Academy for child care services for the Children." Plaintiffs' Amended Complaint at p. 10.

"The federal funds received by the Oklahoma Commission for Human Services and Oklahoma Department of Human Services on behalf of the Children were used to subsidize the intentional racial discrimination of Africa American children by La Petite Academy in violation of 42 U.S.C. §2000d." *Id.*

plaintiff and the federal funds. The Plaintiffs have met that burden. As stated *supra*, they have properly alleged discrimination on the basis of race by the Defendants, who received federal funds for which the Plaintiffs are the beneficiaries.

The Plaintiffs have nevertheless failed to establish a prima facie case of a Title VI violation. To avoid summary judgment on a claim under §2000d, a plaintiff must create a genuine issue of material fact that the defendant intended to discriminate on the basis of race. Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. 582, 593, 602-03 (1983). A plaintiff may pursue a claim under a disparate impact theory as well, as long as the plaintiff contends that the actions of the agency have an unjustifiable disparate impact on minorities. *Id.* See Meyers By and Through Meyers v. Board of Educ. of San Juan School Dist., 905 F. Supp. 1544 (D. Utah, 1995). Plaintiffs here have alleged nowhere that the Defendants acted with discriminatory intent, and they have failed to raise a genuine issue of fact as to whether discriminatory intent was even a factor in DHS' investigative proceedings. And, although Plaintiffs allege: "DHS has done absolutely nothing to assure that Plaintiff Children or other minority children will not be discriminated against while attending day care," they have come forth with no evidence that DHS' policies or lack thereof create a disparate impact on minority children. In fact, Plaintiffs never even utilize the language of Title VI in making their claims. Despite all evidence presented which potentially supports Plaintiffs' claims, in light of their failure to make a prima facie case under Title VI, the motion must be sustained.

IV. Conclusion:

This Court, despite having found that Plaintiffs established standing under Title VI in a suit

for damages, concludes that Plaintiffs have failed to properly plead a prima facie case under Title VI. The Motion for Summary Judgment (#33) is hereby granted as to Defendant, Commission for Human Services of the State of Oklahoma ("Commission") and Defendant, Department of Human Services of the State of Oklahoma ("DHS").

ORDERED this 18th day of December, 1998, the Motion for Summary Judgment (#33) is GRANTED.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

F I L E D

DEC 16 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LUIS V. GOROSPE, M.D.,)
)
Plaintiff,)
)
v.)
)
VICKI HAYMAN,)
)
Defendant,)
)
and)
)
VICKI HAYMAN,)
)
Defendant and)
Third Party Plaintiff,)
v.)
)
PROVIDER MEDICAL)
PHARMACEUTICAL, INC., and)
JOHNSON BROKERS AND)
ADMINISTRATORS, INC.,)
)
Third Party Defendants.)

Case No. 98-CV-0566B(J)

ENTERED ON DOCKET
DATE DEC 21 1998

ORDER

On the 16th day of December, 1998, Defendant and Third Party Plaintiff Vicki Hayman's Stipulation for Dismissal Without Prejudice of Third Party Defendants Provider Medical Pharmaceutical, Inc. and Johnson Brokers and Administrators, Inc., comes on for hearing.

15

It is ordered, adjudged and decreed that Defendant and Third Party Plaintiff's Stipulation of Dismissal Without Prejudice be granted and this action is dismissed pursuant to this Order.

A handwritten signature in black ink, appearing to read "Shawn R. Roth", is written over a horizontal line.

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

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

F I L E D

DEC 16 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TRAVELERS INDEMNITY CO.)
OF ILLINOIS,)
)
Plaintiff(s),)
)
vs.)
)
UNION PACIFIC RAILROAD CO.)
)
Defendant(s).)

Case No. 97-C-851-B ✓

ENTERED ON DOCKET
DATE DEC 21 1998

**ORDER DISMISSING ACTION
BY REASON OF SETTLEMENT**

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

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

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

IT IS SO ORDERED this ^{16th} day of December, 1998.


THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

DEC 16 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRETT FOUT,)
)
Petitioner,)
)
vs.)
)
RON WARD,)
)
Respondent.)

Case No. 96-CV-356-E ✓

ENTERED ON DOCKET

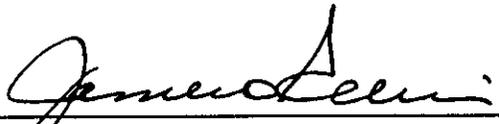
DATE ~~DEC 21 1998~~

JUDGMENT

This matter came before the Court upon Petitioner's 28 U.S.C. § 2254 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.

SO ORDERED THIS 16th day of December, 1998.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

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

DEC 16 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRETT FOUT,)
)
 Petitioner,)
)
 vs.)
)
 RON WARD,)
)
 Respondent.)

Case No. 96-CV-356-E

ENTERED ON DOCKET
DEC 21 1998
DATE _____

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his convictions in Tulsa County District Court, Case No. CRF-94-2042. Respondent has filed a Rule 5 response to which Petitioner has replied. As more fully set out below the Court concludes that this petition should be denied.

BACKGROUND

On March 3, 1995, Petitioner entered a plea of guilty to Possession of Marijuana With Intent to Distribute and Possession of a Firearm in the Commission of a Felony. The plea was pursuant to a plea agreement which struck other counts and the second page of the Information. The trial court accepted Petitioner's guilty plea but withheld a finding of guilt pending completion of a Pre-Sentence Investigation which included a drug test. Petitioner was advised that "[y]ou also need to complete 80 hours Tulsa County Work Program before you report back to this Court on the 21st day of April. If you don't do all your work hours, if you flunk a drug test, violate any law, state or federal, in between the time, then this Court won't consider you for probation and you will be sent

to the penitentiary on these charges." (#13, Transcript at 5). On April 21, 1995, Petitioner returned to court for sentencing. At that hearing, it was determined that although Petitioner had completed his work hours, his urinalysis had come back positive. (#13, Transcript at 7). As a result, Petitioner was sentenced to six (6) years for Possession of Marijuana With Intent to Distribute and to four (4) years for Possession of a Firearm in the Commission of a Felony, with the sentences to be served concurrently. (#13, Transcript at 9-10). At his sentencing hearing, Petitioner acknowledged that he had spoken with his attorney about his rights to appeal and that he understood his appeal rights. (#13, Transcript at 10). Nonetheless, Petitioner did not move to withdraw his guilty plea and otherwise failed to perfect a direct appeal.

