

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

COUNCIL OAKS LEARNING CAMPUS,
INC.

Plaintiff,

vs.

FARMINGTON CASUALTY COMPANY,

Defendant.

FILED
FEB 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE NO. 98-CV-3-C ✓

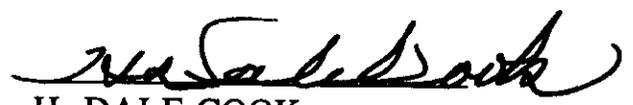
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JUDGMENT

This matter came before the Court for consideration of the motion for summary judgment filed by the defendant, Farmington Casualty Company, on plaintiff's claims for breach of contract and the tort of bad faith. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered for the defendant Farmington Casualty Company, and against the plaintiff, Council Oaks Learning Campus, Inc.

IT IS SO ORDERED this 9th of February, 1999.


H. DALE COOK
Senior, United States District Judge

4. On May 1, 1992, the roof of a building on plaintiff's property suffered wind and hail damage.
5. In May of 1992, plaintiff submitted a claim for loss to Farmington from the wind and hail damage to its roof. Farmington's insurance adjuster denied the claim, stating there was no hail damage and the wind damage was less than the deductible.
6. The defendant did not provide plaintiff with written notice of the denial of the claim. The denial of the claim was indicated verbally to the plaintiff by the insurance adjuster.
7. From May of 1992 through 1996 or 1997, plaintiff's building suffered continuous and repeated water damage to the ceiling, interior and contents due to leaks in the roof.
8. Each year that plaintiff renewed its insurance coverage through its insurance agent, The Holmes Agency, plaintiff complained of continuing damage to its property caused by the 1992 wind and hail storm.
9. On April 16, 1997, plaintiff gave notice of a claim for loss to its roof caused by a then recent storm damaging shingles and the underlying felt. Plaintiff sent the 1997 claim for loss to its insurance agent at that time, The Rogers Agency.
10. Following the storm in 1997, plaintiff replaced the roof of its building.
11. The Rogers Agency submitted the claim to Capitol Indemnity Company, which covered plaintiff's property for 1996 through 1997. The Capitol Indemnity Company rejected plaintiff's claim based on its determination that the damage was related to the 1992 storm.
12. Plaintiff submitted the claim for damages following the 1997 storm to the Holmes Agency. The Holmes Agency submitted the claim to Travelers. Traveler's assigned Richard Johnson, a Traveler's property adjuster to the claim.

13. On June 6, 1997, a check for \$12,578 was issued to plaintiff for the claimed building loss, and charged against The Standard Fire Insurance Company. The check stub bears the names Traveler Indemnity Company and The Aetna Casualty and Surety Company. The Standard Fire Insurance Company is a subsidiary of Travelers.

14. On July 15, 1997, a check for \$8,294.44 was issued to plaintiff as a supplemental payment for plaintiff's claimed building loss, and charged against Standard Fire Insurance. The check stub bears the name Travelers Property Casualty.

15. Richard Johnson agreed to authorize the \$20,872.44 payment to plaintiff as a "questionable" claim payable under the terms of the insurance policy that was in force in 1992. Mr. Johnson testified by deposition:

Q: Would that damage have been covered under the 1992 policy?

A: No, I don't think so. Because if it was covered damage, we would have paid for it.

Q: But Farmington didn't pay for it in '92?

A: I don't have any knowledge of why it wasn't paid for.

Q: And they did pay for the roof damage in 1997?

A: Yes. We paid for questionable damage in '97 after the review.

16. The Farmington policy issued to plaintiff included the following provisions:

Legal Action Against Us.

No one may bring a legal action against us under this coverage part unless:

The action is brought within two years after the date on which the direct physical loss or damage occurred.

Exclusions.

We will not pay for loss or damage caused by or resulting from any of the following:

Continuous or repeated seepage or leakage of water that occurs over a period of 14 days or more.

17. Plaintiff commenced this action on December 12, 1997, in the District Court of Tulsa County, but did not name Farmington as a defendant. The case was removed to federal court on January 5, 1998. Farmington was joined as a defendant by an amended complaint filed on March 12, 1998.

CONCLUSIONS OF LAW

In this action plaintiff contends that Farmington is liable for the damages it suffered by the wind and hail storm which occurred on May 1, 1992, and for the roof and interior damage following the hail storm of April, 1997. It is undisputed that the Farmington policy only provided coverage from September 1, 1991 until September 1, 1992. Plaintiff is seeking damages for a loss which allegedly occurred 5 years and 7 months after the subject insurance policy lapsed. In denying the defense of statute of limitation, plaintiff asserts: (1) defendant renewed the running of the limitation period when it paid the claim in 1997, and (2) the statute of limitation defense is barred by defendant's failure to give plaintiff written notice of the reason for denying its claim for loss in 1992.

The statutory limitation contained in the Farmington policy grants the plaintiff one year longer than the minimum period under Oklahoma law for bringing an action under a property insurance policy. 36 O.S. § 3617 provides:

No policy delivered or issued for delivery in Oklahoma and covering a subject of insurance resident, located, or to be performed in Oklahoma, shall contain any condition, stipulation or agreement . . . limiting the time within which an action may be brought to a period of less than two (2) years from the time the cause of action

accrues in connection with all insurances other than property . . . , in property . . . such time shall not be limited to less than one (1) year from the date of the occurrence of the event resulting in the loss.

Plaintiff contends that by Traveler's 1997 payment of \$20, 872.44 for the 1992 roof damage, Traveler's acknowledged Farmington's outstanding indebtedness to plaintiff for the full amount of damages occurring in 1997, and that such acknowledgment renews the running of the policy and statutory limitations by operation of 12 O.S. § 101. This statutory provision provides:

Extension of limitation – Part payment, acknowledgment or new promise

In any case founded on contract, when any part of the principle or interest shall have been paid, or any acknowledgment of an existing liability, debt or claim, or any promise to pay the same shall have been made, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby.

Under § 101, in order for a payment upon a liability to cause the renewal of a limitation period, the part payment must be in recognition, acknowledgment or a promise to pay the residue. *Freiberg v. Pierce*, 83 F.2d 961, 966 (10th Cir. 1936). The payment of an unliquidated amount in compromise or settlement of a claim will not operate to renew the statutory period. *Id.* In this instance, Traveler's payment of a "questionable" claim for damages occurring in 1992, was not in recognition of its liability for the full amount of plaintiff's loss. It was in compromise of a "questionable" claim made by plaintiff. Traveler's payment of a lesser amount than demanded by plaintiff, negates the idea of a promise to pay, or a recognition that any further sum remains due. *Id.*

In *Freiberg*, the court explained:

In order to make a money payment a part payment, within the statute, the burden is upon the creditor to show that it was a payment of a portion of the admitted debt, and that it was paid to, and accepted by, him as such, accompanied by circumstances

amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder.

The mere reference to a debt without an attendant request for an extension of time to pay or a promise to pay some additional amount in the future is not sufficient to trigger § 101. *FDIC v. Moore*, 898 P.2d 1329, 1331 (Ok.App. 1995). Traveler's paid the \$20,872.44 as a "questionable" claim under the 1992 Farmington policy, and expressly denied owing plaintiff any additional future payments.

Accordingly, the Court finds and concludes that § 101 does not operate to renew the statutory period by Travelers' payment of a questionable claim, without an admission by Travelers of an additional sum owing. Plaintiff's claims against Farmington, as a subsidiary of Travelers, is barred by the running of the statutory period.

Plaintiff next contends that Farmington is barred from raising the policy or statutory limitation defense by its failure to comply with the Oklahoma Unfair Claims Settlement Practices Act, 36 O.S. § 1251.1. Plaintiff contends that Farmington's failure to give written notice of the reason for denial of its claim for loss in 1992, forever bars Farmington from asserting the statute of limitation as a defense. Section 1251.1 has been renumbered and is now Section 1250.7, and provides:

Within forty-five days after receipt by a property and casualty insurer of properly executed proofs of loss, the first party claimant shall be advised of the acceptance or denial of the claim by the insurer, or if further investigation is necessary. No property and casualty insurer shall deny a claim because of a specific policy provision, condition, or exclusion unless reference to such provision, condition, or exclusion is included in the denial. A denial shall be given to any claimant in writing, and the claim file of the property and casualty insurer shall contain a copy of the denial. If there is a reasonable basis supported by specific information available for review by the Commissioner that the first party claimant has fraudulently caused or contributed to the loss, a property and casualty insurer shall be relieved from the requirements of this subsection. In the event of a weather-related catastrophe or a major natural disaster,

as declared by the Governor, the Insurance Commissioner may extend the deadline imposed under this subsection an additional twenty (20) days.

Penalties for violations of this subsection are contained in Section 1250.14, and provides:

For any violation of the Unfair Claims Settlement Practices Act, the Insurance Commissioner may, after notice and hearing, subject an insurer, other than the State Insurance Fund, to a civil penalty of not less than One Hundred Dollars (\$100.00) nor more than Five Thousand Dollars (\$5,000.00) for each occurrence. Such civil penalty may be enforced in the same manner in which civil judgments may be enforced. Such penalties shall be placed in the Insurance Commissioner's Revolving Fund.

From a reading of the plain statutory language, there is no indication within the Unfair Claims Settlement Practices Act that an insurer is denied contract defenses if it fails to comply with the terms of the Act. To the contrary, the violation section provides that remedies under this Act shall be addressed by the State Insurance Commissioner. The Oklahoma Supreme Court has held that there does not exist a private right of action under the Unfair Claims Settlement Practices Act. *Walker v. Chouteau Lime Co.*, 849 P.2d 1085, 1086 (Okla. 1993). In that the plaintiff has failed to provide the Court with any authority to support its claim that Farmington is barred from raising the statute of limitation defense, it is the findings and conclusions of this Court that said limitation period has run.

Accordingly, it is the Order of the Court that the motion for summary judgment filed by the defendant Farmington Casualty Company is hereby GRANTED.

IT IS SO ORDERED this 9th day of February, 1999.


H. DALE COOK
Senior U.S. District Judge

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

F I L E D

FEB 10 1999 *SA*

MARY L. BELL,
445-46-9325

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Plaintiff,

vs.

Case No. 97-CV-357-M ✓

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

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Defendant.

ORDER

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

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

¹ Plaintiff's protectively filed August 5, 1993, application for supplemental security income was denied and affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held January 24, 1995. By decision dated April 17, 1995, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on February 27, 1997. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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

Plaintiff was born September 13, 1946, and was 48 years old at the time of the hearing. She has a high school education and 101 hours of college credit. She formerly worked as a day care attendant, nurses' aide, housekeeper, secretary, nanny/child monitor, and instructional aide. She claims to have been unable to work since August 1993 as a result of angina, anxiety, anorexia, arthritis pain, seizure disorder, allergies, dysthymia. The ALJ determined that although Plaintiff is unable to perform her past relevant work, she was capable of performing light work subject to the limitation of performing only simple work tasks and only minimal interaction with the public. Based on the testimony of the vocational expert, the ALJ determined that there are a significant number of jobs in the national economy that Plaintiff could perform with these limitations. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) failed to consider the limitations imposed by her malnutrition; (2) failed to appropriately evaluate the severity of her mental impairment; and (3) failed to take significant vocational factors into account. The Court concludes that the record contains substantial evidence supporting the ALJ's denial of benefits in this case, and therefore affirms the Commissioner's denial of benefits.

EFFECT OF MALNUTRITION

The medical record indicates that Plaintiff is 5'4" tall and weighed between 86 and 95 pounds during the relevant time frame. Plaintiff contends that the ALJ erred in finding that Ms. Bell retained the capacity to perform the prolonged standing and frequent lifting demands of light work on a regular basis because he failed to properly consider the limitations imposed by her malnutrition. Plaintiff acknowledges that the medical record does not support a finding that she met the listing requirements for presumptive disability related to malnutrition. However, she "contends that, using the Listings as a framework for decisionmaking," it is apparent that she was limited to no more than sedentary work. The significance of being limited to no more than sedentary work is not clear because given Plaintiff's age, 48 at the time of the hearing, the vocational-medical guidelines ("grids") do not dictate a finding of disability. Appendix 2, Subpart P, Regulations No. 4, 201.21. Moreover, a number of the jobs identified by the vocational expert were within the sedentary range. [R. 29, 74]. The Plaintiff did not cite any authority for use of the Listings as a framework for decision

making, nor has the Court found any. Therefore, the Court rejects the ALJ's failure to perform the Listings as a framework for decision making analysis suggested by Plaintiff as a basis for reversal.

EVALUATION OF MENTAL CONDITION

In June 1992, Plaintiff was admitted to Hillcrest Medical Center for a CT scan of the brain, abdomen, and pelvis, and an electroencephalogram. Her physician reported it was clear Plaintiff had no medical problem, but a psychiatric one. [R. 750]. She was admitted to the psychiatric ward, discharged a day later, and subsequently re-admitted for dehydration and caloric deprivation which her physician felt were associated with depression and psychotic tendencies. [R. 775]. Psychological testing was performed February 23, 1993. Based on the results, the psychologist expressed his opinion that Plaintiff "is not disabled in the performance of vocational activities sufficient to meet her financial needs." [R. 832]. On April 13, 1993, her physician reported that her medical problems do not justify disability. [R. 814].

Records generated after her August 5, 1993, application reflect that Plaintiff received outpatient treatment from Parkside, consisting of one 30-minute session of individual counseling per month, one monthly visit with the doctor for management of her medications, and one 90-minute socialization services appointment per week during which Plaintiff worked on arts and crafts. The socialization services records indicate Plaintiff usually worked independently on her ceramics and needlework projects. [R. 859-862]. On December 30, 1993, Plaintiff complained of poor memory and concentration. She admitted having some auditory hallucinations, but stated they

had been pretty quiet lately. [R. 863-64]. Throughout 1994, Plaintiff's physician reported subjective complaints of anxiety, and continued depressive symptoms. [R. 856, 853, 851]. On January 19 and 26, 1994, Plaintiff's therapist noted there were some indications of hallucinations. [R. 831-32] There were no reports of hallucinations or overtly delusional thinking after that time. [R. 851-862].

A consultative examination was performed on October 12, 1993, by Thomas A. Goodman, M.D. Dr. Goodman stated Plaintiff presented with symptoms of a nonspecific generalized anxiety type disorder. He did not find any significant psychiatric disorder and found Plaintiff to be quite intelligent and oriented. [R. 803-4].

The ALJ did exactly what is required of him in evaluating Plaintiff's mental condition. He accurately noted Plaintiff's medical treatment, therapy, and daily activities and gave specific reasons, supported by the record, for his conclusion that her mental disorders have little effect on her activities of daily living and that she retains the capacity to perform simple work activities which involve minimal interaction with the public. [R. 24-25]. The court's role is limited to determining whether the decision is supported by such evidence in the record that a reasonable person might deem it adequate to support the ultimate conclusion. The court does not reweigh the evidence. *Bernal v. Bowen*, 851 F.2d 297, 299 (10th Cir. 1988). The Court finds that the ALJ appropriately evaluated Plaintiff's mental condition.

VOCATIONAL FACTORS

According to Plaintiff, the ALJ inappropriately relied on activities she performed in therapy as evidence of her ability to work. A review of the ALJ's decision reveals

that he relied on numerous factors in reaching the RFC determination. Further, statements regarding daily activities are evidence to be considered under the Commissioner's regulations. See 20 C.F.R. §404.1529(a); 416.929(a).

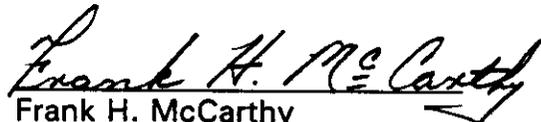
Plaintiff argues that the ALJ decision is not supported by substantial evidence because he did not include fatigue in his hypothetical to the vocational expert and the ALJ ignored vocational expert testimony that anxiety and depression have a high correlation with excessive job absences. *Hargis v. Sullivan*, 945 F.2d 1482, 1292 (10th Cir. 1991) provides that "testimony elicited by hypothetical questions that do not relate with precision all the claimants' impairments cannot constitute substantial evidence to support the Secretary's decision." However, in posing a hypothetical question, an ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990). Answers to hypothetical questions which contain unsupported allegations are not binding on the ALJ. *Gay v. Sullivan*, 986 F.2d 1336, 1341 (10th Cir. 1993). Based on his credibility determination, the ALJ omitted limitations due to lack of stamina, pain and the need to frequently lay down during the day, he also found that Plaintiff's anxiety and depression did not significantly interfere with her daily activities.

The Court finds that the restrictions expressed by the ALJ in the hypothetical posed to the vocational expert are supported by substantial evidence. Further, the Court finds that the ALJ's reliance upon the vocational expert's testimony was appropriate and in accordance with established legal standards.

CONCLUSION

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

SO ORDERED this 10th day of February, 1999.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

FILED

FEB 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARY STOUT,)
)
Plaintiff,)
)
vs.)
)
CIGNA GROUP INSURANCE,)
CONNECTICUT GENERAL LIFE)
INSURANCE COMPANY and GENERAL)
SIGNAL/NELSON ELECTRIC)
COMPANY,)
)
Defendants.)

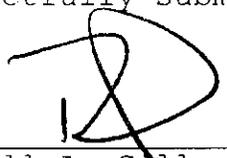
Case No. 98-CV-0224H (J)✓

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STIPULATION OF DISMISSAL

Pursuant to Fed.R.Civ.P. 41(a)(1)(ii), Plaintiff Mary Stout and Defendant Connecticut General Life Insurance Company, stipulate to the dismissal of Plaintiff's Petition against all Defendants with prejudice to refileing.

Respectfully submitted,



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GILL & KEELEY, P.A.
1400 South Boston Building
Suite 680
Tulsa, Oklahoma 74119-3629
(918) 587-1988 - telephone
(918) 587-1993 - facsimile
Attorneys for Plaintiff,
Mary Stout

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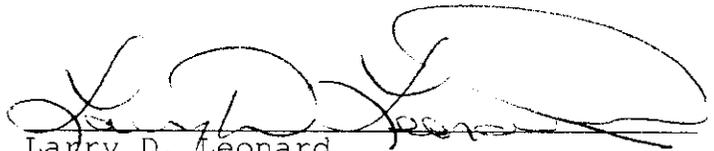
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Larry Leonard, OBA #5380
LEONARD & RINEER, P.C.
1921 South Boston Ave.
Tulsa, Oklahoma 74119-5221
(918) 583-8700
Attorneys for Defendant
Connecticut General Life Insurance
Company

CERTIFICATE OF MAILING

I hereby certify that on the 8th day of February, 1999, I mailed, postage prepaid, a true and correct copy of the above and foregoing instrument to the following:

Randall A. Gill
1400 South Boston Building
Suite 680
Tulsa, OK 74119


Larry D. Leonard

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

FILED

FEB 9 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

B. J. STOUFFER, II,)

Plaintiff,)

vs.)

JAMES SAFFLE, et al.,)

Defendants.)

No. 98-CV-646-H ✓

ENTERED ON DOCKET

DATE **FEB 10 1999**

ORDER

Before the Court is Plaintiff's motion to dismiss without prejudice (#6) filed pursuant to Fed. R. Civ. P. 41. Plaintiff states that he submits his motion "in the interest of judicial economy and at the direction of this Honorable Court's Jan. 7, 1999 Order." In the January 7, 1999 Order, the Court granted Plaintiff's motion for leave to proceed *in forma pauperis* and advised Plaintiff that pursuant to 28 U.S.C. § 1915(b)(1), he was nonetheless responsible for payment of the full \$150 filing fee. Plaintiff was further informed that "he may voluntarily dismiss this action in accordance with Fed. R. Civ. P. 41(a) within thirty (30) days of the entry of this Order, or on or before Feb. 8, 1999, without incurring any fees or costs." (See #4). The Court notes that none of the defendants has been served in this matter.

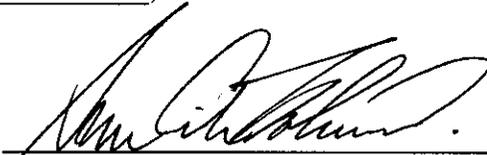
The Court finds that based on Plaintiff's representations in his motion and pursuant to Fed. R. Civ. P. 41(a), the motion to dismiss should be granted and this matter dismissed without prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's motion to dismiss without prejudice (#6) is **granted**.
2. Plaintiff's complaint, as amended, is **dismissed without prejudice**.

IT IS SO ORDERED.

This 9TH day of FEBRUARY, 1999.



Sven Erik Holmes
United States District Judge

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

FILED
FEB 9 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

GLEND A ISOKARIARI,)
)
Plaintiff,)
)
v.)
)
HILLCREST, INC.,)
)
Defendant.)

Case No. 97-CV-1104-H ✓

ENTERED ON DOCKET
DATE FEB 10 1999

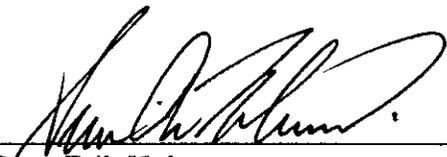
JUDGMENT

This matter came before the Court on a Motion for Summary Judgment by Defendant. The Court duly considered the issues and rendered a decision in accordance with the order filed on February 8, 1999.

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

IT IS SO ORDERED.

This 9TH day of February, 1999.



Sven Erik Holmes
United States District Judge

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

ALPHONSO BROWN,

Petitioner,

vs.