Petitioner sought post-conviction relief in the trial court and raised the following issues: (1) ineffective assistance of counsel, "due to counsel(Todd Tucker)'s [sic] deliberate omission [sic] to object to the issuance of illegal sentence," and (2) "illegal [sic] sentence as applied due to same transaction/act." See Case No. 96-CV-21-B, Docket #1, Petitioner's Application for Post-Conviction Relief. On January 8, 1996, the trial court denied relief, stating that despite having been advised of his appeal rights, Petitioner failed to seek or perfect an appeal, "nor has any sufficient reason been offered by the petitioner for petitioner's failure to so do. Therefore, the Court finds that the petitioner has waived these issues and petitioner's Application is denied." #4, Ex. A.

On January 10, 1996, Petitioner filed a habeas corpus petition in this federal district court, Case No. 96-CV-21-B. Because Petitioner had not presented his claims to the Oklahoma Court of Criminal Appeals, the federal action was dismissed without prejudice for failure to exhaust state remedies.

Petitioner returned to state court to exhaust his remedies. On April 23, 1996, the Oklahoma

Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief (#4, Ex. C). The state appellate court imposed a procedural bar on Petitioner's claims, stating that

[t]he issues he now raises could have been raised, but were not, in a motion to withdraw guilty plea and in a direct appeal. He has therefore waived the right to raise the issues and they may not be the basis of this subsequent post-conviction application. 22 O.S.1991, § 1086; Hale v. State, 807 P.2d 264, 266-67 (Okl.Cr.1991). Petitioner claims a direct appeal is not and was not an option for him. However, he offers nothing to show why a direct appeal, the only legal remedy available as a matter of right, was not an option and could not have been utilized by him. 22 O.S.1991, § 1051; 22 O.S.1991, § 1086.

(#4, Ex. C).

On May 1, 1996, Petitioner filed the instant habeas corpus action, challenging his convictions on the following grounds: (1) "ineffective assistance of counsel," (2) "illegal sentence as applied/due to same transaction act -- and firearm listed was in fact a shotgun of legal limit," and (3) "charge of illegal possession of firearm can not stand." (#1). Respondent has filed a response to the petition alleging that this Court is barred from considering Petitioner's claims based on the doctrine of procedural default. (#4). Petitioner has replied to Respondent's response. (#5).

ANALYSIS

A. Applicability of the Antiterrorism and Effective Death Penalty Act ("AEDPA")

On April 24, 1996, President Clinton signed the AEDPA into law. Because Petitioner filed his petition for writ of habeas corpus on May 1, 1996, after enactment of the AEDPA, the Court concludes that the provisions of the Act apply to this case.¹

¹Although no effective date is specified for those provisions of the AEDPA applicable to non-capital cases, rules of general construction provide that new statutory law applies to cases filed on or after the date of enactment. See Lindh v. Murphy, 117 S.Ct. 2059 (1997); Landgraf v. USI Film Products, 511 U.S. 244 (1994).

B. Exhaustion

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by either showing (a) the state's appellate court has had an opportunity to rule on the same claim presented in federal court, or (b) there is an absence of available State corrective process or circumstances exist that render such process ineffective to protect the rights of the applicant. 28 U.S.C. § 2254 (b); see also White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). The exhaustion doctrine is "principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." Harris v. Champion, 15 F.3d 1538, 1554 (10th Cir. 1994) (quoting Rose v. Lundy, 455 U.S. 509, 518 (1982)).

Respondent concedes, and this Court finds, that the Petitioner meets the exhaustion requirements under the law. The Court also finds that an evidentiary hearing is not necessary as Petitioner has not met his burden of proving entitlement to an evidentiary hearing. See Miller v. Champion, ___ F.3d ___, 1998 WL 811780 (10th Cir. 1998). In denying Petitioner's application for post-conviction relief, the state trial court stated that "the matter under consideration does not present any genuine issue of material fact requiring a formal hearing with the presentation of witnesses and the taking of testimony." (#4, Ex. A). Thus, the state court denied an evidentiary hearing on Petitioner's claims and he shall not be deemed to have "failed to develop the factual basis of a claim in state court." Id. Therefore, his request is governed by pre-AEDPA standards rather than by 28

U.S.C. § 2254(e)(2). Id. Under pre-AEDPA standards, in order to be entitled to an evidentiary hearing, Petitioner must make allegations which, if proven true and "not contravened by the existing factual record, would entitle him to habeas relief." Id. In this case, Petitioner has not made allegations which, if proven true, "would entitle him to habeas relief." Therefore, the Court finds that an evidentiary hearing is not necessary.

C. Procedural Bar

The alleged procedural default in this case results from Petitioner's failure to move to withdraw his guilty plea and perfect a direct appeal. In affirming the trial court's denial of post-conviction relief, the Oklahoma Court of Criminal Appeals specifically found that Petitioner had waived his claims by failing to raise them in a direct appeal as required by Oklahoma procedural rules and that he had failed to provide the court sufficient reason for his failure to file a direct appeal.

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state's highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S.Ct. 1972 (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), cert. denied, 502 U.S. 1110 (1992)).

I. Petitioner's second and third claims

Applying the principles of procedural default to the instant case, the Court concludes Petitioner's second and third claims are procedurally barred. The state court's procedural bar as applied to these claims 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 declined to review claims which could have been but were not raised on direct appeal. Okla. Stat. tit. 22, § 1086.

Because of his procedural default, this Court may not consider Petitioner's second and third claims 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). A "fundamental miscarriage of justice" instead 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 his reply to Respondent's response, Petitioner makes no attempt to show cause for his failure to perfect a direct appeal. He merely states that "he has shown this court due reasons why

Direct Appeal was not sought." (#5 at 1). However, in his petition, he states that "direct appeal was not an option as a guilty plea was entered." (#1, at 5, 6 and 7). The Court finds these conclusory, unsupported efforts to demonstrate "cause" are inadequate to excuse the procedural default.

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 113 S.Ct. 853, 862 (1993); Sawyer v. Whitley, 112 S.Ct. 2514, 2519-20 (1992). Petitioner's third separate claim could be liberally construed as a claim that Petitioner is innocent of the Possession of a Firearm While in Commission of a Felony conviction on the basis that the shotgun he possessed at the time of his arrest does not qualify as a "firearm." However, the statutory law attached by Petitioner in support of this claim is a Federal statute and would not be applicable to Petitioner's conviction pursuant to the laws of the State of Oklahoma. Furthermore, this argument would amount to a claim of "legal innocence" as opposed to "actual innocence." "Legal innocence" will not serve to satisfy the "fundamental miscarriage of justice" exception to the procedural default doctrine. See Klein v. Neal, 45 F.3d 1395, 1400 (10th Cir. 1995); Brecheen v. Reynolds, 41 F.3d 1343, 1356-57 (10th Cir. 1994). Therefore, the Court finds Petitioner has failed to satisfy the "fundamental miscarriage of justice" exception to the procedural default doctrine.

As a result of Petitioner's failure to demonstrate "cause and prejudice" or that a fundamental miscarriage of justice would occur if his claims are not considered, this Court is procedurally barred from considering Petitioner's second and third claims.

2. *Petitioner's claim of ineffective assistance of counsel*

While there is no question that the Oklahoma procedural bar at issue here is "independent" of federal law concerns, the Tenth Circuit Court of Appeals has held that Oklahoma's procedural bar

requiring a criminal defendant to raise on direct appeal any claims alleging the ineffectiveness of trial counsel "will apply in those limited cases meeting the following two conditions: trial and appellate counsel differ; and the ineffectiveness claim can be resolved upon the trial record alone." English v. Cody, 146 F.3d 1257, 1264 (10th Cir. 1998). In the instant case, Petitioner did not perfect a direct appeal and therefore never had the opportunity to consult with counsel different from counsel representing him at the entry of his plea and at sentencing. Therefore, the first requirement for imposition of a procedural bar is not satisfied and the Court will review Petitioner's ineffective assistance of counsel claim on the merits.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. A federal court reviewing an ineffective assistance of counsel claim will begin by presuming that counsel's representation was within that wide range of reasonable, professional assistance that can be considered sound trial strategy. A federal court will also review counsel's performance from counsel's perspective at the time the representation was rendered, and not through the distorting lens of hindsight.

To prevail on a claim of ineffective assistance of counsel under the Sixth Amendment, Petitioner must first overcome the presumption of constitutionally adequate representation and show that his counsel committed a serious error in light of prevailing professional norms. In other words, Petitioner must conclusively demonstrate that counsel's representation fell below an objective standard of reasonableness and so undermined the proper functioning of the adversarial process that the result reached in the trial court cannot be relied on as just. If Petitioner establishes that his counsel's performance was constitutionally ineffective, he must then demonstrate that there is a

reasonable probability that the outcome in the trial court would have been different had counsel performed effectively. Strickland v. Washington, 466 U.S. 668 (1984); Brecheen v. Reynolds, 41 F.3d 1343, 1365 (10th Cir. 1994). When a petitioner has entered a guilty plea, he must demonstrate that but for counsel's deficient performance, he would not have pled guilty and would have proceeded to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

In the instant case, Petitioner alleges his attorney was ineffective because he "allowed the imposition [sic] of stacked cumlitive [sic] charges, and illegal sentence. Plus did not fully inform Petitioner of his right and stated that plea bargin [sic] was to be 7 yrs probation." (#1, at 4). After reviewing the record provided by Respondent in response to this Court's April 29, 1998 Order, including the transcript from Petitioner's plea and sentencing hearings (#13), the Court finds that Petitioner's arguments fail to overcome the first prong of the Strickland test. The Information and the Judgments and Sentences entered in Petitioner's case, (#13), indicate Petitioner was charged and convicted based on violations of two separate statutes: Okla. Stat. tit. 63, § 2-401, Unlawful Possession of Marijuana With Intent to Distribute, and Okla. Stat. tit. 21, § 1287, Possession of Firearm While in Commission of a Felony. These crimes cannot properly be construed as the same act or transaction for which Petitioner received multiple punishments. Petitioner's counsel did not provide ineffective assistance in failing to object and his claim is without merit. Furthermore, the transcript of Petitioner's plea hearing indicates that he acknowledged that he had reviewed the "Plea of Guilty/Summary of Facts" in its entirety with his attorney and that he was aware of his appeal rights. (#13 at 2-3). Lastly, the record clearly demonstrates that a sentence of seven (7) years probation was considered by the trial court. That sentence was premised on several conditions: that Petitioner perform community service, pass a urinalysis test, and receive a favorable

recommendation following a pre-sentence investigation. (#13, Transcript at 5-6). Petitioner indicated he understood these conditions and the ramifications of any failure to comply. (#13, Transcript at 5-6). At the sentencing hearing, Petitioner reported that his urinalysis report came back positive for drug use, and the Judge sentenced Petitioner to terms of imprisonment rather than probation, as had been discussed at the plea hearing. (#13, Transcript at 7). Based on that record, this Court finds Petitioner's assertion of error by his counsel to be without merit.