JOHN WHETSEL, Sheriff of Oklahoma
County, Oklahoma; and MARK READ,
Regional Director of the Immigration and
Naturalization Service,

Respondents.

ENTERED ON DOCKET

DATE **FEB 10 1999**

Case No. 99-CV-14-H(J) ✓

FILED

FEB 9 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Now before the Court is Petitioner's Petition for a Writ of Habeas Corpus. [Doc. No. 1]. This case has previously been divided into two habeas corpus claims -- one under 28 U.S.C. § 2254 and one under 28 U.S.C. § 2241(c). See Doc. No. 4.

Petitioner pleaded guilty on September 8, 1998 to sexual battery charges in Tulsa County, Oklahoma case number CF-TU-98-3557. Petitioner's § 2254 claim is based on the following allegation in his Petition: "My attorney did not informed [sic] me that the guilty plea would result in deportation. My attorney in fact told me that if I would plead guilty I would be going home that day, instead I came to Oklahoma County Jail to be processed and deported." Doc. No. 1, pp. 8-9. The Court has previously construed this allegation as stating a claim for ineffective assistance of counsel. See Doc. No. 4.

Section 2254(b)(2) permits an application for a writ of habeas corpus to "be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2). Because the Court finds Petitioner's argument to be without merit in light of current Tenth Circuit precedent, the Court will dismiss Petitioner's § 2254 claim on the merits, without first discussing § 2254's exhaustion requirement.

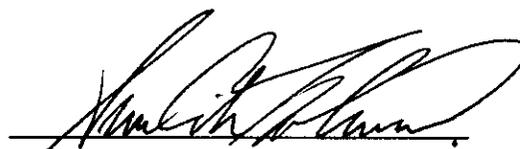
Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts ("Section 2254 Rules") permits the summary dismissal of a § 2254 claim "[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief" From the face of his Petition, Petitioner's § 2254 claim is without merit and Petitioner is not entitled to relief in light of the Tenth Circuit's decision in Varela v. Kaiser, 976 F.2d 1357 (10th Cir. 1992).

In Varela, the Tenth Circuit explicitly held that deportation arising out of a guilty plea in a state criminal proceeding is a collateral consequence of the criminal proceeding. The Tenth Circuit further held that trial counsel's failure to advise his client of such collateral consequences does not amount to ineffective assistance of counsel. Varela, 976 F.2d at 1358. Thus, Petitioner's counsel's alleged failure to inform Petitioner about the deportation consequences of his guilty plea cannot rise to the level of constitutionally deficient assistance of counsel. Petitioner's § 2254 claim is, therefore, without merit.

The Court hereby summarily dismisses Petitioner's § 2254 claim pursuant to Rule 4 of the Section 2254 Rules and 28 U.S.C. § 2254(b)(2). Petitioner's § 2241 claim is still pending and will be resolved at a later time.

IT IS SO ORDERED.

This 9TH day of February 1999.



Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

OSAGE FORD, INC., an Oklahoma corporation,)
and DONALD E. ELLER, an individual,)
)
Plaintiffs,)
)
v.)
)
FORD MOTOR COMPANY, INC., a Delaware)
corporation, and)
FORD DIVISION, a Division of Ford Motor)
Company, and)
FORD MOTOR CREDIT COMPANY, INC., a)
Division of Ford Motor Company,)
)
Defendants.)

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DATE FEB 10 1999

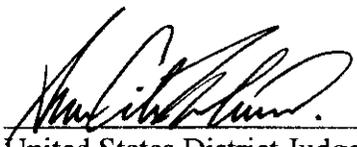
Case No. 97 CV 700H (M) ✓

FILED
FEB 9 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

Now on this 9TH day of FEBRUARY, 1999, upon Stipulation of the Plaintiffs, Osage Ford, Inc. and Donald E. Eller, and the Defendants, Ford Motor Company, Inc., Ford Division, and Ford Motor Credit Company, Inc., it is hereby

ORDERED, ADJUDGED AND DECREED that the above-captioned cause be, and it hereby is, dismissed with prejudice, each party to bear his/its own costs.


United States District Judge

14

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

F I L E D

FEB 09 1999 *SAC*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DONALD J. EVANS,
442-44-0631

Plaintiff,

vs.

Case No. 97-CV-549-M ✓

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

ENTERED ON DOCKET

DATE FEB 10 1999

ORDER

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

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

¹ Plaintiff's January 24, 1994, application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held July 7, 1995. By decision dated July 28, 1995, 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 decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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

Plaintiff was born March 28, 1947, and was 48 years old at the time of the hearing. He has a high school education and additional auto body training. He formerly worked as a mechanic. He claims to have been unable to work since April 1, 1982, as a result of seizure disorder, left knee arthroscopy, residuals from a 1978 fracture C2 on C3, and post traumatic stress disorder. The date last insured for purposes of disability insurance benefits is December 31, 1987. Accordingly, to receive benefits, the record must show that Plaintiff was disabled on or before that date.

The ALJ determined that although Plaintiff is unable to perform his past relevant work, he is capable of performing work activities at the medium exertional level, subject to: avoiding unprotected heights, dangerous machinery, and open flames due to seizures which occur less often than once a month and; reduced concentration due to throbbing headaches, which are relieved by sitting and resting. Based on the testimony of the vocational expert, the ALJ determined that there are a significant

number of jobs in the national economy that Plaintiff could perform with these limitations. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that: (1) the ALJ improperly evaluated the medical evidence concerning Plaintiff's mental impairment; (2) the ALJ improperly discounted Plaintiff's credibility; (3) the ALJ improperly weighed the vocational expert's testimony; and (4) the record lacks evidence that the Appeals Council properly considered Plaintiff's request for review. The Court concludes that the record contains substantial evidence supporting the ALJ's denial of benefits in this case, and therefore affirms the Commissioner's denial of benefits.

ALJ's Evaluation of the Evidence

Plaintiff takes issue with the ALJ's statement: "The claimant has never bothered to obtain treatment for his complaints. . . ." Plaintiff outlines his numerous visits to the VA clinic for his seizure disorder, and argues that the ALJ improperly evaluated the evidence. Review of the ALJ's decision establishes that the ALJ made the quoted comment in reference to Plaintiff's claim that he was disabled by Post Traumatic Stress Syndrome during the relevant time frame. Aside from the seizure disorder, Plaintiff did not seek treatment for any mental impairment during the 1982 to 1987 time-frame. On September 8, 1982, on examination, psychiatrist Gary M. Lee, M.D., noted: "There is no evidence for post-traumatic stress disorder, either by

history or cross-sectional exam on 9/8/82." [Dkt. 371]. "I find no significant evidence of psychiatric disorder." [R. 370]. Eventually, the Veterans Administration found Plaintiff disabled due to post traumatic stress disorder, but this did not occur until 1993, over 5 years after Plaintiff's date last insured for Social Security disability benefits.

Contrary to the Plaintiff's contention that "the evidence plainly shows the Plaintiff suffering from the multiple ailments, both physical and mental, that support his claim of disability since 1983," [Dkt. 6, attachment p. 1-2], the evidence does not disclose that Plaintiff suffered from ailments sufficient to prevent him from being able to perform work during the relevant time frame, April 1, 1982, to December 31, 1987.

Plaintiff testified he experiences "blackouts" which occur one or two times per month. Each such occurrence lasts several minutes. [R. 47]. According to Plaintiff, this condition also existed between 1972 and 1982 when he was working. [R. 50]. On February 15, 1983, the medical records reflect that based on Plaintiff's history and physical examination, temporal lobe seizures were suspected. [R. 216]. March 1983 CT scan and EEG were negative. [R. 214]. The record reflects numerous follow-up visits wherein Plaintiff variously reported seizures occurring from 1 to 4 seizures or black-outs per week, lasting from several seconds to 30 minutes. [R. 174, 176, 178, 191, 192, 195, 201, 208-210]. The record also reflects that Plaintiff was frequently non-compliant in taking Dilantin because he felt like it did not control his seizures but merely eliminated the olfactory aura which preceded the seizures and served as a warning of their onset. Plaintiff was warned against his continued use of alcohol

which was thought to be contributory to his seizure disorder. [R. 202, 204]. A trial of a different anti-convulsive medication, Tegretol, was prescribed but Plaintiff was non-compliant with that medication even though there is no mention of side effects. [R. 190]. On January 6, 1986, following examination which revealed excellent muscle strength, cranial nerves II-XII intact, no cerebellar signs, negative Romberg's sign² and gait within normal limits, the physician noted that there was "no objective evidence either EEG or otherwise for sz [seizure] disorder." [R. 190, 191].

The ALJ's decision appropriately notes the relevant medical history with respect to Plaintiff's seizure disorder, his failure to follow his doctor's prescribed treatment, and the inconsistent reports of the frequency and length of seizures. Contrary to Plaintiff's allegations, the ALJ's conclusions concerning the effect of Plaintiff's seizure disorder are supported by substantial evidence.

CREDIBILITY EVALUATION

Plaintiff asserts that the ALJ failed to perform an appropriate credibility evaluation, claiming: "[t]he ALJ's decision painstakingly lays down a theory of inconsistency in the Plaintiff's proof of his ailments . . ." [Dkt. 6, p. 2].

The Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). Credibility determinations made by an ALJ are generally treated as binding upon review. *Talley v. Sullivan*, 908

² Romberg's test is used to differentiate between peripheral and cerebellar ataxia (failure of muscular coordination). *Dorland's Illustrated Medical Dictionary*, p. 1683 (28th ed. 1994).

F.2d 585, 587 (10th Cir. 1990). The ALJ listed the guidelines set forth in *Luna v. Bowen*, 834 F.2d 161, 165 (10th Cir. 1987), 20 C.F.R. 404.1529(c)(3), and 20 C.F.R. 416.929(c)(3) and appropriately applied the evidence to those guidelines. The ALJ noted the lack of treatment and medication for some of Plaintiff's complaints and that Plaintiff's activities in maintaining 80 acres and livestock were inconsistent with an inability to work. The Court finds that the ALJ evaluated the record, Plaintiff's credibility and allegations of pain in accordance with the correct legal standards established by the Commissioner and the courts.

VOCATIONAL EXPERT TESTIMONY

Plaintiff argues that the ALJ should have accepted the vocational expert's opinion that if claimant was fully credible, there were no jobs he could perform.

Hargis v. Sullivan, 945 F.2d 1482, 1292 (10th Cir. 1991) provides that "testimony elicited by hypothetical questions that do not relate with precision all the claimants' impairments cannot constitute substantial evidence to support the Secretary's decision." However, in posing a hypothetical question, an ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990). Based on his credibility determination, the ALJ omitted limitations of inability to stand more than 15 to 20 minutes, walk more than a block and a half, sit more than one hour, and lack of strength in hands and arms. The Court finds that the restrictions expressed by the ALJ in the hypothetical posed to the vocational expert and upon which the disability determination is based, are supported by substantial evidence. Accordingly, the Court

finds that the ALJ's reliance upon the vocational expert's testimony in his decision was proper and in accordance with established legal standards.

APPEALS COUNCIL REVIEW

Plaintiff complains that since the "Action Of Appeals Council On Request For Review" [R. 12-13] states that "the Appeals Council has considered the applicable statutes, regulations, and rulings in effect as of the date of this action," there is no indication that the Appeals Council "even looked at the evidence, or at the decision of the Administrative Law Judge." [Dkt. 6, p. 4-5].

The Appeals Council denied review. It cited the appropriate regulation and criteria for granting review, and announced that Plaintiff's request for review did not meet those criteria. [R. 12-13]. Plaintiff has not cited any authority suggesting that the Appeals Council's action constitutes a basis for reversal.

CONCLUSION

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

SO ORDERED this 9th day of February, 1999.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

ROBERT M. NORRIS,

Plaintiff,

v.

McDONNELL DOUGLAS
CORPORATION,

Defendant.

ENTERED ON DOCKET
DATE FEB 10 1999

Case No. 98-CV-488BU (E)

FILED

FEB 9 - 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW Plaintiff, Robert M. Norris, pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, and, by stipulation of defendant, McDonnell Douglas Corporation, hereby dismisses this action with prejudice, each party to bear his or its own costs and attorneys fees.

By: _____

Jeff Nix
601 S. Boulder, Suite 610
Tulsa, OK 74119
(918) 587-3193

ATTORNEYS FOR PLAINTIFF

By: _____

David E. O'Melia, OBA No. 6779
Thomas D. Robertson, OBA No. 7665
NICHOLS, WOLFE, STAMPER, NALLY,
FALLIS & ROBERTSON, INC.
Old City Hall Building, Suite 400
124 East Fourth Street
Tulsa, Oklahoma 74103-5010
(918) 584-5182

ATTORNEYS FOR DEFENDANT

SO ORDERED:

UNITED STATES DISTRICT COURT

s/ MICHAEL BURRAGE

DATED: 2-9-99

MICHAEL BURRAGE
United States District Court Judge

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

FILED

FEB - 8 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MICHAEL RAY HUDELSON,)

Plaintiff,)

vs.)

No. 98-C-867-B(E)

ANNA MARIE COWDRY, in her)

individual capacity; RICK PHILLIPS, in)

his individual capacity; R.S. ROHLOFF,)

in his individual capacity; THE CITY OF)

TULSA; and RON PALMER, in his)

individual and official capacities,)

Defendants.)

ENTERED ON DOCKET
DATE FEB 09 1999

ORDER

Before the Court for decision are Defendant R. S. Rohloff's Motion for Qualified Immunity and Motion to Dismiss (Docket #10), Defendant Ron Palmer's Notice of Qualified Immunity Defense and Motion to Dismiss (Docket #11) and Defendant City of Tulsa's Motion to Dismiss (Docket #12).

Plaintiff filed his complaint pursuant to 42 U.S.C. §§1983 and 1988, and the Fourth (4th), Fifth (5th), Ninth (9th) and Fourteenth (14th) Amendments to the United States Constitution. Plaintiff alleges that on or about November 30, 1996, he and friends were at a club in Tulsa and as he was leaving the club, Defendant Cowdry struck him in the face. Plaintiff states he then proceeded to leave to avoid any confrontation and

Parties At

Cowdry attacked him at the door. He claims Cowdry then showed her police badge to the club bouncer and told him she was placing Plaintiff under arrest for sexually assaulting her. Cowdry and the bouncer handcuffed Plaintiff and shortly thereafter, Defendant Tulsa police officers Phillips and Rohloff arrived. Phillips put Plaintiff in the police car with his hands handcuffed behind his back.

Plaintiff alleges that Cowdry then told the officers she was a police officer and wanted to file charges against Plaintiff. Plaintiff states he told the officers he wanted to file charges against Cowdry for striking and assaulting him and that the officers laughed at him, took him out of the patrol car and slammed his head against the side of the car and choked him unconscious until he fell to the cement under the guise of changing handcuffs. Plaintiff alleges that even though Cowdry was off duty and at a bar where considerable drinking was taking place, the officers acted under her direction and did not do a competent investigation. Plaintiff alleges Cowdry staged the incident to help promote herself within the Tulsa Police Department.

Plaintiff alleges the officers acted in concert under color of law in reckless disregard for Plaintiff's constitutional rights, causing him grievous bodily pain, mental anguish, pain and suffering, which resulted in medical expenses and permanent injuries to his arm, shoulder and head.

Plaintiff sues Chief Palmer under the premise that he failed to properly supervise, train and protect Plaintiff's rights and refused to take any action against the officers, allowing Cowdry's allegations to go to a full jury trial, where he was acquitted.

Plaintiff seeks actual damages against all defendants and punitive damages against the individual police officers.

Defendant Rohloff moves to dismiss pursuant to F.R.C.P. 12(b)(6) on the ground Plaintiff's complaint fails to state a claim on which relief may be granted. Rohloff claims he is entitled to qualified immunity which shields a police officer from liability when his conduct does not violate "clearly established" constitutional rights of which a reasonable person would have known, citing to *Harlow v. Fitzgerald*, 457 U.S.800 (1982). Under *Harlow*, qualified immunity is available unless an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took action with the malicious intention to cause a deprivation of constitutional rights or other injury."

A review of the complaint shows the only allegations directed against Rohloff are that he arrived with officer Phillips and that Cowdry told him and Phillips that she was a police officer and that she wanted to file charges against Plaintiff, that he acted under the direction of Cowdry and did not do a competent investigation.

In his response brief, Plaintiff makes more specific allegations against this Defendant, however, these are not encompassed in the allegations of the complaint.¹ Absent amendment, which has not been requested, or evidentiary material supporting the additional allegations contained in the response brief, the Court is limited to a review of

¹None of the defendants filed reply briefs in spite of new allegations being raised in the response brief. See N.D. LR's 7.1 D. and 7.2 E.

those allegations of the complaint properly before it. There are no allegations that Rohloff participated in or was even present during the alleged physical injury to Plaintiff. There are no allegations which support Plaintiff's arguments that Rohloff was protecting Cowdry or Phillips. There is nothing to indicate Rohloff "continued" in prosecuting Plaintiff or that he "suborned and encouraged perjury." The only allegation which could arguably be connected to a violation of Plaintiff's constitutional rights is that he did not do a competent investigation. The failure to fully investigate, to "exhaust every possible lead, interview all potential witnesses, and accumulate overwhelming corroborative evidence" generally establishes negligence at best, which falls outside the standard to which officers are held. *Beard v. City of Northglenn, Colo.*, 24 F. 3d. 110 (10th Cir. 1994), citing *United States v. Dale*, 991 F.2d. 819, 844 (D.C.Cir.1993). Further, it is not clear which constitutional right, of which this defendant should have been aware, was being violated. Accordingly, Defendant Rohloff's Motion to Dismiss is granted.

Defendant Police Chief Palmer ("Palmer") moves for dismissal on the ground that he is entitled to qualified immunity because Plaintiff has not alleged facts and law to prove Palmer acted unreasonably in light of clearly established law.

The allegations against Palmer, in his individual capacity, are that he was "over the control, supervision and actions of the three (3) officers, including the entire Police Department of the City of Tulsa and failed to properly supervise, train and protect the individual rights of the Plaintiff and refused to take any action against the Defendants." Plaintiff also alleges Palmer allowed the matter against him to go to trial, where he was

found "not guilty."

In response, Plaintiff states this motion is premature because he has not had adequate time for discovery to allow him to prove the factual allegations of the complaint. Plaintiff urges Palmer's "lack of inaction after the incident" clearly shows he has established a policy and custom of failing to protect individual Constitutional rights. Plaintiff asserts that if the Court feels dismissal is warranted, he should be allowed to amend to assert additional facts.

The Tenth Circuit addressed a similarly vague complaint in *Breidenbach v. Bolish*, 126 F.3d 1288 (10th Cir. 1997), cited by Plaintiff. The Court concluded that Plaintiffs should have sought to obtain the facts rather than file a civil action and directed the trial court on remand to grant the motion to dismiss without prejudice to refile and with leave to amend. The Court finds the same result should apply in this case. The conclusory allegations asserted by Plaintiff are insufficient to state a supervisory liability claim against Palmer in his individual capacity.

Finally, the Court addresses Defendant City of Tulsa's ("City") Motion to Dismiss based upon failure to state a claim. There are no factual allegations directed toward the City.

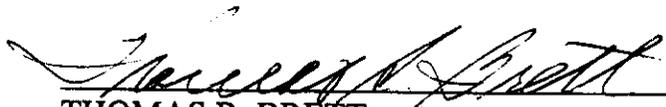
To impose municipal liability, a plaintiff must prove the existence of a policy or custom of the city which caused the alleged constitutional violation. A policy may not be inferred from a single incident of alleged misconduct. *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

Additionally, a plaintiff must demonstrate that through deliberate conduct the City was the moving force behind the alleged injury. *See Bryan County v. Brown*, 520 U.S. 808 (1997).

Plaintiff counters that it is entitled to proceed under notice pleading pursuant to Fed. Rules of Civ. Pro. 8. While it is true that municipalities are not held to a higher pleading standard in §1983 actions under the holding of *Leatherman v. Tarrant County Narcotics Intelligence Coordination Unit*, 507 U.S. 163 (1993), Plaintiff's complaint fails to satisfy even minimal notice standards. Plaintiff's complaint totally fails to state what constitutional rights the City's policies or customs have caused to be violated and what policies or customs these are to begin with. Further, construing the complaint as liberally as possible, any actions complained of appear to arise out of a single incident.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED THAT Defendants Rohloff, Palmer and City of Tulsa's Motions to Dismiss are granted without prejudice as set forth herein.

DONE THIS 8th DAY OF FEBRUARY, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

FEB - 5 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEBRA DILLON,)
)
 Plaintiff,)
)
 vs.)
)
 BAKER PETROLITE CORPORATION,)
)
 Defendant.)

No. 98-C-881-B(M)

ENTERED ON DOCKET
DATE ~~FEB 09 1999~~

ORDER

Before the Court are Defendant's Motion for Summary Judgment (Docket No. 3) and Defendant's Application for Ruling on It's Motion for Summary Judgment (Docket No. 4) and the Court, being fully advised, finds the same shall be granted.

Defendant filed it's Motion for Summary Judgment on December 11, 1998. Response was due no later than December 29, 1998. See N.D. LR 7.1(C). On January 8, 1999, defense counsel sent a letter to Plaintiff's counsel enclosing a copy of an Application For Ruling on Motion for Summary Judgment which counsel advised would be filed if a response was not received by January 15, 1999. Defense counsel received no response to this letter and thereafter filed the Application for Ruling on Motion for Summary Judgment on January 15, 1999.