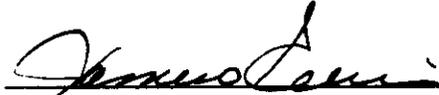
Therefore, because Petitioner has failed to overcome the presumption of effective assistance of counsel as required by the Strickland standard, the Court concludes his claim of ineffective assistance of counsel fails.

CONCLUSION

After carefully reviewing the record in this case, the Court concludes Petitioner's second and third claims are procedurally barred and his first claim, ineffective assistance of counsel, is without merit. As Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States, his petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is **denied**.

SO ORDERED THIS 16th day of December, 1998.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

FILED
DEC 16 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

URALL O. EDWARDS,)
)
Plaintiff,)
)
vs.)
)
KENNETH S. APFEL, Commissioner of the Social)
Security Administration,)
)
Defendant.)

Case No. 93-C-313-E

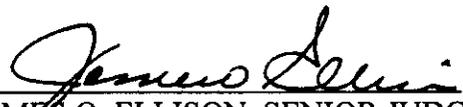
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DATE DEC 21 1998

ORDER

Now before the Court is the Motion for Attorney Fees Pursuant to 42 U.S.C. §406 of the plaintiff Urall O. Edwards.

Plaintiff seeks an attorney fee of \$7,350.00. Defendant does not object to the attorney fees sought by plaintiff. The Court, therefore, finds that an award of \$7,350.00 is appropriate pursuant to 42 U.S.C. §406 (b)(1) and the factors set forth in *Ex Parte Duggan*, 537 F.Supp. 1198 (D.S.C. 1982). Therefore plaintiff's application for attorney's fee is granted and plaintiff is awarded an attorney fee in the amount of \$7,350.00.

IT IS SO ORDERED THIS 16th DAY OF DECEMBER, 1998.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 12-21-98

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

FILED

DEC - 3 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FREDERIC E. RUSSELL,)

Plaintiff,)

-vs-)

Case No. 98-CV-0296-K(E)

AIR MIDWEST, INC.,)

MESA AIRLINES,)

doing business under the name)

U.S. AIR EXPRESS, and)

U.S. AIRLINES,)

foreign corporations,)

Defendants.)

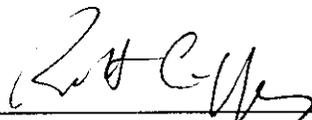
FILED

DEC 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

**DISMISSAL WITHOUT PREJUDICE
AS TO U.S. AIRWAYS, INC.**

The plaintiff, by his undersigned counsel of record, herewith dismisses this action without prejudice as to the defendant U.S. Airways, Inc. (erroneously designated in the Amended Complaint as "U.S. Airlines"), pursuant to Rule 41(a), F. R. Civ. P.



ROBERT S. COFFEY, OBA #17001

1927 South Boston Avenue

Tulsa, OK 74119

Telephone: 918/582-1249

Attorneys for Plaintiff,

Frederic E. Russell

20

STIPULATION

The defendant, U.S. Airways, Inc., herewith stipulates to the dismissal of this action without prejudice as to U.S. Airways, Inc.



STEPHEN P. FRIOT, OBA #3147

OF

SPRADLING, ALPERN, FRIOT & GUM, L.L.P.

101 Park Avenue, Suite 700

Oklahoma City, OK 73102-7283

Telephone: 405/272-0211

Facsimile: 405/236-0992

F I L E D

Attorneys for Defendant,
U.S. Airways, Inc.

DEC 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITHOUT PREJUDICE

Pursuant to Rule 41(a), F. R. Civ. P.,

IT IS ORDERED that this action be, and hereby is, dismissed without prejudice as to U.S. Airways, Inc.

Dated at Tulsa, Oklahoma, this 17 day of December, 1998.



UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET
DATE 12-21-98

ROBERT J. GETCHELL,)
)
 Plaintiff,)
)
 vs.)
)
 LEE CHEW and PAUL STUMPF,)
)
)
)
 Defendants.)

No. 98-CV-638-K

FILED

DEC 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

O R D E R

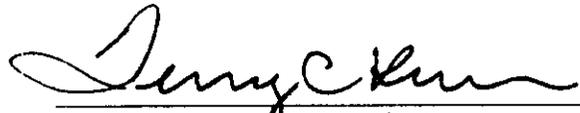
Now before the Court is the motion of defendant Lee Chew to withdraw the reference to the bankruptcy court pursuant to 28 U.S.C. §157(d). Professional Benefits Systems, Inc., ("Debtor"), an Oklahoma insurance company, filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on February 27, 1998. On July 2, 1998, the duly appointed Trustee filed an adversary proceeding complaint against the defendants. The complaint seeks to recover from the defendants fraudulent transfers allegedly made from the Debtor to the defencants between the years 1992 and 1995.

The Court has previously addressed the issues raised in this motion in its Order entered in the companion case, 98-CV-624-K. That Order is incorporated herein by reference and its reasoning adopted.

It is the Order of the Court that the motion of the defendant Lee Chew to withdraw reference (#1) is hereby GRANTED. The adversary proceeding brought by the trustee against Chew and co-defendant Paul Stumpff is hereby transferred to this Court under

case no. 98-CV-624-K. The Court Clerk is directed to administratively close case no. 98-CV-638-K, which was opened merely to accommodate the filing of the present motion.

SO ORDERED this 14 day of December, 1998.