On January 19, 1999, without leave of Court to file out of time, Plaintiff filed Response to Defendant's Motion for Summary Judgment. Under the circumstances, the

Court has the authority to strike the response brief and grant Defendant's Application for Ruling on its Motion for Summary Judgment and the relief requested thereunder.¹ The Court, however, declines this in favor of a ruling on the merits.

Defendant has moved for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure and the corresponding local rule for the Northern District of Oklahoma, which require movant to submit a statement of undisputed material facts which entitle it to entry of summary judgment. Defendant submitted the following facts:

1. Plaintiff was hired by Defendant on February 14, 1996.
2. Plaintiff's employment was terminated by Defendant on July 18, 1997.
3. Plaintiff executed a "Severance Agreement and Release" ("Release") on July 18, 1997. In the Release, Plaintiff acknowledged that "this Agreement is an important legal document" and that she should "consult [her] attorney before signing" the Agreement. Plaintiff acknowledged that she would receive severance pay in return for signing the Release.

4. The Release provided:

"In exchange for the severance pay, I unconditionally RELEASE Baker Hughes Incorporated, its affiliates, subsidiaries, directors, officers, agents and employees, (hereinafter referred to as "Releasees") from any and all claims arising out of my employment with Company or the termination of my employment. I understand that this Release is meant to be as general as possible and covers all claims of any nature whatsoever whether or not I know the claim exists at this time including but

¹Plaintiff's counsel failed to timely file motions for extensions of time and/or respond in another case assigned to this Court, Friday v. Pennwell Publishing Co., No. 97-CV-397. Repeated violation of the Court rules could result in sanctions being imposed on counsel, including suspension from practice before this Court. See N.D. LR 1.4.

not limited to contract claims, tort claims, and claims under any federal, state, or local law. Without limiting the general nature of the Release, I specifically release the Releases from any and all claims that I may have under federal, state and/or local civil rights laws, including but not limited to the Age Discrimination in Employment Act."

Plaintiff failed to submit a statement of controverted facts in response pursuant to N.D. LR 56.1(B), which states: "The response brief ... shall begin with a section which contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the number of the movant's fact that is disputed. All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party." Defendant urges it is entitled to summary judgment on this basis. The Court agrees but finds summary judgment should be entered on the basis of the substantive law underlying Plaintiff's claims.

Summary Judgment Standard

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342 (10th Cir. 1986). In *Celotex*, the court stated:

The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts."

Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Conaway v. Smith*, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. *Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."

* * *

A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary

judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

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

Arguments and Authority

Defendant urges it is entitled to summary judgment based upon the unconditional release signed by Plaintiff at the time she was discharged. Plaintiff's untimely brief, consisting of approximately two (2) pages of sarcastic histrionics teetering on the edge of unprofessionalism, does nothing to properly preserve any issue of fact to be resolved by a jury.²

The Court concludes the release signed was valid and bars Plaintiff's attempt to bring an action under the ADEA or Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq.; 29 U.S.C. §626(f)(1); see also, *Wagner v. The NutraSweet Co.*, 95 F.3d 527 (7th Cir. 1996).

Plaintiff's affidavit, attached to her brief, containing the conclusory allegation that she signed the release "under extreme distress and distraught" is legally insufficient to defeat summary judgment. *Vails v. Southwestern Bell Telephone Company*, 504, F. Supp.

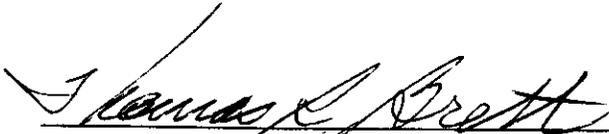
²Plaintiff's "arguments," at pg. 2, "Seems fair to me. NOT!", "Of course we all know that the vast majority of documents are in fact executed, with one of the parties crying hysterically, in the corporate bathrooms of America" and "Offer, acceptance, consideration yadda yadda yadda, Hornbook law, blah blah blah, etc." are more typical of late night television monologues than legal briefs. They appear to cross the fine line separating creative argument from irrelevant argument, particularly where they are not supported by evidentiary matter.

740 (W.D. Okla. 1980). There is no evidence that Plaintiff was misled into signing the release, that she was fraudulently induced or deceived. Further, even though Plaintiff states she did not receive a copy of the release until after the time had run within which to revoke her acceptance of it, she does not produce the referenced post-marked envelope to support this, she does not dispute that she was aware she had seven days within which to revoke the release and she accepted and received severance pay pursuant to the release she executed.

The Court further concludes Defendant is entitled to summary judgment on Plaintiff's contract claims based upon the unambiguous clear language of the release. *Corbett v. Combined Communications Corp.*, 654 P.2d 616 (Okla. 1982).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT Defendant's Motion for Summary Judgment is granted. Each party is to bear its attorney fees. Costs are assessed against Plaintiff upon timely application by Defendant pursuant to N.D. LR 54.1.

DATED THIS 5th DAY OF FEBRUARY, 1999.


THOMAS R. BRET
UNITED STATES DISTRICT JUDGE

2-4-99
fe

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

_____)
ELECTRONIC CHEMICALS, INC.,)
)
Plaintiff,)
)
v.)
)
UNITED STATES OF AMERICA, et al.,)
)
Defendants.)
_____)

F I L E D

FEB 5 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-771-E

ENTERED ON DOCKET

DATE **FEB 09 1999**

SETTLEMENT AGREEMENT AND CONSENT ORDER

WHEREAS, on August 21, 1996, Plaintiff, Electronic Chemicals, Inc. ("ECI") filed a Complaint in the above-captioned matter, alleging contribution claims under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675;

WHEREAS, the Complaint seeks, among other things, a money judgment for reimbursement of response costs incurred by ECI at its principal place of business at 5201 West 21st St., Tulsa, Oklahoma ("the Site");

WHEREAS, the Complaint alleges that as a direct result of the release or threatened release of hazardous substances, ECI has incurred response costs in excess of \$950,000;

WHEREAS, the Complaint alleges that between 1942 and approximately 1947, the United States obtained ownership of all or a portion of the Site;

WHEREAS, the Parties have agreed to enter into this Settlement Agreement and Consent Order ("Agreement") as a full and final resolution of any and all claims that either

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were asserted or could now or hereafter be asserted by ECI against the United States in connection with the Site for Covered Matters as defined below;

WHEREAS, the United States enters into this Agreement as a final settlement of all claims in connection with the Site and neither admits to any facts concerning the Site, nor to any alleged liability arising from any occurrences or transactions concerning the Site;

WHEREAS, the Parties agree that this settlement is just, fair, adequate and an equitable resolution of all claims concerning the Site; and

WHEREAS, it is in the interest of the public, the parties and judicial economy to resolve the issues in this action without protracted litigation, including a trial:

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that:

GENERAL TERMS

1. The Parties to this Agreement are ECI and the United States.
2. This Agreement applies to, is binding upon, and inures to the benefit of ECI (and its successors, assigns, and designees) and the United States.
3. For purposes of entry of this Agreement only, the Parties agree that the Court has jurisdiction over this matter and the parties to the Agreement.

DEFINITIONS

4. "Consent Agreement and Final Order Between ECI and the Oklahoma Department of Environmental Quality" shall mean the Consent Agreement and Final Order for Investigation and Removal Action entered by ECI and the Oklahoma Department of Environmental Quality in August 1993.
5. "Covered Matters" shall mean any and all claims alleging contamination at the

Site or emanating from the Site, whether based upon statute, contract, or tort, that were asserted, or could now or hereafter be asserted against the United States arising out of, or in connection with, activities involving the former ownership and use of the Site by the United States, provided, however, that covered matters do not include claims related to natural resource damages.

6. The "Site" shall mean ECI's principal place of business at 5201 West 21st Street, Tulsa, Oklahoma 74107, as described in the Complaint in the above-captioned matter.
7. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities, and shall further include the Defense Plant Corporation and any of its successors or other defendants named in this case.

EFFECTIVE DATE

8. The Agreement shall become effective upon the date of entry by the Court ("Effective Date"). If for any reason the District Court for the Northern District of Oklahoma does not enter the Consent Order, appended to this Agreement, the obligations set forth in this Agreement are null and void.

PAYMENT

9. As soon as reasonably practicable after the Effective Date of this Agreement, the United States will pay \$50,000 to ECI. Said payment shall be made in the form of a check made payable to Electronic Chemicals, Inc. and Shipley, Jennings & Champlin and sent to Shipley, Jennings & Champlin c/o Blake

Champlin at 201 West Fifth St., Suite 201, Tulsa, Oklahoma 74103.

10. The payment required by the United States under this Agreement is subject to the availability of funds appropriated for such purpose. No provision of this Agreement shall be interpreted or construed as a commitment or requirement that the United States obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, et seq., or any other applicable provision of law.

COVENANTS BY ECI

11. Upon the Effective Date of this Agreement, ECI hereby releases, discharges, covenants and agrees not to assert (by way of the commencement of an action, the joinder of the United States in an existing action or in any other fashion) any and all claims, causes of action, suits or demands of any kind whatsoever in law or in equity which it may have had, or hereafter have, against the United States for Covered Matters.
12. ECI further agrees to indemnify and hold harmless the United States from any and all past and future claims arising from or relating to the Consent Agreement and Final Order between ECI and the Oklahoma Department of Environmental Quality. ECI also agrees to indemnify and hold harmless the United States from any and all future causes of actions, claims, liens, or subrogated or contribution claims made against the United States concerning Covered Matters by ECI's successors in interest to the Site.

COVENANT BY THE UNITED STATES

13. The United States hereby releases and covenants not to sue ECI for Covered Matters, except the United States specifically reserves its right to assert against ECI any claims or actions regarding the Site brought on behalf of EPA or a natural resource trustee.

CONTRIBUTION PROTECTION

14. The Parties acknowledge and agree that the payment to be made by the United States pursuant to this Agreement represents a good faith compromise of disputed claims and that the compromise represents a fair, reasonable, and equitable discharge for the Covered Matters addressed in this Agreement. With regard to any claims for costs, damages or other claims against the United States for Covered Matters under or addressed in this Agreement, the Parties agree that the United States is entitled to, as of the effective date of this Agreement, contribution protection pursuant to section 113(f) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, ("CERCLA"), 42 U.S.C. § 9613(f), the Uniform Comparative Fault Act, and any other applicable provision of federal or state law, whether by statute or common law, discharging the United States' liability for contribution to persons not party to this Agreement. Any rights the United States may have to obtain contribution or otherwise recover costs or damages from persons not party to this Agreement are preserved.

EFFECT OF AGREEMENT AND DISMISSAL OF CLAIMS

15. This Agreement was negotiated and executed by ECI and the United States in good faith and at arms length and is a fair and equitable compromise of claims. The Agreement shall not constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of the United States, its officers, or any person affiliated with it.
16. Upon entry by the Court, the Agreement shall constitute a final judgment between the Parties.
17. Upon entry by the Court, all claims against the United States in the above-captioned matter shall be dismissed with prejudice. ECI and the United States shall each bear their own costs and expenses, including attorney's fees, in this case.

REPRESENTATIVE AUTHORITY

18. Each undersigned representative of the parties to this Agreement certifies that he or she is fully authorized by the party to enter into and execute the terms of this Agreement and to legally bind each party to this Agreement. By signature below, all of the parties consent to entry of this Agreement.

FOR PLAINTIFF:

Date 2-4-99



CHARLES W. SHIPLEY
BLAKE K. CHAMPLIN
JAMIE TAYLOR BOYD
201 West Fifth Street, Suite 201
Tulsa, Oklahoma 74103
(918) 582-1720

FOR DEFENDANTS:

LOIS J. SCHIFFER
Assistant Attorney General
Environment and Natural Resources
Division

Date: 12-11-98



ERIC G. HOSTETLER
United States Department of Justice
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 305-2326

ORDER

UPON CONSIDERATION OF THE FOREGOING, the Court hereby finds that this Agreement is fair and reasonable, both procedurally and substantively, consistent with applicable law, in good faith, and in the public interest. THE FOREGOING Agreement is hereby APPROVED and this action is DISMISSED WITH PREJUDICE.

The Court finds that with regard to any claims for costs, damages or other claims against the United States for Covered Matters under or addressed in this Agreement, the United States is entitled to, as of the effective date of this Agreement, contribution protection pursuant to section 113(f) of CERCLA, 42 U.S.C. § 96513(f), the Uniform Comparative Fault Act, and any other applicable provision of federal or state law, whether by statute or common law.

There being no just reason for delay, this Court expressly directs, pursuant to Rule 54(b), Fed. R. Civ. P., ENTRY OF FINAL JUDGMENT in accordance with the terms of this Agreement, SIGNED and ENTERED this 5TH day of Feb. 1998.

Plaintiff, ECI, and Defendant, the United States, shall each bear their own costs and expenses, including attorneys' fees, in this case.

Dated: 2/5/99


James O. Ellison, Senior Judge
United States District Court

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

FILED

FEB - 8 1999

INTERNATIONAL UNION OF)
OPERATING ENGINEERS, LOCAL 627,)
AFL-CIO,)
)
Plaintiff,)
)
vs.)
)
ZAPATA INDUSTRIES, INC.,)
)
Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-cv-21-B(J)

Judge Brett

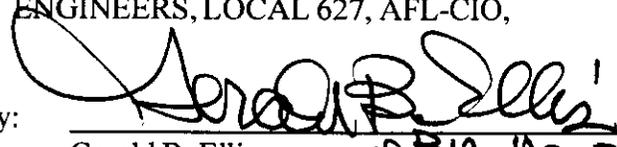
ENTERED ON DOCKET
DATE FEB 09 1999

**JOINT STIPULATION OF
DISMISSAL WITHOUT PREJUDICE**

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereto stipulate that the Plaintiff shall dismiss without prejudice this matter in its entirety, with each party to bear their respective attorneys' fees and costs.

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 627, AFL-CIO,

By:



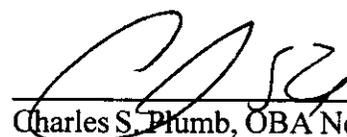
Gerald B. Ellis
12109 East Shelly Drive
Tulsa, OK 74128
(918) 437-0370

OBIA No. 2693

Attorney for Plaintiff

DOERNER, SAUNDERS, DANIEL &
ANDERSON, L.L.P.

By:



Charles S. Plumb, OBA No. 7194
Michael C. Redman, OBA No. 13340
320 South Boston, Suite 500
Tulsa, OK 74103
(918) 582-1211
(918) 591-5362 (FAX)

Attorneys for Defendant
Zapata Industries, Inc.

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

F I L E D

MICHELLE JACKSON-WRIGHT,
SSN: 447-78-3957,

Plaintiff,

v.

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

Defendant.

FEB 09 1999 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE NO. 97-CV-971-M ✓

ENTERED ON DOCKET

DATE FEB - 9 1999

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 9th day of Feb., 1999.

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

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

FEB 09 1999 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MICHELLE JACKSON-WRIGHT,
SSN: 447-78-3957,

PLAINTIFF,

vs.

CASE No. 97-CV-971-M ✓

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

DEFENDANT.

ENTERED ON DOCKET

DATE FEB - 9 1999

ORDER

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

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

¹ Plaintiff's August 29, 1994 application for benefits was denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held February 5, 1996. By decision dated March 27, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on September 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.

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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 February 7, 1965 and was two days short of her 31st birthday the date of the hearing. [R. 29, 302]. She claims to have been unable to work since July 1, 1993, due to arthritis and severe headaches, severe body pain and other symptoms associated with sarcoidosis.²

The ALJ determined that Plaintiff is severely impaired by sarcoidosis and shortness of breath but that she retained the residual functional capacity (RFC) to perform a full range of sedentary work. [R.20]. He determined that Plaintiff has no past relevant work (PRW) and, applying the medical-vocational guidelines, 20 C.F.R., Pt. 404, Subpt. P, App. 2, Rule 201.27, (grids), found Plaintiff not disabled as defined by the Social Security Act. [R. 21]. The case was thus decided at step five of the

² Sarcoidosis: A disease of unknown etiology characterized by widespread granulomatous lesions that may affect any organ or tissue of the body. The liver is frequently affected, as are the skin, lungs, lymph nodes, spleen, eyes and small bones of the hands and feet. *Tabor's Cyclopedic Medical Dictionary*, 17th Ed. (1989), p. 1749.

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 erred in relying conclusively on the grids to find that she is not disabled and that he improperly disregarded the treating physicians' opinions. Because the Court finds it necessary to reverse and remand this claim to the Commissioner to reassess Plaintiff's credibility and to reconsider the medical evidence, it is not now necessary to address the propriety of applying the grids in this case.

Both parties extensively briefed the medical portion of this record. There is no dispute that Plaintiff has sarcoidosis. At issue in this case is the severity of complications caused by Plaintiff's sarcoidosis. The ALJ applied the grids after finding Plaintiff's allegations regarding the severity of the sarcoidosis related symptoms not fully credible. To do this, the ALJ compared Plaintiff's testimony of disabling bowel problems, pain, hand weakness and headaches with the medical record. He determined Plaintiff's credibility was "substantially diminished because of many inconsistencies between her testimony and the objective evidence." [R. 18].

The ALJ stated that Plaintiff's complaints of weakness in both hands were not credible because "there is no evidence that she ever complained to any physician of any problems with her hands." *Id.* However, in its review of the medical record, the Court has found several references by treating physicians of complaints of pain in the hands and feet and diagnosis of arthritis in Plaintiff's hands and knees as well as medication prescribed for treatment of that condition. [R. 93, 98, 114, 254].

The ALJ found Plaintiff's allegations of frequent severe headache not credible because she complained to her physicians only a "few times" and appeared comfortable and in no distress at the hearing even though she equated the pain at the time to a "7" on a "0-10 pain intensity scale." [R. 18]. Yet, the medical record reveals complaints of severe headache pain and treatment with medication for headache recorded by Plaintiff's treating physicians no less than 14 times. [R. 61, 65, 107, 114, 146, 213, 215, 217, 222, 223, 257, 267, 268, 298].

The ALJ minimized Plaintiff's statement that her weight gain was a side effect of her medication by implying that 40 pounds on a 5'2 $\frac{3}{4}$ " body frame was not significant.³ [R. 62, 257, 268]. He discredited Plaintiff's allegations of other side effects from medication, including muscle spasm, because "there is no evidence that she ever complained to her physicians about any side effect. [R. 18-19]. This statement is also factually inaccurate as revealed by the record. [R. 62, 76, 79, 93, 115, 256].

The ALJ stated the medical evidence shows no current involvement or treatment for sarcoidosis. [R. 19]. Yet, ongoing treatment for that time period was evident in the record. Plaintiff brought to the hearing on February 5, 1996, a short letter dated December 12, 1995, and office treatment notes covering the time period October 6, 1995 through December 20, 1995, from her treating physician, James Millar, M.D. [R.

³ Later in his decision, the ALJ used Plaintiff's treating physician's comment about her sciatic pain being "most likely related" to her weight gain to discredit the physician's finding of peripheral neuropathy.

267-268]. After the hearing, progress notes signed by Ronald H. English, M.D., dated January 19, 1996, were provided to the ALJ by Plaintiff. [R. 269]. Dr. English's RFC evaluation, dated September 17, 1995, was included in the medical evidence available to the ALJ well before the hearing. [R. 254-256]. Contrary to the ALJ's finding, the Court finds medical involvement and treatment as recent as the month before the hearing and evidence that treatment had been routinely sought and given within five months of the hearing as "current."

Plaintiff's unsuccessful work attempt at a convenience store in 1994, viewed by the ALJ as inconsistent with her testimony that she was disabled, does not demonstrate that she could perform, on a sustained basis, the full range of sedentary work eight hours a day for five days a week. See *Byron v. Heckler*, 742 F.2d 1232, 1235 (10th Cir. 1984).

Also, the ALJ stated that he had "considered" Plaintiff's list of 20 medications in arriving at his decision. [R. 18]. However, in a later paragraph on the same page of his decision, the ALJ stated among his reasons for finding Plaintiff's allegations not fully credible, "the lack of medication for severe pain." *Id.* He did not state where in the record he found inconsistencies between the list of medication and the records of prescribed medication or, indeed, whether that was the basis for his finding. Furthermore, the ALJ's comment that Prednisone, the steroid prescribed for treatment of sarcoidosis, was not on Plaintiff's list of current medications is also a misstatement of the facts. Deltasone, ninth listed medication on Plaintiff's list, is a brand of Prednisone tablets. See *Physician's Desk Reference*, 49th Ed. 1995, p. 2536.

The ALJ stated that Dr. Millar had "diagnosed" Plaintiff with sciatica as being related to weight gain and then determined that Dr. Millar's opinion that Plaintiff has peripheral neuropathy is not consistent with his office notes. [R. 19]. Dr. Millar's December 6, 1995 treatment note indicated that, on that date, Plaintiff was being seen for "intermittent chest discomfort, continuation of the headaches and pain radiating down the right leg along the region of the sciatic nerve." [R.268]. Although he did comment that the sciatica was most likely related to weight gain, there was no such "diagnosis" and the dosage of Prednisone, for treatment of sarcoidosis, was increased due to complaints of complications from sarcoidosis, including pain. *Id.* It is not clear what inconsistency the ALJ found between this note and Dr. Millar's statement in his December 12, 1995 letter that Plaintiff "also has peripheral neuropathy related to sarcoid." [R. 267].