A handwritten signature in cursive script, appearing to read "Terry C. Kern", written in black ink. The signature is positioned above a horizontal line.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 12-21-98

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

DEC 18 1998 *PL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FREDERICK E. FREY, JR.,)
SSN: 444-42-7373,)

Plaintiff,)

v.)

CASE NO. 97-CV-403-M ✓

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

Defendant.)

JUDGMENT

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

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

8

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FREDERICK E. FREY, JR.,)
SSN: 444-42-7373,)
)
PLAINTIFF,)
)
vs.)
)
KENNETH S. APFEL,)
Commissioner of the Social)
Security Administration,¹)
)
DEFENDANT.)

CASE No. 97-CV-403-M

ENTERED ON DOCKET

DATE 12-21-98

ORDER

Plaintiff, Frederick E. Frey, Jr., seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.² In accordance with 28 U.S.C. § 636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge.

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

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

² Plaintiff's January 18, 1995 application for benefits was denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held June 26, 1996. By decision dated July 31, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on March 5, 1997. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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

Plaintiff was born June 28, 1940 and was two days short of his 56th birthday on the date of the hearing. [R. 47, 60]. He claims to have been unable to work since September 1, 1989, due to extreme anxiety and depression and an "uncontrollable twitch." [R. 98].

The ALJ determined that Plaintiff has severe impairments consisting of chronic hypertension and hereditary chorea³ but that he retained the residual functional capacity (RFC) to perform work-related activities except for work that required lifting and carrying more than 50 pounds occasionally and 25 pounds frequently. [R.16-17].

³ Chorea: the ceaseless occurrence of a wide variety of rapid, highly complex, jerky, dyskinetic movements that appear to be well coordinated but are performed involuntarily. *Dorlands Illustrated Medical Dictionary*, 28th Ed. 1994, p. 323.

He decided that Plaintiff had no significant non-exertional limitations during the relevant time period. He determined that Plaintiff's past relevant work (PRW) of clerk/cashier and library cataloger did not require performance of the restricted activities and concluded that Plaintiff could return to his past relevant work. The ALJ found, therefore, that Plaintiff was not disabled as defined by the Social Security Act. [R. 17]. The case was thus decided at step four of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts the ALJ's determination is not supported by substantial evidence in the record. He complains the ALJ's finding that Plaintiff did not have a non-exertional impairment was contrary to the weight of the medical evidence. He also complains the ALJ's credibility determination was flawed and that the Appeals Council erred in not reviewing the claim. [Plaintiff's Brief].

The period under review is the time frame between February 28, 1989, the alleged onset date, and December 31, 1994, the date Plaintiff was last insured. To be eligible for benefits, Plaintiff's disability must be established by the evidence prior to the expiration of Plaintiff's insured status. *Miller v. Chater*, 99 F.3d 972, 975 (10th Cir. 1996); *Henrie v. United States Dep't of Health & Human Servs.* 13 F.3d 359, 360 (10th Cir. 1993). For the reasons discussed below, the Court affirms the decision of the Commissioner.

Plaintiff claims the record supports his claim of disability due to non-exertional impairments. He relies upon a Psychiatric Review Form (PRT)⁴ filled out by his treating physician, Kyle Stewart, M.D., on May 28, 1996, [R. 178-190], and a letter signed by Dr. Stewart on July 11, 1996 stating Plaintiff has been unable to work since September 1, 1989, [R. 191]. Dr. Stewart's PRT reflects that Plaintiff meets or equals Listings 12.02 and 12.04. [R. 178].

As it pertains to this case, Listing 12.04 requires that the Plaintiff have a depressive syndrome meeting the requirements of Listing parts A and B. Part A requires documented persistence of:

- a. Anhedonia or pervasive loss of interest in almost all activities; or
- b. Appetite disturbance with change in weight; or ⁵
- c. Sleep disturbance; or
- d. Psychomotor agitation or retardation, or
- e. Decreased energy; or
- f. Feelings of guilt or worthlessness; or
- g. Difficulty concentrating or thinking;

* * *

⁴ The procedure for evaluation of a mental impairment is outlined at 20 C.F.R. § 1520a. If a claimant has a mental impairment, the degree of functional loss resulting from the impairment must be rated in four areas: (1) activities of daily living, (2) social functioning, (3) concentration, persistence or pace; and (4) deterioration or decompensation in work or work-like settings. 20 C.F.R. §1520a(b)(3). If each of the four areas is rated as having an impact of "none", "never", "slight", or "seldom", the conclusion is that the impairment is not severe, unless the evidence otherwise indicates there is significant limitation of the claimant's mental ability to do basic work activities. See 20 C.F.R. §1520a(c)(1). An ALJ must attach to his decision a PRT form detailing his assessment of the claimant's level of mental impairment. 20 C.F.R. §1520a(d). In this case, Plaintiff's physician, Dr. Stewart also filled out a PRT form which was submitted to the ALJ at the hearing and made part of the record at pages 178-190.

⁵ It should be noted that Plaintiff's weight loss was by design. He was counseled about his weight in relation to his hypertension problems and placed on a diet by Dr. Pribil in 1994 who characterized Plaintiff's weight loss as "appropriate." [R. 121].

20 C.F.R. Pt. 404, Subpt. P, App.1. § 12.04. Dr. Stewart found Plaintiff to have met the above-listed *Part A* criteria. [R. 181]. However, to meet Listing 12.04, Plaintiff's depression must also cause functional limitations in at least two of the following areas:

1. Marked restriction of activities of daily living; or
2. Marked difficulties in maintaining social functioning; or
3. Deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner (in work settings or elsewhere); or
4. Repeated episodes of deterioration of decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms (which may include deterioration of adaptive behaviors).

Id. § 12.04 B.

Dr. Stewart found "marked" limitations in social functioning, but only moderate, not marked, restriction of activities of daily living. According to Dr. Stewart, Plaintiff often, not frequently, displayed deficiencies of concentration. As to Dr. Stewart's check mark in the box for "repeated episodes (three or more) of deterioration or decompensation" in a work-like setting, the ALJ determined, and the Court agrees, that there was insufficient evidence upon which to base this determination. [R. 12].

The ALJ discussed the PRT and letter of Dr. Stewart at length in his decision denying benefits. [R. 12]. In that discussion, the ALJ noted that Plaintiff had not sought treatment for depression or anxiety until February 1995, which was more than a year after the expiration of his insured status and a month after his claim for Social Security benefits was filed. The ALJ also compared the 1996 PRT and letter with Dr. Stewart's treatment records from February 1995 through August 1995. [See R. 133-

138; ALJ's decision at R. 12]. Notes from those records reflect that, during the treatment period, Dr. Stewart assessed Plaintiff as able to remember, comprehend and carry out instructions on an independent basis and reported that, in a work environment, "anxiety and depression impair[s] his ability to tolerate stress somewhat". [R. 133]. Dr. Stewart's diagnosis was "Dysthymia", described as a mood disorder characterized by depressed feeling, loss of interest or pleasure in one's usual activities, persisting for more than two years but not severe enough to meet the criteria for major depression. See *Dorlands Illustrated Medical Dictionary*, 28th Ed. 1194, p. 519. Dr. Stewart described Plaintiff's daily activities and interests as "fairly constricted." [R. 133]. As pointed out by the ALJ, the PRT by Dr. Stewart is inconsistent with his treatment records and not supported by clinical findings.

Although Plaintiff now claims he stopped working due to depression, as noted by the ALJ, Plaintiff's medical records reveal that Plaintiff had reasons other than mental/emotional problems for leaving his jobs. The **first** time Plaintiff asserted he had resigned his library cataloger job because he was "very unhappy" was at the hearing. [R. 43]. Plaintiff had told Dr. Wamsley, one of his treating physicians with Primary Care Associates in Bartlesville, Oklahoma, on June 20, 1989, that he intended to retire from work at the end of the summer and return to school. [R. 150, 152]. The record contains treatment notes from these physicians from as far back as September 1988 for various physical complaints with no mention of depression until October 2, 1995. [R. 143-168]. Dr. James Stauffer reported April 26, 1995 that Plaintiff had quit his library cataloger job to take care of his mother. [R. 128]. Plaintiff's records from

Gerald F. Pribil, M.D., another Bartlesville, Oklahoma, treating physician, dated June 1993 through January 1995, also contain no mention of depression. [R. 121-122]. From all accounts in the record, Plaintiff stopped working at the donut shop in 1995 because the store closed, not because he was unable to work. [R. 44, 102]. And, as Plaintiff admitted both during his testimony and on his Disability Supplemental Outline, he did not seek treatment for depression or anxiety until 1995. [R. 33, 39, 103]. The Court finds the ALJ's determination that Plaintiff's mental condition did not meet the functional limitations required to meet Listing § 12.04 during the relevant time period is supported by the record.

In the portion of the PRT documenting factors that evidence Organic Mental Disorders, Listing 12.02, Dr. Stewart wrote:

Other: Motor Disorder - (Tic) - DSM IV.

[R. 180].

Part B of Listing 12.02 is the same as Part B of Listing 12.04 and, as discussed above, the Court finds the ALJ properly considered and rejected the PRT of Dr. Stewart. Furthermore, the record shows, and Plaintiff admits, the "nervous tic" disorder has been present since childhood and did not hamper Plaintiff's ability to perform his jobs as library cataloger and clerk/cashier. Despite Plaintiff's testimony to the contrary, the notations made by Plaintiff's treating physicians in the medical records reveal that medication, Clonidine, had "some benefit with his facial tic" as well as controlling hypertension. [R. 146]. Plaintiff stated at the hearing that he was still taking that medication. [R. 55]. At any rate, there is no indication in the record

that Plaintiff ever informed his physicians that the Clonidine was ineffective and alternative treatment, as suggested by Dr. Breske in 1990, undertaken. [R. 148].

In rejecting Dr. Stewart's 1996 PRT and letter, the ALJ stated:

The physician has not submitted evidence of an impairment of such severity as could reasonably be expected to preclude the claimant's ability to work at any exertional and skill level.

[R. 12]. The Court agrees with this finding. Furthermore, where Dr. Stewart had an opportunity to specify the extent of Plaintiff's impairment on work-related activities, he declined to do so. The final two pages of the PRT which provided a check list for specific mental/emotional limitations on work-related activities on a day-to-day basis in a regular work setting were not completed but signed as a blank form. [R. 189-190]. The doctor's PRT, therefore, lacked sufficient objective documentation to support his findings. Likewise, the three sentence letter by Dr. Stewart dated July 11, 1996 and submitted to the ALJ after the hearing, which stated Plaintiff had been unable to work since 9/1/89, was brief, cursory and not supported by clinical findings.

A treating physician may offer an opinion as to the nature and severity of a claimant's impairments, including symptoms, diagnosis and prognosis, and any physical or mental restrictions. *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1029 (10th Cir.1994). However, to be given controlling weight, the opinion must be "well supported by clinical and laboratory diagnostic techniques and cannot be inconsistent with other substantial evidence in the record. *Id.* A treating physician's opinion that a claimant is disabled is not dispositive. *Castellano*, 26 F.3d

at 1027. Also see 20 C.F.R. § 416.927(d)(2); *Bean v. Chater*, 77 F.3d 1210, 1214 (10th Cir. 1995). In this case, the opinion of Plaintiff's treating physician that he met the listings is contrary to his own treatment notes and is inconsistent with other substantial evidence in the record. See *Castellano*, 26 F.3d at 1029. The ALJ concluded that Dr. Stewart's opinion as to the severity of Plaintiff's impairments was not well supported by clinical and laboratory diagnostic techniques and was not consistent with the other medical evidence of record. The Record supports that conclusion. Consequently, the ALJ did not err in failing to give it controlling weight.