The ALJ's statement that Dr. J. Wade, a neurologist, reported on March 13, 1995 that Plaintiff's examination was "normal" is also inaccurate. [R. 16]. Dr. Wade reported to Dr. Towsley that it was "unclear at this point what stage of her disease she is presently in. It will be necessary to obtain further information concerning her staging." [R. 213]. He also reported that Plaintiff appeared to be having "a flare of her sarcoidosis." *Id.*

Given these discrepancies, the Court's examination of the record leads it to conclude that the ALJ failed to properly evaluate Plaintiff's claim of constant and debilitating pain, side effects from medication, headache and sarcoidosis related complaints. The credibility determination made by the ALJ was based upon

misinterpretation of the evidence. Therefore, the Court cannot say that his decision was based upon substantial evidence. Because the ALJ found that Plaintiff can do the full range of sedentary work, her restrictions matter greatly. This case must be remanded to the Commissioner to evaluate the evidence and Plaintiff's credibility under the guidelines promulgated by the regulations and the courts. Then, if it is found that Plaintiff cannot perform all the functions of sedentary work as it is defined by the regulations, 20 CFR § 404.1567, the grids should not be applied conclusively and a vocational expert should be called. Where exertional limitations prevent the claimant from doing the full range of work...or where nonexertional impairments are also present, the grids alone cannot be used to determine the claimant's ability to perform alternative work. See *Thompson v. Sullivan*, 987 F.2d 1482, 1491 (10th Cir. 1993).

The ALJ's additional error in disregarding Plaintiff's treating physician's opinion also requires reversal of this case. Among the medical records of Ronald H. English, M.D., is a "Physician's Residual Functional Capabilities (RFC) Evaluation" form signed September 17, 1995. Dr. English set forth sitting, standing/walking, lifting, carrying, pushing/pulling, bending, squatting, crawling, climbing, reaching above, stooping, crouching, kneeling restrictions due to arthritis and sarcoidosis in his evaluation. [R. 254-255]. He noted objective signs of pain as redness and muscle spasm. [R. 256]. He marked pain as "severe (would preclude the activity precipitating the pain.)" *Id.* He noted that Plaintiff would need rest periods during the day and will probably miss work due to exacerbations of pain "as needed." *Id.* Dr. English also remarked that

Plaintiff "will probably be an unreliable employee" and noted that this condition would be "life long!" [sic] *Id.*

The only comment the ALJ made about the RFC evaluation performed by Dr. English on September 17, 1995 was:

The estimation of the claimant's physical capacity in Exhibit 39 is not supported by the underlying medical notes compiled by that treating physician because no impairments are set out as a diagnosis which would serve to reduce the claimant's ability to perform work-related activities. Therefore, the opinion in Exhibit 39 is given minimal weight under the criteria set out in 20 CFR 416.927(d).

[R. 19].

20 CFR 416.927(d) requires that a treating physician's opinion, if it is well supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in claimant's record be given **controlling weight**. *Castellano*, 26 F.3d at 1029. If the opinion of the claimant's physician is to be disregarded, specific, legitimate reasons for this action must be set forth. *Frey v. Bowen*, 816 F.2d 508, 512 (10th Cir. 1987). Here, the ALJ made only a conclusory statement that the RFC evaluation performed by Plaintiff's treating physician, Ronald H. English, M.D., is not supported by his medical notes.

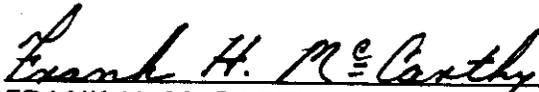
There is no indication from the ALJ's decision what medical evidence he determined conflicted with this evaluation of Plaintiff's RFC. Since Dr. English's RFC evaluation is the only assessment by a medical care provider of Plaintiff's limitations in the record and, since the ALJ did not sufficiently articulate good cause for disregarding and rejecting the opinion of Plaintiff's treating physician, his conclusory

statement that the treating physician's opinion was not supported by the notes is insufficient under the established precedent. See *Goatcher v. United States Department of Health & Human Services*, 52 F.3d 288, 290 (10th Cir. 1995) (ALJ must examine other evidence to see if it outweighs the treating physician report, not the other way around). In addition, the ALJ must consider the following specific factors to determine what weight to give any medical opinion: (1) the length of the treatment relationship and the frequency of examination; (2) the nature and extent of the treatment relationship, including the treatment provided and the kind of examination or testing performed; (3) the degree to which the physician's opinion is supported by relevant evidence; (4) consistency between the opinion and the record as a whole; (5) whether or not the physician is a specialist in the area upon which an opinion is rendered; and (6) other factors brought to the ALJ's attention which tend to support or contradict the opinion. 20 C.F.R. § 404.1527(d)(2)-(6); *Gotcher* 52 F.3d at 290. Here, as in *Goatcher*, the ALJ gave "short shrift" to the opinion of Dr. English, the physician who had rendered long term treatment. The ALJ must give more than a conclusory statement for rejection of the treating physician's opinion. *Goatcher*, 52 F.3d, p. 290. The Commissioner must apply the correct legal standards, and show that he has done so. *Winfrey*, p. 1019.

For the above reasons, the case is REVERSED and REMANDED for further proceedings, including reconsideration of the medical evidence and for a credibility determination in accordance with correct legal standards and, if necessary, a

supplemental hearing for testimony by a vocational expert on the impact, if any, of Plaintiff's impairments on the availability of jobs in the economy that she can perform.

Dated this 9th day of Feb., 1999.


FRANK H. MCCARTHY
UNITED STATES MAGISTRATE JUDGE

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

MICHAEL JOHNSON, et. al,)
)
 Plaintiffs,)
)
 vs.)
)
 SMITH & NEPHEW RICHARDS, INC.,)
)
 Defendants.)

ENTERED ON DOCKET

DATE FEB - 9 1999

Case No. 97-C- 363-K ✓

F I L E D

FEB 09 1999 *SLC*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Now before the Court is the Plaintiff, Rose Robinson's, Motion for Dismissal Without Prejudice (#6). The Plaintiff does not wish to pursue her claims at this time. The Defendant has no objection to the dismissal..

It is therefore Ordered that Plaintiff Rose Robinson be dismissed without prejudice as a Plaintiff in this case.

IT IS SO ORDERED THIS 8 DAY OF FEBRUARY, 1999.



TERRY C. KEAN, Chief
UNITED STATES DISTRICT JUDGE

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

FILED
FEB - 5 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

NANNETTE BIBLE,)
)
) **Plaintiffs,**)
)
) **v.**)
)
) **ADVANCED SPINE FIXATION**)
) **SYSTEMS, INC.,**)
)
) **Defendant.**)

Case No. 98- CV-397 B (E)

FILED ON DOCKET
DATE FEB 08 1999

ORDER OF DISMISSAL WITHOUT PREJUDICE

Now on this 5th day of Feb., 1999, this matter comes on for consideration of the parties' Joint Stipulation. The Court having examined the files and records herein, having considered the legal arguments of and authorities cited by the parties, and being otherwise fully advised in the premises, finds and adjudges as follows:

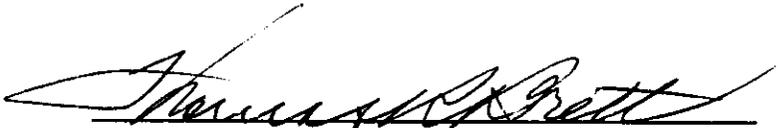
1. The Plaintiff has claims pending in the District Court of Tulsa County, State of Oklahoma, against this Defendant. The state court case encompasses the same issues of fact and law. The parties agree that the state court litigation will resolve all issues between them and will avoid "piecemeal" litigation. The parties agree that when all factors are considered it is in the best interests of all concerned that the issues between them be litigated in the state court forum.

2. The parties agree and stipulate that this Court should exercise its judicial discretion pursuant to Rule 41 of the Federal Rules of Civil Procedure and dismiss this

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case without prejudice upon terms and conditions that preserve the Plaintiffs' rights under 12 Okl. St. Ann. Sec. 100. More specifically, the parties agree and stipulate that this dismissal without prejudice shall be deemed not to constitute a dismissal which invokes the operation of 12 Okl. St. Ann. Sec. 100, and this dismissal shall not operate to adversely affect or limit the Plaintiffs' rights to file a new action if the aforementioned state court case should fail otherwise than on the merits.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that this action is dismissed without prejudice upon terms and conditions set forth above.



Judge of the District Court

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LEANNA SUE HENDERSON,)
)
Plaintiff,)
)
v.)
)
O'REILLY AUTOMOTIVE, INC.,)
)
Defendant.)

99-CV-81-H(E) ✓

FILED
FEB 8 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE FEB - 8 1999

ORDER

This matter comes before the Court on Defendant's notice of removal (Docket # 1).

Plaintiff Leanna Sue Henderson ("Ms. Henderson") originally brought this action in the District Court of Creek County. Plaintiff's Amended Petition alleges that Defendant O'Reilly Automotive, Inc. knew of and failed to correct sexual harassment in the workplace in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.*, and retaliated against Ms. Henderson for filing a worker's compensation claim. Defendant removed this action to this Court on the basis of federal question jurisdiction and contends that federal question jurisdiction is properly invoked here because Ms. Henderson has alleged a violation of Title VII, conferring original jurisdiction upon this Court pursuant to 28 U.S.C. § 1331.

Paragraph Three of Ms. Henderson's Amended Complaint provides as follows:

Plaintiff filed her Title VII claim with the Equal Employment Opportunity Commission on May 23, 1995, but despite several inquiries from Plaintiff's lawyers since that time, the Equal Employment Opportunity Commission has never issued Plaintiff a right-to-sue letter and has informed the undersigned that her file has been disposed of or lost.

It is settled law in the Tenth Circuit that a plaintiff must obtain a Notice of Right to Sue from the EEOC before filing suit in federal court. See 42 U.S.C. § 2000e-5(f)(1); Yellow Freight System v. Donnelly, 494 U.S. 820, 825 (1990); Witt v. Roadway Express, 136 F.2d 1424, 1429 (10th

3

Cir.), cert. denied, 119 S. Ct. 188 (1998). It is unsettled in the Tenth Circuit as to whether the requirement of an EEOC filing is a jurisdictional prerequisite to maintaining suit under Title VII. Compare Jones v. Runyon, 91 F.3d 1398, 1399-1400 (10th Cir. 1996) (noting Tenth Circuit "has referred to the requirement of an EEOC filing . . . as a jurisdictional requirement) with Biestler v. Midwest Health Servs. Inc., 77 F.3d 1264, 1267 (10th Cir. 1996) (holding 90-day period for filing suit following EEOC disposition "is not jurisdictional but in the nature of a statute of limitations" and is "subject to waiver, estoppel, and equitable tolling."). However, Ms. Henderson's Amended Petition indicates on its face that she has failed to exhaust the administrative procedures required before filing a Title VII claim, and the Tenth Circuit unquestionably recognizes such failure as grounds for dismissal of a Title VII claim. See Jones v. Runyon, 91 F.3d 1398, 1400 n.1 (10th Cir. 1996), cert. denied, 117 S. Ct. 1243 (1997). As Plaintiff has not properly alleged on the face of her Amended Petition a federal claim upon which this Court may rest jurisdiction, the Court is without subject matter jurisdiction and lacks the power to hear this matter. As a result, the Court must remand this action to the District Court of Creek County. The Court hereby orders the Court Clerk to remand this case to the District Court in and for Creek County.

IT IS SO ORDERED.

This 8TH day of February, 1999.



Sven Erik Holmes
United States District Judge

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

FEDERAL INSURANCE COMPANY;)
VIGILANT INSURANCE COMPANY;)
NORTHWESTERN PACIFIC INDEMNITY)
COMPANY,)

Plaintiffs,)

vs.)

SOUTHWESTERN WIRE CLOTH, INC.;)
SOUTHWESTERN WIRE CLOTH)
OILFIELD SCREENS, INC.; ROBERT)
E. NORMAN; HARTFORD FIRE)
INSURANCE COMPANY,)

Defendants.)

ENTERED ON DOCKET

DATE **FEB - 8 1999**

No. 95-C-689-K ✓ **FILED**

FEB 08 1999

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

JUDGMENT

This action came on for bench trial before the Court, Honorable Terry C. Kern, Chief District Judge, presiding, and the decision having been duly rendered,

IT IS THEREFORE ORDERED that Hartford Fire Insurance Company owed a duty to defend the Southwestern defendants in the underlying Derrick lawsuit (CAH-94-0135, United States District Court for the Southern District of Texas). Hartford Fire Insurance Company is responsible for 2/3 of the total amount of defense costs and expenses, less \$152,000 already paid by Hartford.

IT IS FURTHER ORDERED that plaintiff Vigilant Insurance Company recover from defendant Hartford Fire Insurance Company the

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amount of \$1,139,312.00 together with post-judgment interest as provided by law.

ORDERED this 5 day of February, 1999.

A handwritten signature in cursive script, reading "Terry C. Kern", written over a horizontal line.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

FEDERAL INSURANCE COMPANY;)
VIGILANT INSURANCE COMPANY;)
NORTHWESTERN PACIFIC INDEMNITY)
COMPANY,)

Plaintiffs,)

vs.)

SOUTHWESTERN WIRE CLOTH, INC.;)
SOUTHWESTERN WIRE CLOTH)
OILFIELD SCREENS, INC.; ROBERT)
E. NORMAN; HARTFORD FIRE)
INSURANCE COMPANY,)

Defendants.)

ENTERED ON DOCKET

DATE **FEB - 8 1999**

No. 95-C-689-K ✓

FILED

FEB 08 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

The above-styled case was tried to the Court without a jury on August 3, 1998. The parties have completed supplemental briefing. After considering the pleadings, the testimony and exhibits admitted at trial, all of the briefs and arguments presented by counsel for the parties, and being fully advised in the premises, the Court enters the following Findings of Fact, Conclusions of Law and Judgment, in accordance with Rule 52 F.R.Cv.P., as follows:

FINDINGS OF FACT

1. Federal Insurance Company ("Federal") is an Indiana corporation; Vigilant Insurance Company ("Vigilant") is a New York corporation; and Northwestern Pacific Indemnity Company

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("Northwestern") is an Oregon corporation. Each has its principal place of business in New Jersey. Federal, Vigilant and Northwestern are affiliated with the Chubb Group of Insurance Companies, and are admitted as insurers in Oklahoma. They are referred to collectively herein as "plaintiffs" or "Chubb".

2. Southwestern Wire Cloth, Inc. ("SWWC"), Southwestern Wire Cloth Oilfield Screens, Inc. ("Oilfield") and Robert E. Norman ("Norman") (collectively referred to as "Southwestern defendants") are residents and citizens of Oklahoma with principal places of business in Oklahoma. Hartford Fire Insurance Company ("Hartford") is a citizen of and has its principal place of business in Connecticut.

3. Federal and SWWC entered into a primary insurance contract for the period February 15, 1988 to February 15, 1989. Northwestern and SWCC entered into "umbrella" contracts for the same time period.¹

4. Hartford and SWWC entered into primary and umbrella insurance contracts for the period February 15, 1989 to April 1, 1993.

5. Vigilant and the Southwestern defendants entered into insurance contracts for the period April 1, 1993 to April 1, 1995.

6. By complaint filed January 14, 1994, Derrick Manufacturing Corporation ("Derrick") sued SWWC in the United States District Court for the Southern District of Texas, CAH-94-0135, for patent

¹An umbrella policy is a policy which provides excess liability coverage. See Moser v. Liberty Mutual Ins. Co., 731 P.2d 406, 407 (Okla.1987).

infringement, violation of the Lanham Act unfair competition and violation of the Texas Anti-Dilution Act. By amended complaint, Derrick subsequently added the other Southwestern defendants as parties to the action. As regards the non-patent claims,² Derrick alleged that the Southwestern defendants misappropriated the name "Derrick" in the advertisements used to market the replacement screens manufactured by the Southwestern defendants. Derrick placed the following designations on its screens: "PWP" (standing for "perforated wear plate"), "HP" (standing for "high performance") and "DX" (standing for "Derrick extra fine"). Derrick alleged in the underlying action that the Southwestern defendants placed these same designations on their replacement screens and used the same designations in their advertising. Derrick argued in the underlying lawsuit that the Southwestern defendants' use of the name "Derrick" and their use of the "PWP", "HP" and "DX" designations infringed Derrick's trademark and constituted unfair competition and dilution of the name and designations.

7. The Southwestern defendants tendered the Derrick lawsuit to both Hartford and Chubb. Both insurers agreed to defend under a reservation of rights. Hartford ultimately decided that it did not have a duty to defend and withdrew from the defense. Vigilant, however, determined that the trademark offenses charged against the Southwestern defendants evoked a duty to defend, but that the

²The distinction is important because this Court has previously ruled that neither Hartford nor the plaintiffs owed a duty to defend the patent claims.

offending publication of oral or written material began during the time when Hartford insured the Southwestern defendants. Vigilant continued to defend the Southwestern defendants and Chubb brought this declaratory judgment action to determine the rights and duties of the parties with regard to the insurance issues.

8. Vigilant paid a total of One Million Nine Hundred Thirty Six Thousand Nine Hundred Sixty Nine Dollars (\$1,936,969) in fees and expenses to the Southwestern defendants' attorneys and for disbursements in the Derrick case. This payment was made by Vigilant on the submission of attorney fee statements by the Southwestern defendants' attorneys in the Derrick case for collective defense of SWWC, Oilfield and Norman. Hartford also paid approximately \$152,000 to the Southwestern defendants' attorneys separately from the amounts paid by Vigilant. Hartford and Vigilant agree the amounts paid were reasonable and necessary.

9. The time and fees spent on the patent issues cannot readily be separated from the time and fees spent on the trademark-related issues. In sworn testimony, the attorneys in the underlying Derrick suit gave various estimates of the division of time and fees between the patent part of the case and trademark-related claims. They confirmed that the single patent infringement charge required more time and effort than the three trademark claims. In deposition, Mr. Hewitt, lead attorney for the Southwestern defendants, did not provide an estimate in percentage terms of the amount of effort divided between the patent and trademark-related claims. Attorney Dan Goforth came into the case

shortly before trial representing Mr. Norman, individually, and also focused on the trademark issues. Mr. Goforth estimated that 60% of his time was spent on the trademark issues. The attorneys who represented Derrick in the underlying case were also deposed. David Burget testified that the percentage between patent and trademark work was "Maybe 60-40. I don't know." (Deposition of October 29, 1997 at 17.5). Derrick co-counsel Gregory L. Maag thought the percentage of patent work was higher. He testified that "I would say about 70 percent of the attorneys' fees were spent on patent-related issues." (Deposition of October 29, 1997 at 19.17-18). In their affidavits prepared before the depositions for the purpose of attempting to obtain attorney fee reimbursement from Derrick, the Southwestern defense attorneys testified to differing estimates of the amount of time and effort spent on the patent claim and the trademark-related claims. In post-trial motions in the Derrick case, the Southwestern defense attorneys filed motions for a discretionary determination of the "exceptional" nature of the case as contemplated by the applicable patent and trademark statutes, 35 U.S.C. §285 and 15 U.S.C. §1117. In those motions, supporting affidavits estimated the ratio of time and billing at approximately 75% to the patent claim and about 25% to the trademark offenses. There was no finding by the trial court as to the allocation between the patent and trademark issues. Judge Black, the trial judge in the Derrick case, denied the motions for attorney fees.

10. The primary issue in the case at bar is whether Hartford

or Vigilant had an obligation to defend the Southwestern defendants for the alleged advertising injury offenses under the policy language covering "misappropriation of advertising ideas or style of doing business" only if "caused by an offense committed within the policy period". Also before the Court is whether Federal had a duty to defend under a similar provision.

11. Both the Hartford and Chubb insurance contracts contained substantially identical Prior Acts Exclusions which provided that "this insurance does not apply to: . . . Prior Acts. . . advertising injury:. . . 2. Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period. . . ." Hartford and Chubb agree that the Prior Acts Exclusion is clear and unambiguous. (Pretrial Order at p.6, Stipulations and Admissions).

12. The testimony of the witnesses and the documentation submitted demonstrates that the publication of oral and written solicitations and price quotations at trade shows and by direct face-to-face and telephone contact with potential buyers of equipment that Derrick claimed as infringing its trademarks commenced on or about May 1989 and continued until on or about the end of 1994.

13. The first amended complaint in the Derrick lawsuit alleged that Oilfield, separate and apart from SWWC, manufactured screens and also marketed screens with the names and marks belonging exclusively to Derrick, including the marks "Derrick", "PWP", "HP" and "DX". (Exhibit 22).

14. All of the allegations of the first amended complaint asserted against Oilfield charged offenses which occurred during the period of Vigilant's contracts of insurance.

15. SWWC and Vigilant have entered into a purported Assignment and a Settlement Agreement and Assignment contracts by which SWWC gave over all of its assignable contract and statutory claims for attorney's fees and expenses incurred in the underlying Derrick case and in this declaratory judgment action to Vigilant pursuant to the terms of the Vigilant policy 3531-56-19 for the April 1, 1993 policy period. Vigilant paid and agreed to pay the entirety of the expense expended and incurred by the Southwestern defendants in this declaratory judgment action.

16. Hartford purports to have entered into a settlement with the Southwestern defendants by way of a Memorandum of Understanding on April 28, 1998. The Memorandum contained many of the specific elements of a valid contract, including the amount of consideration. It also recited that it would be incorporated into a separate settlement agreement and general release (with prejudice) "along with other terms and conditions." The Memorandum does not recite that it acts as a release of the Southwestern defendants' rights against Vigilant or Vigilant's rights against Hartford. This Court does not here make a factual finding as to the validity of the Memorandum of Understanding as between Hartford and the Southwestern defendants.

17. Oilfield was formed in December, 1993, after the Hartford insurance contracts terminated, and first began to do business in

early 1994.

18. Norman is the sole shareholder and director of both SWWC and Oilfield.

To the extent that any of these Findings of Fact constitute Conclusions of Law, they should be so considered.

CONCLUSIONS OF LAW

1. This is a civil action brought pursuant to 28 U.S.C. §§2201 and 2202. The Court has subject matter jurisdiction under 28 U.S.C. §1332(a)(1).

2. The Court has personal jurisdiction over the parties and venue is proper under 28 U.S.C. §1391(a).

3. Plaintiffs moved to dismiss the Southwestern defendants at the Pretrial Conference. (Transcript of Pretrial Conference at 20.15-21.2). The Southwestern defendants are hereby dismissed.

4. The Court has previously ruled that Hartford owed a duty to defend the non-patent claims in the Derrick lawsuit. Hartford has presented an elaborate argument for the proposition that the plaintiffs have no right of recovery against Hartford. First, Hartford contends that once the plaintiffs' duty to defend was triggered by the possibility of coverage, that duty continued and may not be altered by the insurer's investigation. Under the present facts, the Court disagrees.

5. Hartford's argument proceeds for pages as if the following

principle did not exist: "It is almost uniformly held that if an insurer conducts an investigation or defense under a non-waiver agreement or a notice of reservation of its rights, it will not thereby be estopped to set up any policy defenses that may be available to it." 7C Appleman, Insurance Law and Practice, §4694 at 336 (1979) (footnote omitted).

6. In Braun v. Annesley, 936 F.2d 1105, 1110 (10th Cir.1991), the court found estoppel where an insurer defended without a reservation of rights. In the case at bar, it is undisputed that plaintiffs made such a reservation. (Ex. 24). Hartford's citation of Valley Improvement Ass'n Inc. v. United States Fidelity & Guaranty Corp., 129 F.3d 1108 (10th Cir.1997) is inapposite. In that case, the insurer refused to defend and attempted to rely upon facts discovered by its subsequent investigation to justify the refusal. This merely reflects the weaker legal position of an insurer who refuses to defend as opposed to an insurer who defends under a reservation of rights.

7. In a similar vein, Hartford contends that plaintiffs have no right to subrogation or equitable indemnity as against Hartford. Hartford proceeds from the premise that "the duty to defend under Oklahoma law is several, and not joint." (Hartford's Post-Trial Brief at 19 n.11).

8. In support of this premise, Hartford cites United States Fidelity & Guar. Co. v. Tri-State Ins. Co., 285 F.2d 579, 582 (10th Cir.1960) and Fidelity and Casualty Co. of New York v. Ohio Cas. Ins. Co., 482 P.2d 924, 926 (Okla.1971). These are the cases which

Hartford previously cited in seeking (and gaining) dismissal of plaintiffs' claim for contribution. In its Order entered March 31, 1988, this Court declined to dismiss plaintiffs' claim for equitable subrogation, citing Farmers Alliance Ins. Co. v. Commercial Union Ins. Co., 972 F.2d 356, 1992 WL 181977 (10th Cir.). The Court also permitted plaintiffs' claim for equitable indemnity to proceed.

9. Now that the trial has concluded, Hartford requests the Court deny plaintiffs any relief under either theory. Hartford contends that Chubb is not entitled to equitable subrogation because it acted as a volunteer in undertaking defense of the Derrick lawsuit. The mischief such a ruling would cause is apparent. Whenever two insurers were tendered a defense, each would hold back, hoping the other would undertake the defense and be subsequently labeled a "volunteer". The unpublished decision cited by Hartford, Farmers Alliance Ins. Co. v. Commercial Union Ins. Co., 74 F.3d 1239, 1996 WL 15689 (10th Cir.), does not appear to involve a defense under reservation of rights, as does the case at bar.

10. "Subrogation is an equitable principle by which, based on the facts and circumstances in each case, responsibility for a loss' payment or an obligation's discharge is ultimately placed upon the person who, in good conscience, ought to pay." Travelers Ins. Companies v. Dickey, 799 P.2d 625, 627 n.1 (Okla.1990).

11. The Supreme Court of Oklahoma has not described any set of elements which must be proved to establish a subrogation claim.

Instead, it has used such language as "the natural justice of placing the ultimate burden where it ought to rest. . . [subrogation] does not flow from a fixed rule of law but rather from principles of justice, equity and benevolence providing a purely equitable result depending on the circumstances of the cause." Republic Underwriters v. Fire Ins. Exchange, 655 P.2d 544, 545-46 (Okla.1982).

12. Pursuant to these principles, the Court has reviewed the facts and circumstances of this case and concludes that plaintiffs are entitled to equitable subrogation for a portion of the defense costs and expenses incurred in the Derrick lawsuit. Hartford owed a duty to defend to the Southwestern defendants and declined to fulfill that duty. In such circumstances, the insurer who does undertake a defense should not be held liable for the entire amount.

13. As to the theory of equitable indemnity, authority appears uniform that the doctrine is similar, if not virtually identical, to common law contribution. See Travelers Ins. Co. v. L.V. French Truck Service, 770 P.2d 551, 555 n.16 (Okla.1988); Burrell v. Rodgers, 441 F. Supp. 275, 278 (W.D.Okla.1977). As already stated, the Tenth Circuit and the Supreme Court of Oklahoma have ruled that common law contribution is unavailable to an insurer in a situation like the case at bar. See United States Fidelity & Guar. Co. v. Tri-State Ins. Co., 285 F.2d 579, 582 (10th Cir.1960); Fidelity & Casualty Co. v. Ohio Casualty Ins. Co., 482 P.2d 924, 926 (Okla.1971).

14. Chubb believes these latter cases were wrongly decided, but this Court is bound by them. The Court sees no basis for permitting an equitable indemnity cause of action when a contribution action is barred under Oklahoma law. Accordingly, Chubb's equitable indemnity claim is dismissed.

15. Finally, Chubb seeks to recover by way of contractual subrogation. This claim is based upon the purported settlement between Chubb and the Southwestern defendants. On June 29, 1998, Chubb filed a motion to strike defenses and contentions by Hartford related to the Memorandum of Understanding. On July 2, 1998, Hartford filed a cross-motion to enforce that same document. At the settlement conference conducted in this case by an Adjunct Settlement Judge, Hartford and the Southwestern defendants had entered into the Memorandum of Understanding. Hartford sought to use the purported settlement as a bar to any Chubb claim against Hartford.

16. The issue was taken up at the Pretrial Conference on July 7, 1998. The Court ruled that the Memorandum was merely an incomplete agreement to settle at some future point, if certain conditions were fulfilled. Further, the Court ruled that one insurer's rights could not be cut off in this manner through settlement between the insured and the other insurer, citing Sharon Steel Corp. v. Aetna Cas. & Sur. Co., 931 P.2d 127, 138-39 (Utah 1997).

17. The Court reserved ruling on the extent to which the Memorandum of Understanding might be binding as between the

Southwestern defendants and Hartford. It was further noted that this issue would have to be addressed in the event of a hearing on attorney fees if Chubb should prevail in this litigation. (Transcript of Pretrial Conference at 26.21-22).

18. On July 21, 1998 Hartford filed a motion to strike or clarify the Court's Order of July 7, 1998. In that motion, Hartford contended that Chubb improperly included a claim for contractual subrogation in the Pretrial Order. Hartford asserted it was prejudiced because (1) contractual subrogation had not been pleaded by Chubb and (2) such a claim was contrary to the Court's ruling at the Pretrial Conference that Chubb would be allowed to proceed with an equitable subrogation claim alone.

19. The Court concludes that, as it stated at the Pretrial Conference, the legal effect of the Memorandum of Understanding will have to be addressed in post-judgment proceedings, inasmuch as Chubb has prevailed to some extent in this litigation. The motion need not have been addressed before trial, because Hartford failed to show prejudice. Chubb could not have pled contractual subrogation until such a claim arose through Chubb's purported settlement with the Southwestern defendants. Moreover, the claims of equitable and contractual subrogation are apparently equivalent in terms of relief. The Court hereby rules in Chubb's favor on the claim of contractual subrogation and awards the same damages under that claim as will be awarded under equitable subrogation. Should the Court later conclude that Chubb's claim for contractual subrogation is invalid, the claim will be dismissed and only the

equitable subrogation claim will stand.

20. A principal issue in this litigation is that of allocation of defense costs. It is actually misleading to refer to allocation as a single issue, because the parties' arguments have shaped the multiple issues as concentric circles, each requiring separate discussion.

21. The broadest issue involves allocation between covered and non-covered claims.³ Hartford correctly notes that this is an issue currently in flux, and that some jurisdictions have recently recognized such an allocation. See Buss v. Superior Court, 939 P.2d 766 (Cal.1997); SL Industries, Inc. v. American Motorists Ins. Co., 607 A.2d 1266 (N.J.1992).

22. In response, plaintiffs assert that the issue is foreclosed by First Bank of Turley v. Fidelity and Dep. Ins. Co. of Md., 928 P.2d 298 (Okla.1996), in which the Supreme Court of Oklahoma stated that when an insurer, under a duty to defend, refuses to so defend, the insurer is liable for all reasonable expenses incurred by the insured in defense of a third-party action. Id. at 305.

23. The Supreme Court of Oklahoma did not make this statement squarely confronted with the allocation issue. This Court concludes from its research that no appellate court in Oklahoma has yet ruled on the issue of apportionment of defense costs between covered and non-covered claims. In such a circumstance, this Court

³The narrower issue is Hartford's request for allocation between Hartford's insureds and Oilfield. This issue is discussed later in this opinion.

is mindful of federalism concerns which suggest that state courts should be allowed to decide whether and to what extent they will expand state common law. City of Philadelphia v. Lead Indus. Ass'n, 994 F.2d 112, 123 (3d Cir.1993). Federal courts must take great caution when blazing new state-law trails. Acadia Motors, Inc. v. Ford Motor Co., 44 F.3d 1050, 1057 (1st Cir.1995).

24. It is true that Oklahoma's declaratory judgment statute, 12 O.S. §1651, "specifically excludes declaratory judgment actions to construe coverage under liability insurance policies." Horace Mann Ins. Co. v. Johnson, 953 F.2d 575, 576 (10th Cir.1991). Thus, only a federal forum was appropriate for the present action. However, no party has sought to avail itself of the certification procedure provided by Oklahoma law. See 20 O.S. §§1601 et seq.

25. This Court declines to "create" state law on such a portentous issue. Having found the First Bank of Turley decision to be the most applicable expression of state law by Oklahoma's highest court, this Court declines Hartford's request for allocation between covered and non-covered claims. Even if this Court were to recognize such allocation in principle, this case is not appropriate for its application. As stated in Finding of Fact No. 9, the defense costs may not be readily apportioned between covered and non-covered claims. This is the standard for allocation. See Insurance Co. of North America v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1224-25 (6th Cir.1980), reh'g granted, clarified, 657 F.2d 814 (6th Cir.1981), cert. denied, 454 U.S. 1109 (1981). At best, the testimony of the lawyers produced

"rough estimates" of the time spent on particular claims. This Court deems the evidence insufficient for allocation.

26. The Court now turns to whether Federal owed a duty to defend. As stated, Federal afforded SWWC primary insurance from February 15, 1988 to February 15, 1989. The dispositive question is: when did the allegedly infringing advertising commence? At trial, Mr. Norman testified with certainty that the SWWC screen was first manufactured and publicized in 1989. (Trial Transcript at 21.25-22.1; 24.7-14). Hartford argues that a factual dispute exists, mandating a duty to defend, because Mr. Von Drehle (marketing manager and subsequent president of SWWC) testified in the Derrick trial in Houston that the first public display of the infringing product was in 1988 or 1989. In view of the fact that Mr. Von Drehle was not an employee of SWWC until 1993 and given Mr. Norman's intimate familiarity with the company, the Court finds Mr. Norman's testimony more credible and accepts 1989 as the date of the first display. Because Federal's coverage had lapsed in 1989, it owed no duty to defend.

27. The next issue is whether Vigilant owed a duty to defend. The answer involves interpretation of the "prior acts" exclusion in the Vigilant policy. First, Vigilant contends that the rule requiring words of exclusion to be strictly construed against the insurer does not apply when the lawsuit is between two insurance companies.

28. In making this argument, Vigilant relies upon United States Fire Ins. Co. v. General Reinsurance Corp., 949 F.2d 569,

573 (2d Cir.1991). The Court notes that (1) this decision was interpreting New York state court decisions and no Oklahoma state court decisions exist on the point; (2) the Second Circuit has subsequently raised doubt as to a general application of that holding. See Sea Ins. Co., Ltd. v. Westchester Fire Ins. Co., 51 F.3d 22, 26 n.4 (2d Cir.1995). It also seems odd to this Court that an insurer should be able to gain an interpretive advantage, as it were, by settling with the insured and dismissing the insured from the case. When the issue being litigated is whether a duty to defend exists, it would seem the interpretation still needs to be made in the insurer-insured context. The Court elects to maintain the contra proferentem principle.

29. Vigilant relies upon Applied Bolting Technology Products, Inc. v. U.S.F. & G., 942 F.Supp. 1029 (E.D.Penn.1996), aff'd, 118 F.3d 1574 (3d Cir.1997). That court specifically declined to follow the reasoning of Irons Home Builders, Inc. v. Auto-Owners Ins. Co., 839 F. Supp. 1260 (E.D.Mich.1993), upon which Hartford relies in the case at bar. The court in Applied Bolting held that "[u]nder the exclusion's plain terms, the 'first publication' date is a landmark: if the injurious advertisement was 'first published' before the policy coverage began, then coverage for the 'advertising injury' is excluded. It is irrelevant that later publications, made after the policy became effective, also caused 'advertising injury' or increased the damages." 942 F.Supp. at 1036,

30. In the course of its Order denying plaintiffs' motion for

summary judgment on this issue, the Court raised the hypothetical argument that the rule might be different if a wholly distinct form of advertising (e.g., written rather than oral) constituted a violation after the lapsing of one policy and the beginning of another. The Court reserved the issue for trial.

31. No decisions on this issue have appeared since Applied Bolting. The Court has found no authority for its suggested distinction, and now declines to adopt it. It is clear that the advertising and marketing efforts by SWWC were continuous from 1989, in both oral and written form, until about the end of 1994. These included the use of the name "Derrick". The fact that the first use of the name "Derrick" in a brochure was 1993, i.e., after the commencement of Vigilant's policy period, does not negate the "prior acts" exclusion, as interpreted in Applied Bolting.

32. This conclusion does not mean that Vigilant owed no defense to any Southwestern defendant. As Hartford argues, Oilfield was Vigilant's named insured and not Hartford's. Derrick's first amended complaint alleged acts of infringement by Oilfield occurring during Vigilant's policy period. (Ex.22). Vigilant owed Oilfield a defense, and allocation is appropriate.

33. Vigilant argues, in the event the Court concluded allocation was appropriate, that any allocation should be based upon "time on the risk." That is, at the time Vigilant owed a defense, Hartford had collected premiums for over four years. Vigilant reasons that Hartford should therefore bear 4/5 or 80% of the fees and expenses.

34. "Time on the risk" is indeed a method of allocation recognized by some courts. See e.g., Insurance Co. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1224-25 (6th Cir.1980). Once again, Oklahoma is not among the jurisdictions recognizing this doctrine and this Court, sitting in diversity, declines to do so. In any event, the Court is not persuaded equity would be best served by such an allocation. If both insurers had fulfilled their duties to defend, the efforts would have merged to some extent. Under the facts of this case, the appropriate allocation appears to be dividing the expenses by the number of defendants who were named insureds. Accordingly, Hartford shall be liable for 2/3 of the total amount and Vigilant shall be responsible for the remaining 1/3.

35. The parties agree that Vigilant paid a total of One Million Nine Hundred Thirty Six Thousand Nine Hundred Sixty Nine Dollars (\$1,936,969) in fees and expenses in connection with defense of the Derrick lawsuit. Two-thirds of that amount is \$1,291,312. The parties also agree that Hartford paid approximately \$152,000 to the Southwestern defendants' attorneys separately from the amounts paid by Vigilant. With this deduction, the amount owed by Hartford to Vigilant is \$1,139,312.

36. Although this is a declaratory judgment action, plaintiffs have also requested the assessment of monies due. 28 U.S.C. §2202 may include the grant of monetary damages as relief. See Security Ins. Co. v. White, 236 F.2d 215, 220 (10th Cir.1956); Fred Ahlert Music Corp. v. Warner/Chappell Music, 155 F.3d 17, 25

(2nd Cir.1998).

To the extent that any of these Conclusions of Law constitute Findings of Fact, they should be so considered.

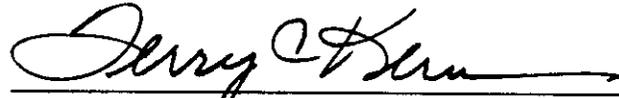
It is the Order of the Court that judgment be entered in favor of the plaintiffs and against the defendant Hartford Fire Insurance Company regarding the declaratory judgment aspect of this litigation. The Court declares that defendant Hartford Fire Insurance Company had a duty to defend the Southwestern defendants as described above and is liable for two-thirds of the defense costs and expenses in the underlying Derrick lawsuit (CAH-94-0135).

It is the further Order of the Court that a judgment for money damages be entered in favor of plaintiff Vigilant Insurance Company and against defendant Hartford Fire Insurance Company in the amount of \$1,139,312.

It is the further Order of the Court that all pending motions are hereby declared moot. The parties may raise by post-judgment motion, if they so choose, issues such as entitlement to attorney

fees and the legal effect of the Memorandum of Understanding between Hartford and the Southwestern defendants.

ORDERED this 5 day of February, 1999.



TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

1/29/99
hc

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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

Plaintiff,

v.

MUHAMMAD ALMANSUR;
BETH STRANGE aka Beth Almansur;
VELMAR ALMANSUR;
UNKNOWN SPOUSE, if any, OF
VELMAR ALMANSUR;
BRANDY CHASE OWNERS ASSOCIATION, INC.
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma,

Defendants.

ENTERED ON DOCKET

DATE FEB - 8 1999

FILED

FEB 5 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 98-CV-0310-H (E)

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 4th day of FEBRUARY, 1999.

The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendants, Muhammad Almansur and Beth Strange aka Beth Almansur, appear not, having previously filed their Disclaimers; and the Defendants, Velmar Almansur, Unknown Spouse, if any, of Velmar Almansur, and Brandy Chase Owners Association, Inc., appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, Muhammad Almansur, was served with Summons and Complaint by certified mail,

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return receipt requested, delivery restricted to the addressee on April 25, 1998; that the Defendant, Beth Strange aka Beth Almansur, was served with Summons and Amended Complaint by certified mail, return receipt requested, delivery restricted to the addressee on June 24, 1998; that the Defendant, Brandy Chase Owners Association, Inc., executed a Waiver of Service of Summons by its president Edward Crossland on April 28, 1998.

The Court further finds that the Defendants, Velmar Almansur and Unknown Spouse, if any, of Velmar Almansur, 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 July 17, 1998, and continuing through August 21, 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, Velmar Almansur and Unknown Spouse, if any, of Velmar Almansur, 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 May 7, 1998; the Defendants, Muhammad Almansur and Beth Strange aka Beth Almansur, filed their Disclaimers on January 14, 1999; and that the Defendants, Velmar Almansur, Unknown Spouse, if any, of Velmar Almansur, and Brandy Chase Owners Association, Inc., 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 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:

THAT CERTAIN UNIT OWNERSHIP ESTATE DESIGNATED AS UNIT C-216 AND AN UNDIVIDED 1.21012833% INTEREST IN AND TO THE COMMON ELEMENTS APPERTAINING AND APPURTENANT THERETO IN BRANDY CHASE UNIT OWNERSHIP ESTATES ACCORDING TO THE DECLARATION OF UNIT OWNERSHIP ESTATES FOR BRANDY CHASE CONDOMINIUMS AT SANS SOUCI RECORDED IN BOOK 4608 AT PAGE 2 ET SEQ., THE FIRST DECLARATION OF ANNEXATION AND MERGER OF UNIT OWNERSHIP ESTATES FOR BRANDY CHASE CONDOMINIUMS AT SANS SOUCI RECORDED IN BOOK 4638 AT PAGE 2091 ET SEQ., AND THE SECOND DECLARATION OF ANNEXATION AND MERGER OF UNIT OWNERSHIP ESTATES FOR BRANDY CHASE CONDOMINIUMS AT SANS SOUCI RECORDED IN BOOK 4655 AT PAGE 186 ET SEQ., AND LOCATED ON A PART OF THE FOLLOWING DESCRIBED REAL PROPERTY, LOT FIFTY (50), BLOCK ONE (1), SANS SOUCI, AN ADDITION IN THE CITY OF TULSA, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that on November 25, 1987, the Defendants, Muhammad Almansur and Velmar Almansur, executed and delivered to Midfirst Mortgage Co., their mortgage note in the amount of \$25,000.00, payable in monthly installments, with interest thereon at the rate of 10 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, Muhammad Almansur and Velmar Almansur, husband and wife, executed and delivered to Midfirst Mortgage Co., a real estate mortgage dated November 25, 1987, covering the above-described property, situated in the State of Oklahoma, Tulsa County. This mortgage was recorded on December 3, 1987, in Book 5067, Page 2254, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 25, 1987, Midfirst Mortgage Co. assigned the above-described mortgage note and mortgage to Midfirst Savings and Loan Association. This Assignment of Mortgage was recorded on December 3, 1987, in Book 5067, Page 2259, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 15, 1990, Midfirst Savings and Loan Association assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development. This Assignment of Mortgage was recorded on January 23, 1990, in Book 5232, Page 442, in the records of Tulsa County, Oklahoma.

The Court further finds that Defendants, Muhammad Almansur and Velmar Almansur, made default under the terms of the aforesaid note and mortgage by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof Plaintiff alleges that there is now due and owing under the note and mortgage, after full credit for all payments made, the principal sum of \$24,798.96, plus penalty charges in

the amount of \$1,875.55, plus accrued interest in the amount of \$18,604.50 as of February 1, 1997, plus interest accruing thereafter at the rate of 10 percent per annum until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action accrued and accruing.

The Court further finds that the Defendant, County Treasurer, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of 1993 personal property taxes in the amount of \$4.00 which became a lien on the property as of June 23, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

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

The Court further finds that the Defendants, Muhammad Almansur and Beth Strange aka Beth Almansur, disclaim any right, title or interest in the subject real property.

The Court further finds that the Defendants, Velmar Almansur, Unknown Spouse, if any, of Velmar Almansur, and Brandy Chase Owners Association, Inc., 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.

The Court further finds that the United States of America on behalf of the Secretary of Veterans Affairs has a lien upon the property by virtue of an Abstract of Judgment recorded on June 1, 1994, in Book 5629, Page 594 in the records of the Tulsa County Clerk, Tulsa County, Oklahoma. Inasmuch as government policy prohibits the joining of another federal agency as party defendant, the Secretary of Veterans Affairs is not made a party hereto; however, by agreement of the agencies the lien will be released as to the subject

property at the time of sale should the property fail to yield an amount in excess of the debt to the Secretary of Housing and Urban Development.

The Court further finds that the United States of America on behalf of the Department of Justice has a lien upon the property by virtue of a Notice of Lien recorded on February 1, 1995, in Book 5690, Page 317 in the records of the Tulsa County Clerk, Tulsa County, Oklahoma. Inasmuch as government policy prohibits the joining of another federal agency as party defendant, the Department of Justice is not made a party hereto; however, by agreement of the agencies the lien will be released as to the subject property at the time of sale should the property fail to yield an amount in excess of the debt to the Secretary of Housing and Urban Development.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment **in rem** against Defendants, Muhammad Almansur and Velmar Almansur, in the principal sum of \$24,798.96, plus penalty charges in the amount of \$1,875.55, plus accrued interest in the amount of \$18,604.50 as of February 1, 1997, plus interest accruing thereafter at the rate of 10 percent per annum until judgment, plus interest thereafter at the current legal rate of 4.584 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.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, County Treasurer, Tulsa County, Oklahoma, have and recover judgment in the

amount of \$4.00 plus penalties and interest by virtue of 1993 personal property taxes which became a lien on the property as of June 23, 1994.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, Muhammad Almansur, Beth Strange aka Beth Almansur, Velmar Almansur, Unknown Spouse, if any, of Velmar Almansur, Brandy Chase Owners Association, Inc., and Board of County Commissioners, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

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

First:

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

Second:

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

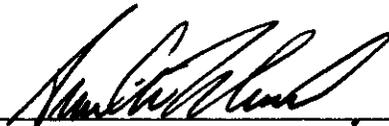
Third:

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

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

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

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


UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


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


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

Judgment of Foreclosure
Case No. 98-CV-0310-H (B) (Almansur)

LFR.css

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

FILED
FEB - 5 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PERFECT DESIGN SOFTWARE, L.L.C.,)
an Oklahoma limited liability company,)
)
Plaintiff,)
)
vs.)
)
GENOTECHS, INC., an Arizona)
corporation,)
)
Defendant.)

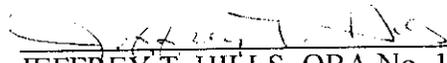
Case No. 98CV904 H (E) ✓

ENTERED ON DOCKET
DATE FEB - 8 1999

VOLUNTARY DISMISSAL WITH PREJUDICE

Pursuant to Fed. R. Civ. P. 41 (a), the Plaintiff, Perfect Design Software, L.L.C., hereby
dismisses this action in its entirety with prejudice to refiling thereof.

Respectfully Submitted,



JEFFREY T. HILLS, OBA No. 14743
JOSEPH J. FERRETTI, OBA No. 15231
PAIGE S. BASS, OBA No. 17572
- Of the Firm -

CROWE & DUNLEVY
A Professional Corporation
321 South Boston
500 Kennedy Building
Tulsa, Oklahoma 74103
(918) 592-9800

ATTORNEYS FOR PLAINTIFF

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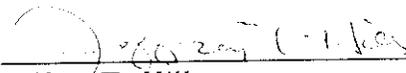
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was mailed, postage prepaid, this 5 day of February, 1999, to:

Glenn Spencer Bacal
Quarles & Brady
One East Camelback Road
Suite 400
Phoenix, Arizona 85012-1649



Jeffrey T. Hills

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

ANGELA GORCZYNSKI f/k/a)
ANGELA ALLISON,)

Plaintiff,)

v.)

ALLSTATE INSURANCE COMPANY,)
ALLSTATE INDEMNITY COMPANY,)
and ALLSTATE PROPERTY-)
CASUALTY CLAIMS SERVICE)
ORGANIZATION, foreign corporations,)

Defendants.)

No. 98-CV-412-K (J)

ENTERED ON DOCKET
DATE FEB - 5 1999

F I L E D

FEB 05 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 5 day of Feb; 1999, it appearing to the Court that this matter has been compromised and settled, this case is hereby dismissed with prejudice to the refileing of a future action.

TERRY C. KERN

United States District Judge

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

FILED
FEB 04 1999
Paul Lombardi, Clerk
U.S. DISTRICT COURT

NANNETTE BIBLE,)
)
 Plaintiffs,)
)
 v.)
)
 ADVANCED SPINE FIXATION)
 SYSTEMS, INC.,)
)
 Defendant.)

Case No. 98- CV-397 B (#)
(E)

ENTERED ON DOCKET
FEB 05 1999

JOINT STIPULATION FOR DISMISSAL WITHOUT PREJUDICE

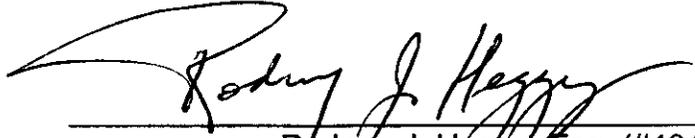
Defendant, Advanced Spine Fixation Systems, Inc. ("Advanced Spine"), believes this Honorable Court should abstain from exercising its diversity jurisdiction over the claims of Plaintiff, Nannette Bible ("Bible"), pursuant to the doctrine set forth in Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236 (1976) and Moses H. Cone Hospital v. Mercury Construction Corp., 460 U.S. 1, 103 S.Ct. 927 (1983).

The parties stipulate that the Court should abstain from exercising jurisdiction and Bible's suit dismissed without prejudice for the reason that she is also a plaintiff in a concurrent state court proceeding alleging identical state law claims against Advanced Spine. A proposed order is attached for the court's convenience. Plaintiff's counsel has reviewed this pleading and the proposed order in advance of filing and approved same.

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Handwritten notes at bottom right: "mail 01/10 00/12"

Respectfully Submitted,



Rodney J. Heggy, Esq. (#4049)

**DAY, EDWARDS, FEDERMAN, PROPESTER
& CHRISTENSEN, P.C.**

2900 Oklahoma Tower; 210 Park Avenue
Oklahoma City, Oklahoma 73102-5605

Telephone: (405) 239-2121

Telecopier: (405) 236-1012

Electronic Mail: heggy@oklawyer.com

and

Raymond J. Pajares, Esq.

AUBERT & PAJARES

Two Lakeway Center, Suite 1650

3850 N. Causeway Boulevard

Metairie, Louisiana 70002

Telephone: (504) 836-5200

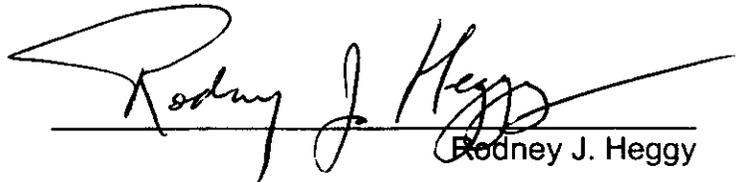
Telecopier: (504) 836-5201

**ATTORNEYS FOR DEFENDANT,
ADVANCED SPINE FIXATION SYSTEMS, INC.**

CERTIFICATE OF MAILING

On this 3 day of February, 1999, the foregoing was mailed by prepaid postage to:

Bradley C. West, Esq.
THE WEST LAW FIRM
124 West Highland
Shawnee, Oklahoma 74801
Attorneys for Plaintiff



Rodney J. Heggy

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

KERRY STEEL, INC., a
Michigan corporation

Plaintiff,

- vs. -

PARAGON INDUSTRIES,
INC., an Oklahoma corporation,

Defendant.

ENTERED ON DOCKET

DATE 2/5/99

CASE NO. 97-CV-924 J ✓

FILED
FEB - 4 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

Based upon the parties' Joint Stipulation for Dismissal With Prejudice, and for good cause shown thereby, this matter is hereby dismissed with prejudice to its future re-filing.

Dated this 4 day of ~~January~~ ^{February}, 1999.



The Honorable Sam Joyner
United States Magistrate Judge

(Handwritten initials)

F I L E D

FEB - 3 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

JACK BROTTON, JR., d/b/a)
CARAVAN CATTLE COMPANY)

Plaintiff,)

vs.)

AMERICAN EQUITY INSURANCE)
COMPANY, a foreign corporation,)

Defendant.)

No. 99-C-0060-B(E)

FILED ON DOCKET

DATE FEB 04 1999

ORDER

Before the Court is Plaintiff's Motion to Remand (Docket #4) filed pursuant to 28 U.S.C. § 1447(c) and the Court finds the same shall be granted.

The Court has reviewed the Notice of Removal pursuant to the directive of this circuit in *Laughlin v. Kmart Corp.*, 50 F.3d 871 (10th Cir. 1995), and concludes that neither the Petition nor the Notice of Removal establish the requisite jurisdictional amount for purposes of diversity jurisdiction. Defendants' allegations are legally insufficient to establish the amount in controversy by a preponderance of the evidence. *Barber v. Albertsons, Inc.*, 935 F. Supp. 1188 (N.D.Okla 1996), citing *Gafford v. General Elec. Co.*, 997 F.2d 150, 157-60 (6th Cir. 1993).

Removal statutes are narrowly construed and uncertainties resolved in favor of

9

remand. The presumption is against removal jurisdiction. If it appears from the notice and any exhibits thereto that removal should not be permitted, "the Court shall make an order for summary remand." 28 U.S.C. §1446(c)(4).

The Court concludes it is without subject matter jurisdiction to proceed in this matter. Accordingly, the case should be remanded to the District Court of Tulsa County, Oklahoma.

IT IS THEREFORE ORDERED that the above styled action is hereby remanded to the District Court of Tulsa County, Oklahoma. The Clerk of Court is directed to take the necessary action to remand this case without delay.

DATED THIS 3rd DAY OF FEBRUARY, 1999, AT TULSA, OKLAHOMA.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

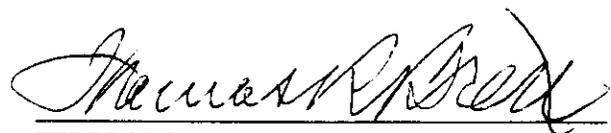
allegations are legally insufficient to establish the amount in controversy by a preponderance of the evidence. *Barber v. Albertsons, Inc.*, 935 F. Supp. 1188 (N.D.Okla 1996), citing *Gafford v. General Elec. Co.*, 997 F.2d 150, 157-60 (6th Cir. 1993).

Removal statutes are narrowly construed and uncertainties resolved in favor of remand. The presumption is against removal jurisdiction. If it appears from the notice and any exhibits thereto that removal should not be permitted, "the Court shall make an order for summary remand." 28 U.S.C. §1446(c)(4).

The Court concludes it is without subject matter jurisdiction to proceed in this matter. Accordingly, the case should be remanded to the District Court of Tulsa County, Oklahoma.

IT IS THEREFORE ORDERED that the above styled action is hereby remanded to the District Court of Tulsa County, Oklahoma. The Clerk of Court is directed to take the necessary action to remand this case without delay.

DATED THIS 23rd DAY OF FEBRUARY, 1999, AT TULSA, OKLAHOMA.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FEB - 2 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THOMAS C. HAMPTON, JR.,
SSN: 447-40-1739

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,^{1/}

Defendant.

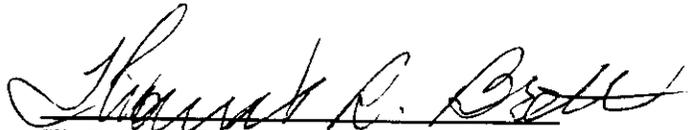
No. 96-C-993-B(J)

ENTERED ON DOCKET
DATE FEB 04 1999

JUDGMENT

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

It is so ordered this 2nd day of February 1999.



THOMAS R. BRETT
SENIOR DISTRICT 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.

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

WORLDCOM TECHNOLOGIES, INC.,)
a Delaware Corporation,)
)
Plaintiff,)
)
v.)
)
PRIME ENTERTAINMENT, INC.,)
a Maryland Corporation,)
)
Defendant.)

98-CV-737-H ✓

FILED
FEB 4 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE 2-4-99

ORDER

This matter comes before the Court on Defendant Prime Entertainment, Inc.'s ("Prime") Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(2) (Docket # 3). For the reasons expressed herein, the Court concludes that the motion should be granted.

For purposes of the instant motion the following facts are undisputed:

1. Prime is a Maryland corporation with its principal place of business being Boca Raton, Florida. Prime is a private, closely held corporation engaged in the business of providing consulting services and expertise relating to pay-per-view and closed circuit sporting and entertainment events. Prime manufactures no products, licenses no intellectual property, and does not distribute any goods or materials
2. Pursuant to its normal business needs, Prime contracted with Worldcom for long distance telephone services in March of 1995. Their relationship was memorialized in a series of extended service plan agreements, which were uniformly negotiated and executed in Palm Beach County, Florida.
3. From March 1995 until October 1997, Prime directed a number of calls and faxes to

Worldcom's offices in Tulsa, Oklahoma for purposes of obtaining technical support related to the performance of the service plan agreements and to address financial matters related to those agreements.

4. Due to a dispute between the parties regarding payment for long distance services provided in August and September of 1997, Worldcom filed this suit against Prime. The Complaint contains no facts supporting a grant of personal jurisdiction over Prime.
5. Prime does not conduct business in Oklahoma and has no bank accounts, offices, or other places of business in Oklahoma. Prime has no employees in Oklahoma and has never been licensed to do business in Oklahoma. Prime owns no real or personal property in Oklahoma and derives no income or revenue from activities undertaken in Oklahoma. Prime has never entered into a contract in Oklahoma or sent employees into Oklahoma for business purposes.

Defendant Prime has moved to dismiss the complaint for lack of personal jurisdiction. In this regard:

[t]he plaintiff bears the burden of establishing personal jurisdiction over the defendant. Prior to trial, however, when a motion to dismiss for lack of jurisdiction is decided on the basis of affidavits and other written materials, the plaintiff need only make a prima facie showing. The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. If the parties present conflicting affidavits, all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party. (citations omitted).

Rambo v. American Southern Ins. Co., 839 F.2d 1415, 1417 (10th Cir. 1988). Thus, the Court must "determine whether the plaintiff's allegations, as supported by affidavits, make a prima facie showing of the minimum contacts necessary to establish jurisdiction over each defendant."

Id.

“The test for exercising long-arm jurisdiction in Oklahoma is to determine first whether the exercise of jurisdiction is authorized by statute and, if so, whether such exercise of jurisdiction is consistent with the constitutional requirements of due process. (citation omitted). In Oklahoma, this two-part inquiry collapses into a single due process analysis, as the current Oklahoma long-arm statute provides that ‘[a] court of this state may exercise jurisdiction on any basis consistent with the Constitution of this state and the Constitution of the United States.’” (citations omitted). Id. at 1416.

The Rambo court stated that:

[j]urisdiction over corporations may be either general or specific. Jurisdiction over a defendant in a suit arising out of or related to the defendant’s contacts with the forum state is “specific jurisdiction.” In contrast, when the suit does not arise from or relate to the defendant’s contacts with the forum and jurisdiction is based on the defendant’s presence or accumulated contacts with the forum, the court exercises “general jurisdiction.” (citations omitted).

839 F.2d at 1418; Doe v. Nat’l Medical Servs., 974 F.2d 143, 145 (10th Cir. 1992) (“Specific jurisdiction may be asserted if the defendant has ‘purposefully directed’ its activities toward the forum state, and if the lawsuit is based upon injuries which ‘arise out of’ or ‘relate to’ the defendant’s contacts with the state.”). The Supreme Court has explained that:

[j]urisdiction in these circumstances may not be avoided merely because the defendant did not physically enter the foreign state . . . it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communication across state lines, thus obviating the need for physical presence within a state in which business is conducted. So long as a commercial actor’s efforts are “purposefully directed” toward residents of another state, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction.

Burger King, 471 U.S. at 476.

As the undisputed facts establish, Prime's only contacts with the forum state consist of telephone calls and facsimiles made to Worldcom's Oklahoma office for purposes of obtaining technical support or addressing financial matters arising from the extended service plan agreements. The Court notes that telephone calls alone may provide sufficient contact with the forum for the exercise of personal jurisdiction. See Continental Am. Corp. v. Camera Controls Corp., 692 F.2d 1309, 1313-1314 (10th Cir. 1982). However, such contacts must "represent an effort by the defendant to 'purposefully avail[] itself of the privilege of conducting activities within the forum State.'" Rambo, 839 F.2d at 1418. Purposeful availment requires "affirmative conduct by the defendant which allows or promotes the transaction of business within the forum state." Id. at 1419. The undisputed facts establish that the agreements at issue in this case giving rise to the telephone calls were negotiated and executed in Florida for services to be provided in Florida. Given that the locus of the business activity at issue in the case occurred in Florida and the telephone calls made by Prime were admittedly made for the purpose of enforcing and maintaining those Florida agreements, the Court finds that the telephone calls and facsimiles are insufficient, standing alone, to support the exercise of jurisdiction over Prime. See, e.g., Kenan v. McBirney, 702 F. Supp. 843 (W.D. Okla. 1989). Accordingly, Defendant Prime Entertainment, Inc.'s Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(2) (Docket # 3) is hereby granted.

IT IS SO ORDERED.

This 2ND day of February, 1999.


Sven Erik Holmes
United States District Judge

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

ENTERED ON DOCKET

DATE 2-4-99

WOOLSLAYER COMPANIES and
KEMPER NATIONAL INSURANCE
COMPANIES

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CIVIL ACTION

NUMBER 98-C-217-H ✓

SECTION

MAGISTRATE

VERSUS

CANAL BARGE COMPANY, INC.;
BARNETT & CASBARIAN, INC.;
TULOMA STEVEDORING, INC.;
DANA MARINE SERVICE, INC.;
and the M/V FORT
McHENRY, ITS ENGINES, TACKLE,
APPAREL, FURNITURE, ETC., in rem

F I L E D

FEB 4 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MOTION & ORDER TO DISMISS WITH PREJUDICE

NOW INTO COURT, comes Woolslayer Companies and Kemper National Insurance
Companies who move this court to dismiss this action, with prejudice, each party to bear its own
costs.

Respectfully submitted,

T. Ramona

SIDNEY W. DEGAN, III (4804)
TRACEY L. RANNALS (22560)

Of

DEGAN, BLANCHARD & NASH
201 St. Charles Avenue, Suite 2401
New Orleans, Louisiana 70170
Telephone: (504) 529-3333

Attorney for Plaintiffs, Woolslayer Companies and
Kemper National Insurance Companies

5

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

WOOLSLAYER COMPANIES and
KEMPER NATIONAL INSURANCE
COMPANIES

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CIVIL ACTION
NUMBER 98-C-217-H
SECTION
MAGISTRATE

VERSUS

CANAL BARGE COMPANY, INC.;
BARNETT & CASBARIAN, INC.;
TULOMA STEVEDORING, INC.;
DANA MARINE SERVICE, INC.;
and the M/V FORT
McHENRY, ITS ENGINES, TACKLE,
APPAREL, FURNITURE, ETC., in rem

ORDER

Considering the foregoing;

IT IS ORDERED, ADJUDGED and DECREED that the above captioned matter be
dismissed, with prejudice, each party to bear its own costs.

TULSA, OKLAHOMA this 4TH day of FEBRUARY, 1999.



JUDGE

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

FILED

FEB 4 - 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TERESA HARNAR and)
CHARLES TANNER,)
)
Plaintiffs,)
)
vs.)
)
DANEK MEDICAL, INC.,)
)
Defendant.)

Case No. 97-CV-362-BU

ENTERED ON DOCKET

DATE 2-4-99

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 45 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiffs' actions shall be deemed to be dismissed with prejudice.

Entered this 4th day of February, 1999.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

22

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

KATHRYN S. DUKE,)
)
Plaintiff,)
)
v.)
)
PARADIGM FINANCIAL GROUP;)
ACCOUNT MANAGEMENT)
INFORMATION, INC., CREDIT)
BUREAU OF OKLAHOMA CITY, INC.,)
CSC CREDIT SERVICES, EQUIFAX)
CREDIT INFO and TRANSUNION,)
)
Defendants.)

FEB - 2 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-0459B (E)

ENTERED ON DOCKET
DATE **FEB 03 1999**

ORDER

NOW on this 2nd day of Feb January, 1999, there comes on for consideration Plaintiff's written Application to Dismiss, with Prejudice, Defendant Transunion in the above-entitled matter. The Court having been advised in the premises reviewed the file and finds that the same should be granted and the Defendant Transunion should be dismissed with prejudice from the above-entitled matter, and;

IT IS SO ORDERED.



Thomas R. Brett, Senior Judge
United States District Court

Approved:
Theodore P. Gibson, OBA #3353
525 S. Main, 1111 Park Centre
Tulsa, OK 74103
(918) 585-1181

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

FILED
FEB - 3 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

RANDY D. GRIFFIN,)
)
Plaintiff,)
)
v.)
)
VINEYARD PLATING & SUPPLY CO.,)
)
Defendant.)

Case No. 98-CV-524K(E) ✓

ENTERED ON DOCKET

DATE FEB - 3 1999

AMENDED
STIPULATION OF DISMISSAL WITH PREJUDICE

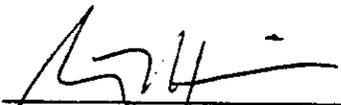
Pursuant to Rule 41(a)(1), F.R.Civ.P., the parties hereby stipulate that the above-captioned case be dismissed with prejudice because the parties have settled the case, each party to bear his or its own costs.

Respectfully submitted,



Kimberly Lambert Love, OBA #15806
Mary L. Lohrke, OBA #15806
BOONE, SMITH, DAVIS, HURST & DICKMAN
500 ONEOK Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103
(918) 587-0000

ATTORNEYS FOR DEFENDANT



Steve Hickman, OBA #4172
Frasier, Frasier & Hickman
1700 Southwest Boulevard
P.O. Box 799
Tulsa, Oklahoma 74101-0799

ATTORNEY FOR PLAINTIFF

CR

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

FILED

FEB 3 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

**KERRY STEEL, INC., a
Michigan corporation**

Plaintiff,

- vs. -

**PARAGON INDUSTRIES,
INC., an Oklahoma corporation,**

Defendant.

CASE NO. 97-CV-924 J ✓

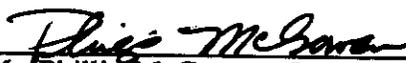
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DATE FEB - 3 1999

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

The parties hereto, each by and through their respective and duly authorized counsel, jointly represent to this Court that this matter has been successfully resolved as a result of the Court-ordered Settlement Conference. The parties, therefore, here jointly stipulate, and they hereby request, that this matter be dismissed with prejudice.

Dated this 15th day of January, 1999.


Mr. Phillip McGowan, OBA # 5997
Attorney at Law
Suite 205
1516 S. Boston
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Counsel to Defendant


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Co-Counsel to Plaintiff

01/mj

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

F I L E D

FEB - 2 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

EARL H. DUMAS,)

Plaintiff,)

v.)

ALBERTSON'S, INC.,)

Defendant.)

Case No. 97-CV-1123-B(J)

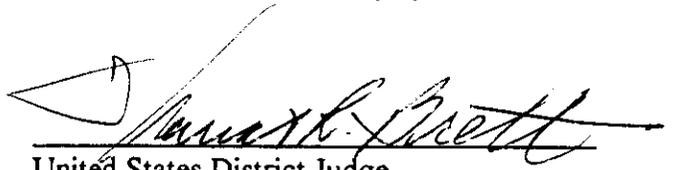
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DATE FEB 03 1999

ORDER OF DISMISSAL WITHOUT PREJUDICE

NOW on this 7th day of Feb., 1999, there comes on before the

Court the application of the Plaintiff for leave to dismiss this cause without prejudice. The Court notes that the Plaintiff has been charged in the District Court of Tulsa County, Oklahoma with two counts of murder and that the defense of this action has interfered with the Plaintiff's ability to give his attention to the prosecution of this action. The Court finds that a dismissal without prejudice would allow the Plaintiff to give his full attention to the defense of criminal charges filed against him, while still affording him an opportunity to refile the case, in the event the criminal charges are successfully disposed of in a manner which leaves him free to again give his attention to this matter.

IT IS, THEREFORE, ORDERED, that this cause be dismissed without prejudice.


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

FEB - 2 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RONALD E. O'DELL and)
PAULA O'DELL, husband and wife,)

Plaintiffs,)

v.)

Case No. 98-CV 487-B(J)

SUN REFINING AND MARKETING)
COMPANY, a Pennsylvania corporation,)
and E.I. DU PONT DE NEMOURS)
AND COMPANY, a Delaware corporation,)

Defendants.)

ENTERED ON DOCKET
FEB 03 1999

ORDER

Before the Court is the motion to dismiss filed by defendant Sun Refining and Marketing Company ("Sun") (Docket No. 9). Sun seeks to dismiss plaintiffs Ronald E. and Paula O'Dell's (the "O'Dells") Complaint to Vacate the Judgment entered by this Court on April 30, 1991 pursuant to a jury verdict in favor of plaintiff Ronald E. O'Dell in the amount of \$1.00 in damages in *Ronald E. O'Dell and Paula O'Dell v. Sun Refining and Marketing Co. and E.I. DuPont de Nemours and Co.*, 89-C-434-B.

Procedural History

A. O'Dell I

On May 24, 1989, the O'Dells filed suit against Sun and E.I. Du Pont de Nemours and Company¹ seeking damages for injuries allegedly caused by a release of hydrogen fluoride

¹ Pursuant to the parties' stipulation, defendant E.I. Du Pont de Nemours and Company was dismissed without prejudice in this action on July 28, 1998.

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("HF") gas at the Sun refinery in Tulsa, Oklahoma, on March 19, 1988 (hereinafter referred to as "*O'Dell I*"). During the discovery phase of *O'Dell I*, Sun raised several objections to the O'Dells' discovery requests, including relevance, undue burden, harassment, attorney-client privilege, and work product. At no time did the O'Dells object to or move to compel Sun's discovery responses. As this Court granted partial summary judgment to defendants based on its holding that the "Firemen's Rule" provided Sun with immunity from the O'Dells' claims of negligence, nuisance and strict liability, the only issue for the jury was whether Sun was grossly negligent. The jury found that Sun was grossly negligent; however, the jury awarded Ronald E. O'Dell \$1.00 in actual damages and no punitive damages, and awarded no damages to Paula O'Dell for loss of consortium.

After this Court denied Plaintiffs' Motion for New Trial, the O'Dells filed (1) a Notice of Appeal on October 18, 1991, and (2) a Motion to Vacate under Fed.R.Civ.P. 60(b)(2) and (3) on May 1, 1992. In their Rule 60(b) motion, the O'Dells moved to vacate the judgment based on newly discovered evidence, fraud, misrepresentation and misconduct of Sun and its attorneys. Specifically, the O'Dells alleged that Sun and its attorneys withheld documents that, if disclosed, would have proved that the amount of HF actually released at the Sun refinery was substantially more than was admitted during the trial. The O'Dells asserted that this information, if produced, would have increased their damage award. On July, 14, 1992, this Court dismissed the O'Dells' Rule 60(b) motion, concluding the Tenth Circuit had jurisdiction because of the pending appeal.

On August 10, 1992, the Tenth Circuit dismissed the O'Dells' appeal of the verdict and judgment for lack of prosecution. Then, on August 13, 1992, the O'Dells filed a Notice of Appeal of this Court's denial of the O'Dells' Rule 60(b) motion. The Tenth Circuit also dismissed this appeal for lack of prosecution on February 12, 1993 as the O'Dells did not file an opening brief.

Thus, the February 12, 1993 dismissal concluded *O'Dell I*.

B. O'Dell II

On July 30, 1993, the O'Dells filed a petition in the District Court of Tulsa County, *Ronald E. O'Dell and Paula O'Dell v. William Thomas McCollough, Sun Refining and Marketing Co., John H. Tucker, Robert P. Redemann, and Rhodes, Hieronymus, Jones, Tucker & Gable*, Case No. CJ-93-03422 ("*O'Dell II*"), asserting a private cause of action for perjury. In that petition, the O'Dells not only named Sun as a defendant, but they also named Sun's attorneys and one of Sun's employees. The O'Dells alleged that a Sun employee committed perjury at trial, and that Sun and its attorneys suborned that perjury and concealed documents in *O'Dell I*. The O'Dells further alleged that the jury in *O'Dell I* relied on the perjured testimony and the absence of the evidence improperly withheld during discovery in reaching its verdict of \$1.00 in damages, and that but for the discovery violations, the O'Dells would have been better able to have established the true volume of HF released on March 19, 1988 and thus have received a higher damage award.

On February 8, 1996, the Tulsa County district court dismissed the O'Dells' action with prejudice because (1) Plaintiffs' allegations failed to state a claim; (2) Plaintiffs failed to state a claim for fraud; and (3) the two year statute of limitations barred Plaintiffs' fraud action. On appeal, the Oklahoma Court of Appeals affirmed the trial court and held:

Plaintiffs' allegations in this action stem in part from Defendants' alleged fraudulent conduct that occurred in the federal litigation [*O'Dell I*]. After a review of the record, it must be concluded that the alleged fraud does not rise above intrinsic fraud -- one perpetrated within the course of adversary proceedings. [Citation omitted]. Additionally, it must be noted Plaintiffs have extensively litigated their claim in federal court [in *O'Dell I*], resulting in a verdict for Plaintiffs. Plaintiffs, having chosen the federal forum, may not now seek this forum to complain of perjury and fraud, particularly where these issues were raised in federal court. Public policy requires that there be an end to civil litigation involving allegations of fraud and

perjury. [Citations omitted]. We find that the trial court did not err in granting the motion to dismiss of Defendants Sun and McCollough.

The O'Dells then petitioned the Oklahoma Supreme Court for certiorari, wherein the O'Dells admitted that *O'Dell II* was indeed a collateral attack on the judgment in *O'Dell I*. On October 23, 1996, the Oklahoma Supreme Court denied certiorari.

C. O'Dell III

On July 6, 1998, the O'Dells again sought redress in this Court for the alleged injuries caused by the March 19, 1988 HF release by filing their Complaint to Vacate Judgment ("*O'Dell III*"). In the complaint, the O'Dells allege the same perjury and discovery violations in *O'Dell I* previously alleged in their Rule 60(b) motion to vacate filed in *O'Dell I*, as well as in their state court petition in *O'Dell II*. The O'Dells again complain that Sun's failure to produce documents during discovery in *O'Dell I* precluded them from proving the extent of their damages due to the HF release from the Sun Refinery. The O'Dells assert the *O'Dell I* judgment should be vacated based on Federal Rule of Civil Procedure 60(b)(6) and the "savings" provision of Rule 60 regarding "fraud upon the court."

Analysis

Sun asserts the O'Dells cannot state a claim to vacate the judgment in *O'Dell I* and thus moves to dismiss the Complaint. To dismiss the O'Dell's complaint under Fed.R.Civ.P. 12(b)(6), the Court must consider "the allegations set forth in the complaint, accept all well-pleaded allegations in the complaint as true, and draw all reasonable inferences in Plaintiff's favor." *Kamplain v. Curry County Board of Commissioners*, 159 F.3d 1248, 1250 (10th Cir. 1998); *Jojola v. Chavez*, 55 F.3d 488, 490 (10th Cir. 1995); *Gagan v. Norton*, 35 F.3d 1473, 1475 (10th Cir. 1994).

In addition, the Court takes judicial notice of the proceedings in *O'Dell I and II*. *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172-73 (10th Cir. 1979) (The “court may, *Sua sponte*, take judicial notice of its own records and preceding records,” . . . as well as “proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.”); *Ginsberg v. Thomas*, 170 F.2d 1 (10th Cir. 1948).

Rule 60(b) states in pertinent part the following:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a judgment for fraud upon the court.

Fed.R.Civ.P. 60(b).

As noted above, the judgment the O'Dells seek to vacate was entered on April 30, 1991 pursuant to the jury verdict in *O'Dell I*, finding for Ronald E. O'Dell and against Sun on his claim of gross negligence and awarding damages in the amount of \$1.00, and finding for Sun and against Paula O'Dell on her claim for loss of consortium. The O'Dells base their independent action to vacate this judgment on “fraud upon the court” and subsection (b)(6) of Rule 60, “any other reason justifying relief from the operation of the judgment.” However, neither ground supports the relief

sought by plaintiffs. Plaintiffs' allegations support a motion for vacation of the *O'Dell I* judgment only under Rule 60(b)(2) and (3) and such motion would be barred by the Rule's one-year time limit.

In *O'Dell I*, the O'Dells moved to vacate the *O'Dell I* judgment on May 1, 1992 based on newly discovered evidence which had not been produced during discovery and "fraud, misrepresentation and misconduct on the part of material witnesses, the Defendant, Sun Refining and Marketing Company and its counsel." *Motion to Vacate, Case No. 89-C-434-B*. The alleged misconduct was substantively identical to that now alleged in the Complaint in this action. However, in the earlier Rule 60(b) motion, Plaintiffs correctly based their Rule 60(b) motion on clauses (2) and (3). That motion was denied for lack of subject matter jurisdiction, appealed, and dismissed on appeal for lack of prosecution. Now, as the one-year time limit in which to bring a motion under Rule 60(b)(2) and (3) terminated more than six years before the filing of the present Complaint, the O'Dells seek to fashion an independent action for "fraud upon the court" from similar allegations of newly discovered evidence, discovery misconduct, perjury and fraud. Such allegations, however, do not rise to a "fraud upon the court."

The allegations in the instant Complaint, if timely filed, would clearly support a Rule 60(b)(3) motion, as it is replete with allegations of "fraud . . . , misrepresentation, or other misconduct of an adverse party." Fed.R.Civ.P. 60(b)(3). An independent action for "fraud on the court," however, significantly differs from a motion alleging fraud under Rule 60(b)(3). "Fraud on the court" is tightly construed because the consequences are severe. It may permit a party to overturn a judgment long after it has become final. . . . Thus, it runs counter to the strong policy of judicial finality." *Weese v. Schukman*, 98 F.3d 542, 553 (10th Cir. 1996). The Tenth Circuit defines "fraud on the court" as follows:

“Fraud on the court...is fraud which is directed to the judicial machinery itself and *is not fraud between the parties or fraudulent documents, false statements or perjury.* It has been held that allegations of nondisclosure in pretrial discovery will not support an action for fraud on the court.... It is thus fraud where the court or a member is corrupted, influenced or influence is attempted or where the judge has not performed his judicial function -- thus where the impartial functions of the court have been directly corrupted.”

Weese, 98 F.3d at 552 (quoting *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259, 1266 (10th Cir. 1995)). Plaintiffs bring this independent action alleging “fraud between the parties,” “false statements or perjury,” and “nondisclosure in pretrial discovery.” Thus, plaintiffs’ allegations, even if true, do not support an action for fraud on the court. *Id.* And any allegations which would form the basis for a Rule 60(b)(3) motion is barred the one-year time limit.

If relief may be obtained through an independent action in a case such as this, where the most that may be charged . . . is a failure to furnish relevant information that would at best form the basis for a Rule 60(b)(3) motion, the strict 1-year time limit on such motions would be set at naught. Independent actions must, if Rule 60(b) is to be interpreted as a coherent whole, be reserved for those cases of “injustices which, in certain instances, are deemed sufficiently gross to demand a departure” from rigid adherence to the doctrine of *res judicata*.

United States v. Beggerly, 118 S.Ct. 1862, 1867 (1998). Plaintiffs’ complaint fails to justify such a departure.

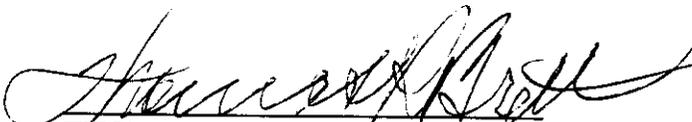
Further, plaintiffs cannot save their claim by relying on Rule 60(b)(6). As noted above, the type of allegations in the Complaint fall within the scope of Rule 60(b)(3). The United States Supreme Court has recognized that clause (6) and clauses (1)-(5) are mutually exclusive: “Rule 60(b)(6) . . . grants federal courts broad authority to relieve a party from a final judgment ‘upon such terms as are just,’ provided that the motion is made within a reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5).” *Liljeberg v. Health*

Services Acquisition Corp., 486 U.S. 847, 863, 864 n.11 (1988) (quoting *Klapprott v. United States*, 335 U.S. 601, 613 (1949)). However, even if these clauses were not mutually exclusive, the Complaint would be dismissed as it was not filed within a reasonable time.

The record supports lack of diligence and neglect on the part of the plaintiffs. The O'Dells never made any effort during the discovery phase of *O'Dell I* to compel production of the documents they alleged were wrongfully withheld. And, although plaintiffs were aware of these alleged nondisclosures and misrepresentations in May 1992 when they filed their Rule 60(b) motion in *O'Dell I*, they failed to prosecute their appeal of this Court's Order denying the motion. Now, six years and two lawsuits later, the O'Dells have no credible claim to the reasonableness of their delay. *Winfield Associates, Inc. v. Stonecipher*, 429 F.2d 1087, 1090 (10th Cir. 1970) (In an independent action under Rule 60(b), "it is fundamental that equity will not grant relief if the complaining party 'has, or by exercising proper diligence would have had, an adequate remedy at law, or by proceedings in the original action * * * to open, vacate, modify or otherwise obtain relief against, the judgment.'").

Accordingly, the Court grants Defendant Sun's Motion to Dismiss. (Docket No. 9)

IT IS SO ORDERED, this 2nd day of February, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

F I L E D

FEB 2 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CLAUDE "SONNY" MILES,)
)
Petitioner,)
)
vs.)
)
RON CHAMPION,)
)
Respondent.)

Case No. 96-CV-167-E

ENTERED ON DOCKET

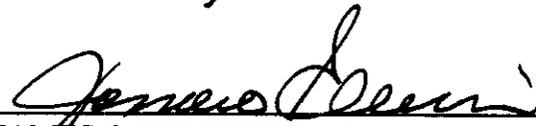
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JUDGMENT

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 2^o day of February, 1999.


JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

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

F I L E D

FEB 2 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CLAUDE "SONNY" MILES,)

Petitioner,)

vs.)

Case No. 96-CV-167-E ✓

RON CHAMPION,)

Respondent.)

ENTERED ON DOCKET
DATE **FEB 03 1999**

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges his conviction entered in LeFlore County District Court, Case No. CRF-91-24. He raises six (6) grounds of error allegedly justifying habeas corpus relief. Pursuant to this Court's Order of May 1, 1998 (#16), Respondent has filed a supplemental Rule 5 response (#21). Petitioner has filed a reply to Respondent's response (#24). As more fully set out below the Court finds that this petition should be denied.

BACKGROUND

Petitioner was convicted by a jury of Unlawful Possession of a Controlled Drug with Intent to Distribute (Count I), Knowingly Concealing Stolen Property (Count II), and Unlawful Possession of Marijuana with Intent to Distribute (Count III) in LeFlore County, District Court Case No. CRF-91-24. He was sentenced to life imprisonment on Counts I and III and to five years imprisonment on Count II. Petitioner was represented at trial by attorney Don Sullivan.

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On direct appeal, counsel for Petitioner, Carl Robinson, raised six issues in Petitioner's original appellate brief. Appellate counsel also filed, at Petitioner's request, a supplemental brief expanding the discussion of one issue and raising one new issue. The Court of Criminal Appeals affirmed the judgment and sentence on December 23, 1994, in an unpublished summary opinion.

On March 8, 1995, Petitioner filed a petition for post-conviction relief in LeFlore County District Court, raising the six claims presented for consideration in the instant action. On March 22, 1995, the trial court denied the application. Petitioner appealed the denial of post-conviction relief. On February 8, 1996, the Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief. That court found that with the exception of Petitioner's ineffective assistance of appellate counsel claim, Petitioner had "failed to provide this Court with sufficient reasons concerning why the issues presented in his application for post-conviction relief were not asserted or were insufficiently raised in prior proceedings. 22 O.S.1991, §§ 1080 and 1086. Further, '[t]he mere fact that counsel fails to recognize the factual or legal basis for a claim, or fails to raise the claim despite recognizing it, is not sufficient to preclude enforcement of a procedural default.' Webb v. State, 835 P.2d 115, 116 (Okl.Cr.1992)." (#21, Ex. B at 3.) Therefore, the state appellate court imposed a procedural bar on Petitioner's post-convictions claims, with the exception of his ineffective assistance of appellate counsel claim which was denied on the merits.

On March 1, 1996, Petitioner filed the instant petition for writ of habeas corpus. According to Petitioner, federal habeas corpus relief is warranted based on the following six (6) grounds:

- Ground I: Appellate counsel was ineffective and directly caused Petitioner's due process right to review to be circumvented and violated.
- Ground II: Petitioner's due process rights were violated when he was denied the opportunity for a rehearing by the appeals court due to the mis-conduct of

appellate counsel.

- Ground III: The memorandum opinion issued in the appeal has deprived petitioner of his statutory and constitutional right to due process in his appeal.
- Ground IV: The appeals court ruled contrary to law and their own ruling when they failed to reverse the conviction when presented with an identical case situation.
- Ground V: Petitioner was denied a fair trial when the State was allowed to use prejudicial as (sic) confusing statements and closing argument during the proceedings.
- Ground VI: The sentence imposed was rendered invalid when the original charge afforded only a maximum penalty of ten years imprisonment.

(#1).

ANALYSIS

As a preliminary matter, the Court must determine whether Petitioner has satisfied the exhaustion requirement of 28 U.S.C. § 2254(b). In this case, Respondent concedes and the Court agrees that Petitioner has met the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Coleman v. Thompson, 501 U.S. 722, 732 (1991); Rose v. Lundy, 455 U.S. 509 (1982).

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 March 1, 1996, more than one month before enactment of the AEDPA, the Court concludes that the provisions of the Act do not apply to this case.¹ This case will be reviewed pursuant to pre-AEDPA standards.

¹Although no effective date is specified for those provisions of the AEDPA applicable to non-capital cases, the Supreme Court has ruled that the AEDPA does not apply to non-capital habeas corpus cases pending on the date of enactment. See Lindh v. Murphy, 117 S.Ct. 2059 (1997).

B. Procedural bar applies to preclude consideration of claims 5 and 6

The alleged procedural default in this case results from Petitioner's failure to present claims numbered 5 and 6 to the Oklahoma Court of Criminal Appeals on direct appeal. As claim number 5, Petitioner alleges he was denied a fair trial due to prosecutorial misconduct. Specifically, Petitioner complains that the prosecutor made remarks during closing argument intended to inflame the jurors' passions. In his supplemental brief filed on direct appeal, Petitioner alleged prosecutorial misconduct but only in regard to statements made by the prosecutor during closing argument related to the presumption of innocence. The instant claim was not presented on direct appeal. As a result, the Oklahoma Court of Criminal Appeals imposed a procedural bar on this claim first raised in Petitioner's post-conviction application.

As claim number 6, Petitioner alleges that the sentence of life imprisonment imposed pursuant to Okla. Stat. tit. 63, § 2-401(B)(2) was invalid because the statute in effect at the time of the original charge provided a maximum penalty of only ten years imprisonment. Although Petitioner argued on direct appeal that the imposed sentence was excessive, the basis for the allegation was Petitioner's contention that the jury rendered excessive sentences because the trial court erroneously admitted "grossly prejudicial" evidence. The instant claim, that the life sentence is invalid, was not presented to the state appellate court on direct appeal. As a result, that court imposed a procedural bar on Petitioner's claim first raised in post-conviction proceedings.

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 the 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)).

Applying these principles to the instant case, the Court concludes Petitioner's claims 5 and 6 are barred by the procedural default doctrine. The state court's procedural bar as applied to Petitioner's claims was an "independent" state ground because it would be "the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar would be an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently declined to review claims which were not but could have been raised on direct appeal. Okla. Stat. tit. 22, § 1086.

Because of Petitioner's procedural default, this Court may not consider Petitioner's claims numbered 5 and 6 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, 501 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).

Petitioner attributes his failure to raise these claims on direct appeal to appellate counsel's ineffectiveness. See #24. Ineffective assistance of counsel is cause for a procedural default. Coleman, 501 U.S. at 755. To prove ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 687 (1984), a habeas petitioner must satisfy a two-part test. First, he must show that his attorney's performance "fell below an objective standard of reasonableness," id. at 688, and second, he must show that there is a "reasonable probability" that but for counsel's error, the outcome would have been different, id. at 694. Although the Strickland test was formulated in the context of evaluating a claim of ineffective assistance of trial counsel, the same test is used with respect to appellate counsel. See, e.g., Claudio v. Scully, 982 F.2d 798, 803 (2d Cir. 1992).

In attempting to demonstrate that appellate counsel's failure to raise a state claim constitutes deficient performance, it is not sufficient for the habeas petitioner to show merely that counsel omitted a nonfrivolous argument that could be made. See Jones v. Barnes, 463 U.S. 745, 754 (1983). A petitioner, however, may establish constitutionally inadequate performance if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker.

When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.

Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986); Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987) (ineffective assistance of counsel when appellate counsel ignored "a substantial, meritorious Fifth Amendment issue, raising instead a weak issue). The claim whose omission forms the basis of an ineffective assistance claim may be either a federal-law or a state-law claim, so long as the "failure to raise the state . . . claim fell 'outside the wide range of professionally competent assistance.'" Claudio, 982 F.2d at 805 (quoting Strickland, 466 U.S. at 690).

In assessing the attorney's performance, a reviewing court must judge his conduct on the basis of the facts of the particular case, "viewed as of the time of counsel's conduct," Strickland, 466 U.S. at 690, and may not use hindsight to second-guess his strategy choices, see Lockhart v. Fretwell, 113 S. Ct. 838, 844 (1993). Counsel is not required to forecast changes in the governing law. See, e.g., Horne v. Trickey, 895 F.2d 498, 500 (8th Cir. 1990) (ineffectiveness not established by claim that "counsel should have realized that the Supreme Court was planning a significant change rises to the level of constitutional ineffectiveness").

In evaluating the prejudice component of the Strickland test, a court must determine whether, absent counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. The outcome determination, unlike the performance determination, may be made with the benefit of hindsight. See Fretwell, 113 S. Ct. at 844. To establish prejudice in the appellate context, a petitioner must demonstrate that "there was a 'reasonable probability' that [his] claim would have been successful before the [state's highest court]." Claudio, 982 F.2d at 803 (footnote omitted).

After reviewing the record in this case, the Court concludes that appellate counsel's failure

to argue on appeal Petitioner's claims numbered 5 and 6 does not fall below the standard of reasonably effective assistance. As discussed below, Petitioner has failed to establish that the ignored issues were more likely to result in a reversal or new trial than the issues actually raised on appeal. See Gray v. Gray, 800 F.2d 644, 647 (7th Cir. 1986).

As to Petitioner's claim of prosecutorial misconduct, a habeas corpus petitioner must demonstrate that the prosecutor's conduct resulted in a trial "so fundamentally unfair as to deny [the petitioner] due process." Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974). In evaluating whether a prosecutor's remarks effectively denied petitioner due process, "we must take notice of all the surrounding circumstances, including the strength of the state's case." Coleman v. Brown, 802 F.2d 1227, 1237 (10th Cir. 1986). Furthermore, a showing which might call for application of supervisory powers is not sufficient "for not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to every concept of justice.'" Fero v. Kerby, 39 F.3d 1462, 1473 (10th Cir. 1994) (citations omitted).

In this case, the state produced overwhelming evidence to support Petitioner's conviction. Petitioner claims that during closing argument, the prosecutor improperly sought "sympathy for the victim of the alleged stolen gun" and improperly portrayed Petitioner as a dealer of stolen weapons. (#1). Petitioner also complains that his attorney failed to object to the remarks. After reviewing the record, the Court finds that the remark complained of and the lack of an admonishment by the trial judge did not deny due process and does not constitute an infirmity of constitutional proportions. Under Strickland, appellate counsel did not provide ineffective assistance in failing to raise this claim on direct appeal. The Court concludes that Petitioner has failed to demonstrate cause to excuse

his procedural default

Similarly, the Court finds appellate counsel did not provide ineffective assistance in failing to argue that Petitioner's life sentence is invalid because that claim is legally frivolous. Petitioner believes that the version of the statute in effect at the time he committed the crimes for which he was convicted provided that the maximum sentence he could receive on the drug charges was ten (10) years imprisonment. According to Petitioner, the amendment to the statute increasing the maximum sentence to life imprisonment became effective September 1, 1991, approximately nine (9) months after his arrest.

Petitioner was sentenced pursuant to Okla. Stat. tit. 63, § 2-401(B)(2). Prior to November 1, 1989, that statute provided that the maximum sentence for violation of the provisions of subsection A was twenty (20) years imprisonment. However, effective November 1, 1989, the maximum sentence was life imprisonment. Petitioner states that the crime for which he was sentenced was committed on January 20, 1991 (#1). Thus, the sentence Petitioner received was consistent with the statutory provisions in effect at the time. His claim to the contrary is legally frivolous and his appellate counsel did not provide ineffective assistance in failing to raise it on appeal. The Court concludes that Petitioner has failed to demonstrate cause to excuse his procedural default of this claim.

Even if any of Petitioner's claims would have been successful on direct appeal, the Court notes that the failure to raise a particular issue on appeal is not in and of itself indicative of ineffective assistance of appellate counsel. The U.S. Supreme Court has recognized that appellate counsel serves best by winnowing out weaker arguments and focusing upon stronger central claims. Jones v. Barnes, 463 U.S. 745, 751-52. Petitioner's appellate counsel followed to the letter the

Supreme Court's suggestion in Jones. It appears he focused Petitioner's appellate claims on his best arguments under the law and the facts of this case. Therefore, appellate counsel's decision not to present all possible issues on direct appeal did not deny Petitioner the effective assistance of counsel and does not constitute cause sufficient to excuse Petitioner's procedural default in state court.

Petitioner's only other means of gaining federal habeas review of his procedurally barred claims 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, however, does not claim that he is actually innocent of the crimes underlying his criminal conviction. Therefore, Petitioner has failed to establish that a fundamental miscarriage of justice will occur if his these claims are not considered in this habeas corpus proceeding.

The Court concludes that Petitioner has failed to demonstrate cause and prejudice or a fundamental miscarriage of justice and his claims numbered 5 and 6 are procedurally barred from federal habeas corpus review.

C. Petitioner's remaining claims (numbered 1 - 4) lack merit

As discussed above, pre-AEDPA standards of review apply in this case. Under those standards, the determination by a state court of competent jurisdiction after a hearing on the merits of a factual issue will be presumed to be correct, unless the petitioner demonstrates that the state courts failed to resolve the claims on the merits. See Wright v. West, 505 U.S. 277, 300-306 (1992) (White, J., concurring); Ramirez v. Rodriguez, 467 F.2d 822 (10th Cir. 1972). In contrast to the deferential standard of review for a state court's factual findings, this Court reviews issues of law and issues of mixed law and fact *de novo* under pre-AEDPA standards. See Wright, 505 U.S. at 300-01.

1. *Ineffective assistance of appellate counsel (Claims 1 and 2)*

As his first ground of error, Petitioner alleges that his appellate counsel provided ineffective assistance of counsel when he "ignored" Petitioner prior to filing the brief on appeal "rendering his right to review ineffective and the entire appellate process a travesty." (#1) As his second ground of error, Petitioner complains that his appellate counsel provided ineffective assistance of counsel when he failed to file a timely request for rehearing after the state appellate court entered its order affirming his conviction and sentence.

The Sixth Amendment right to effective assistance of counsel extends to a criminal defendant's direct appeal. Evitts v. Lucey, 469 U.S. 387 (1985). As discussed above, the standard announced by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984) applies to claims of ineffective assistance of appellate counsel. To satisfy the Strickland standard, Petitioner must demonstrate that his appellate counsel's performance was deficient and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the appeal would have been different." Id. at 688. After reviewing the record in this case, the Court finds Petitioner has failed to satisfy either prong of the Strickland standard.

Petitioner complains that appellate counsel failed to answer his letters promptly and did not prepare a supplemental brief to include both citation to a case² decided after the original brief had been submitted and a claim of prosecutorial misconduct based on the prosecutors statements made during closing argument concerning the presumption of innocence. However, the record before the

²Petitioner cites the case as "State v. Vaughn, __ P.2d __ (Okla. Cir. 1993) 64 OBJ 2099 (Fall 1993)." The Court believes the case to which Petitioner refers is State v. Stuart, 855 P.2d 1070 (Okla. Crim. App. 1993). In Stuart, co-defendants Billie Jean Stuart and Denzel Lee Vaughn successfully argued that because a search warrant affidavit, supported by evidence obtained by officers acting outside their jurisdiction, was fatally defective, all evidence seized pursuant to the defective search warrant had to be suppressed.

Court indicates Petitioner's appellate counsel did communicate with Petitioner and did submit the supplemental brief as requested by Petitioner. The Oklahoma Court of Criminal Appeals considered and rejected the claims raised in the supplemental brief. As a result, the Court finds Petitioner has failed to demonstrate how he was prejudiced by counsel's allegedly deficient performance.

Petitioner also contends that his appellate counsel rendered constitutionally ineffective assistance when he failed to request rehearing after the state appellate court entered its order affirming Petitioner's conviction. However, contrary to Petitioner's assertion, the *Rules of the Oklahoma Court of Criminal Appeals* clearly provide that a defendant is not entitled to rehearing as a matter of right. According to Rule 3.14(B),

[a] petition for rehearing shall not be filed, as a matter of course, but *only* for the following reasons:

(1) Some question decisive of the case and duly submitted by the attorney of record has been overlooked by the Court, or

(2) The decision is in conflict with an express statute or controlling decision to which the attention of this Court was not called either in the brief or in oral argument.

(emphasis added). In the instant case, a petition for rehearing was not justified on either ground. No question decisive of the case was overlooked as evidenced by the list of issues identified in the summary opinion filed by the Court of Criminal Appeals. As to the second ground justifying rehearing, Petitioner identifies only statutes and cases cited in his briefs as the basis for his argument that the opinion conflicted with existing law. Therefore, the second ground for rehearing, requiring that the decision conflict with law to which the attention of the Court was not called, is not satisfied. The Court concludes that appellate counsel's failure to file a petition for rehearing does not constitute deficient performance under Strickland.

Petitioner has failed to demonstrate that his appellate counsel provided ineffective assistance. The Court finds habeas corpus relief on this ground should be denied.

2. *State appellate court's use of summary opinion violates due process (Claim 3)*

As his third ground of error, Petitioner complains that the state appellate court's use of a summary opinion in affirming his conviction and sentence on direct appeal constitutes a violation of his right to due process. This argument has no merit. There is no constitutional requirement that an appellate court accompany a decision with a written opinion. See Taylor v. McKeithen, 407 U.S. 191, 194 n.4 (1972); see also King v. Champion, 55 F.3d 522, 526 (10th Cir. 1995); Furman v. United States, 720 F.2d 263, 265 (2d Cir. 1983) ("The fact that a disposition is by informal summary order rather than by formal published opinion in no way indicates that less than adequate consideration has been given to the claims raised in the appeal."). In support of his argument, Petitioner cites Smith v. Ohio, 494 U.S. 541 (1990). In Smith, Justice Marshall filed a dissenting opinion wherein he states that "I continue to believe that summary dispositions deprive litigants of a fair opportunity to be heard on the merits and significantly increase the risk of an erroneous decision." Id. at 544 (citations omitted). Dissenting opinions, however, have no precedential value and do not control as a matter of law. The Court concludes that habeas corpus relief on this ground should be denied.

3. *State appellate court's decision conflicts with established state law (Claim 4)*

As his fourth allegation of error, Petitioner contends that the state appellate court's affirmance of his conviction was contrary to Oklahoma law, specifically "State v. Vaughn." As discussed above, the Court believes that the full citation for the case relied on by Petitioner is State v. Stuart, 855 P.2d 1070 (Okla. Crim. App. 1993). However, as stated by Respondent, it is well established

that "federal habeas corpus relief does not lie for errors of state law." Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (citing Lewis v. Jeffers, 497 U.S. 764, 780 (1990); Pulley v. Harris, 465 U.S. 37, 41, (1984)). In Estelle, the Supreme Court reemphasized that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Id. (citing 28 U.S.C. § 2241; Rose v. Hodges, 423 U.S. 19, 21 (1975) (per curiam)). Therefore, this Court cannot consider Petitioner's instant claim unless a violation of federal law is involved.

The thrust of Petitioner's claim is that he was convicted based on evidence obtained in violation of his Fourth and Fourteenth Amendment right to be free of unreasonable searches and seizures. However, Fourth Amendment exclusionary rule claims are not cognizable in federal habeas corpus proceedings if the petitioner had an opportunity for full and fair litigation of the claim in state court. Stone v. Powell, 428 U.S. 465, 494 (1976). The record of Petitioner's proceedings in state court indicates he challenged the constitutionality of the search and seizure both through a motion to suppress in the trial court, and as an issue raised in his direct appeal. The state courts reviewed and rejected his claim on the merits. Petitioner had a full and fair opportunity to litigate his Fourth Amendment claim in state court, and, pursuant to the bar imposed by Stone, federal habeas relief cannot be granted on that ground.

CONCLUSION

Petitioner's claims numbered 5 and 6 are procedurally barred from federal habeas corpus review. Petitioner's remaining claims, numbered 1-4, are without merit or are not cognizable in federal habeas corpus. Therefore, after carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States and 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 2^d day of February, 1999.



JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

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

F I L E D

FEB 2 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARY RAE PRUITT, WINDELL MICHELLE)
GOOSBY, and YOLANDA YBARRA,)

Plaintiffs,)

vs.)

No. 98-C-186-C ✓

BORG-WARNER SECURITY CORP., a)
foreign corporation, ORVEL LEE THOMPSON,)
individually and in his capacity as employee of)
Borg-Warner Security, and as a correctional officer)
for the State of Oklahoma, FREEDOM HOUSE,)
INC., d/b/a FREEDOM RANCH, a corporation,)

Defendants.)

ENTERED ON DOCKET
FEB 03 1999

ORDER

Before the Court are the motions for summary judgment filed by defendants, Borg-Warner Security Corp. and Freedom Ranch, Inc., pursuant to F.R.C.P. 56.

Background

The present motions arise from argument presented to the Court during the status conference, held on September 3, 1998, at which defendants raised certain jurisdictional issues. Because the issues had not been fully explored nor briefed, the Court gave the parties sixty days in which to conduct limited discovery on the jurisdictional issues, and an additional period of time in which to formulate and file motions respecting such issues. At the conclusion of the hearing, the Court made clear that the jurisdictional issues are to be decided before the action proceeds to the merits. The Court stated, "What we're dealing with now are just the jurisdictional issues that we're going to be confronted with, [which] should pass first. And then we'll immediately, if we pass that threshold, have our scheduling order . . ." Hence, in addressing these motions, the Court will not consider the underlying merits of the action, but will only consider the matter of its jurisdiction.

The Court will briefly outline facts which are relevant to the present jurisdictional analysis, and the Court notes that some of the following facts, which relate to the merits, are presently disputed. During the period of time relevant to this lawsuit, plaintiffs, all of whom are females, were inmates of the Oklahoma Department of Corrections ("DOC"), and they were housed at Freedom House. Since 1986, the Freedom House facility has operated under a contract with DOC to house inmates who participate in DOC's Prisoner Public Works Programs.¹ In 1996, the City of Tulsa operated under a contract with DOC to utilize inmate work crews to perform a variety of jobs, such as picking up trash along public roads in Tulsa.² Inmates from the Freedom House, including plaintiffs, were utilized by the City for this purpose. The City contracted with defendant Borg-Warner Security to supply guards to the City to oversee the inmate work crews.³ However, Borg-Warner had not entered into any contract with DOC or Freedom House. Defendant Orvel Thompson was a male security officer, licensed by the State of Oklahoma and employed by Borg-Warner at the times relevant to this action, and his duties included the transportation of inmates, including plaintiffs, from Freedom House to outside work details and the supervision of those inmates. Thompson wore a uniform while supervising the inmates.

Plaintiffs allege in their complaint that while acting as a security officer assigned to supervise inmate work crews away from Freedom House in April 1996, Thompson sexually assaulted them. Plaintiffs further allege that Borg-Warner and Freedom House knew or should have known that female inmates at Freedom House had in the past been sexually assaulted by male security officers while in

¹ Freedom House performs its limited function of housing inmates by reason of an agreement with DOC.

² Essentially, then, the City of Tulsa contracted with DOC for inmates to be placed in the custody of the City for the purpose of performing designated tasks for the City.

³ The City of Tulsa furnishes custodial security for the inmates while they are performing tasks for the City. The City contracted with Borg-Warner to furnish security officers to act in behalf of the City, which includes security over DOC inmates. There is, however, no contractual relation between Borg-Warner, its employees, and the City with Freedom House.

custody. Plaintiffs allege that despite this knowledge, Borg-Warner and Freedom House failed to protect plaintiffs from sexual harassment and assault, failed to correct known risks, failed to train personnel, and failed to implement procedures designed to prevent such attacks. Plaintiffs bring their claims under 42 U.S.C. § 1983, for deprivation of civil rights in violation of the Eighth and Fourteenth Amendments, and the Violence Against Women Act, 42 U.S.C. § 13981, and they further raise various state law tort claims. Defendants, Borg-Warner and Freedom House, move for summary judgment on jurisdictional grounds.⁴

Standard of Review

In considering a motion for summary judgment, the Court must view the pleadings and documentary evidence in the light most favorable to plaintiffs, Cone v. Longmont United Hosp. Ass'n, 14 F.3d 526, 527-28 (10th Cir.1994), and summary judgment is only appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). The “moving party carries