Citing only his own testimony, Plaintiff disputes the ALJ's finding that he had no medically determinable impairments prohibiting his return to his past relevant work. According to Plaintiff, the inconsistencies in his testimony and statements when compared to the medical evidence and other required factors of evaluation were "only those superficial, fragmentary and irrelevant ones usually to be found." [Plaintiff's Brief, p. 5]. Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908 F.2d 585, 587 (10th Cir. 1990). The Tenth Circuit has instructed "[f]indings as to credibility should be closely and affirmatively tied to substantial evidence and not just conclusions in the guise of findings." *Huston v. Bowen*, 838 F.2d 1125, 1133 (10th Cir. 1988). In this case, the ALJ's decision clearly meets these requirements. The ALJ made an extensive credibility evaluation, comparing Plaintiff's allegations to the medical record, taking into account the lack of treatment for Plaintiff's complaints during the relevant time period and Plaintiff's activities, including his ability to care for his ailing mother, completion of studies for

a BLS degree and purchasing a donut shop. The ALJ gave specific reasons for his credibility determinations. [R. 14-15]. The Court finds that the ALJ evaluated the record, Plaintiff's credibility and allegations in accordance with the correct legal standards established by the Commissioner and the courts.

Plaintiff's complaints regarding the action of the Appeals Council are not clear. It appears that he questions whether the Appeals Council complied with the regulations in considering his request for review. [Plaintiff's Brief, p. 5].

20 C.F.R. § 404.970 provides the circumstances under which the Appeals Council may grant review of the decision of the ALJ:

- (1) There appears to be an abuse of discretion by the administrative law judge;
- (2) There is an error of law;
- (3) The action, findings or conclusions of the administrative law judge are not supported by substantial evidence; or
- (4) There is a broad policy or procedural issue that may affect the general public interest.

The Appeals Council considered Plaintiff's request to review the decision of the ALJ and advised Plaintiff that "there is no basis under the above regulations for granting [Plaintiff's] request for review." [R. 3-4]. In light of Plaintiff's failure to demonstrate error on the part of the ALJ in any of the above criteria, the Court finds the Appeals Council was not required to grant review of the ALJ's decision.

The ALJ's decision demonstrates that he considered all of the medical reports and other evidence in the record in his determination that Plaintiff retained the capacity to return to his past relevant work as library cataloger and clerk/cashier during the time period under review, February 1989 to December 1994. The record as a whole

contains substantial evidence to support the determination of the ALJ that Plaintiff was not disabled before the expiration of his insured status, December 31, 1994. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

Dated this 18th day of Dec., 1998.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

EVERETT R. WAGONER and
 MADELINE WAGONER,

 Plaintiffs,

 v.

 THE GRAND RIVER DAM AUTHORITY,
 et al.,

 Defendants/Third Party Plaintiffs,

 v.

 UNITED STATES OF AMERICA, ex rel.,
 FEDERAL ENERGY REGULATORY
 COMMISSION, et al.

 Third Party Defendants.

Case No. 94-CV-1091-H

FILED
 DEC 18 1998
 Phil Lombardi, Clerk
 U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

This matters comes before the Court on a Joint Status Report in which the parties state that by Order, filed May 28, 1998, the United States Court of Appeals for the Tenth Circuit (1) dismissed the appeal of this Courts's remand orders for lack of jurisdiction, and (2) affirmed this Court's dismissal of Defendants/Third Party Plaintiffs' complaints against Third Party Defendants. The report further provides that the Tenth Circuit's Order disposes of this action so far as this Court is concerned, although Defendant/Third Party Plaintiff Grand River Dam Authority ("GRDA") plans to file a petition for writ of certiorari to the United States Supreme Court.¹

Pursuant to the Joint Status Report and for good cause shown, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the

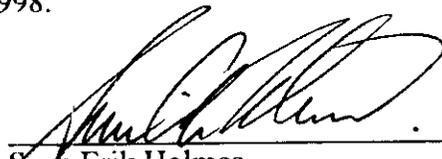
¹ The Court observes that GRDA filed its Petition for Writ of Certiorari on October 29, 1998.

parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

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

IT IS SO ORDERED.

This 18TH day of December, 1998.



Steven Erik Holmes
United States District Judge

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

ENTERED ON DOCKET

DATE 12-21-98

WAYNE E. ROBERTS,

Plaintiff,

v.

THE GRAND RIVER DAM AUTHORITY,
et al.,

Defendants/Third Party Plaintiffs,

v.

UNITED STATES OF AMERICA, ex rel.,
FEDERAL ENERGY REGULATORY
COMMISSION, et al.

Third Party Defendants.

Case No. 94-CV-1092-H ✓

FILED

DEC 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

This matters comes before the Court on a Joint Status Report in which the parties state that by Order, filed May 28, 1998, the United States Court of Appeals for the Tenth Circuit (1) dismissed the appeal of this Courts's remand orders for lack of jurisdiction, and (2) affirmed this Court's dismissal of Defendants/Third Party Plaintiffs' complaints against Third Party Defendants. The report further provides that the Tenth Circuit's Order disposes of this action so far as this Court is concerned, although Defendant/Third Party Plaintiff Grand River Dam Authority ("GRDA") plans to file a petition for writ of certiorari to the United States Supreme Court.¹

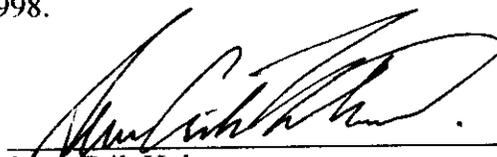
Pursuant to the Joint Status Report and for good cause shown, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

¹ The Court observes that GRDA filed its Petition for Writ of Certiorari on October 29, 1998.

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

IT IS SO ORDERED.

This 18TH day of December, 1998.



Sven Erik Holmes
United States District Judge

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

DEC 18 1998 P

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DORETTA LETBETTER,)
an individual,)
)
Plaintiff,)
)
vs.)
)
AFTON PUBLIC SCHOOLS DISTRICT)
I-26 & RANDY GARDNER, as its)
superintendent,)
)
Defendants.)

Case No. 98-CV-327-BU ✓

ENTERED ON DOCKET

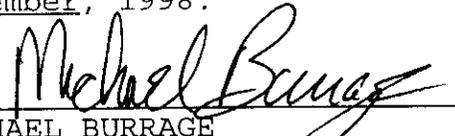
DATE 12-21-98

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the 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 proceedings.

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

ENTERED this 18th day of December, 1998.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET

DATE 12-21-98

JACK DALRYMPLE, et al.,)
)
 Plaintiffs,)
)
 v.)
)
 THE GRAND RIVER DAM AUTHORITY,)
 et al.,)
)
 Defendants/Third Party Plaintiffs,)
)
 v.)
)
 UNITED STATES OF AMERICA, ex rel.,)
 FEDERAL ENERGY REGULATORY)
 COMMISSION, et al.)
)
 Third Party Defendants.)

Case No. 94-CV-970-H ✓

FILED
DEC 18 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

This matters comes before the Court on a Joint Status Report in which the parties state that by Order, filed May 28, 1998, the United States Court of Appeals for the Tenth Circuit (1) dismissed the appeal of this Courts's remand orders for lack of jurisdiction, and (2) affirmed this Court's dismissal of Defendants/Third Party Plaintiffs' complaints against Third Party Defendants. The report further provides that the Tenth Circuit's Order disposes of this action so far as this Court is concerned, although Defendant/Third Party Plaintiff Grand River Dam Authority ("GRDA") plans to file a petition for writ of certiorari to the United States Supreme Court.¹

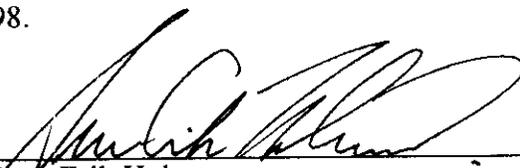
Pursuant to the Joint Status Report and for good cause shown, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

¹ The Court observes that GRDA filed its Petition for Writ of Certiorari on October 29, 1998.

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

IT IS SO ORDERED.

This 18TH day of December, 1998.



Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT **FILED**
FOR THE NORTHERN DISTRICT OF OKLAHOMA DEC 16 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
KENNETH MICHAEL SPROUTS,)
)
Defendant.)

Case No. 92-CR-54-E
98-CV-22-Ej ✓

ENTERED ON DOCKET
DATE 12-21-98

ORDER

Now before the Court is the Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Docket # 229) of the Defendant Kenneth Michael Sprouts filed on December 29, 1997, and his corresponding Motion to Equitably Toll One Year Deadline for Filing Habeas Petition Under the Antiterrorism and Effective Death Penalty Act (AEDPA) (Docket # 228) filed on December 22, 1997.

Before the Court can address the merits of Sprouts' §2255 motion, the Court must examine the issue of whether it was timely filed under the 1-year period of limitation imposed by the AEDPA amendments to 28 U.S.C. §2255. Section 2255 provides:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made

retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

In this case, the date on which the conviction became final is January 5, 1993, and none of the other provisions apply to the facts of this case. Therefore, under the rule of United States v. Simmonds, 111 F.3d 737, 746 (10th Cir. 1997), Sprouts, as a prisoner “whose conviction[] became final on or before April 24, 1996” must, in order to be timely, file his §2255 motion before April 25, 1997.

It is undisputed that Sprouts missed the deadline of April 25, 1997 as established by Simmonds. Sprouts argues, however, that the one year deadline should be “equitably tolled” because of extraordinary circumstances. The circumstances cited by Sprouts for this “equitable tolling” are ineffective assistance of counsel, failure of counsel to file an appeal as promised, lack of legal knowledge or assistance, and ignorance of the one-year time period. The courts are split as to whether the one-year time period of the AEDPA can be equitably tolled, and the Tenth Circuit has not yet decided the issue. See, e.g., Calderon v. U.S. District Court for Central District of California, 112 F.3d 386 (9th Cir. 1997) (one-year time limit can be equitably tolled), United States v. Eubanks, Crim. No. 92-392, 1997 WL 115647 (S.D.N.Y. 1997) (AEDPA limitation period is a statute of limitations which cannot be modified by the court).

Assuming, without deciding, that the limitation period is subject to equitable tolling, the Court finds that equitable tolling is not appropriate under the circumstances presented in this case. Under the law of this Circuit, equitable tolling is available in circumstances where the complainant has been misled by the other party or in “extraordinary circumstances.” Gatewood v. Railroad Retirement Board, 88 F.3d 886, 889-90 (10th Cir. 1996). Specifically, the Court in Gatewood held that equitable tolling is not warranted by ignorance of the law. The court finds in these

circumstances that neither the failure of Sprouts' attorney to file an appeal nor Sprouts' ignorance of the one-year limitations period are sufficient "extraordinary circumstances" to warrant equitable tolling.

Sprouts' Motion to Equitably Toll the One-Year Limitations Period (Docket #228) is denied. Accordingly, Sprouts' Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Docket # 229) is dismissed for failure to file it within the one-year limitations period.

IT IS SO ORDERED THIS 16th DAY OF DECEMBER, 1998.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT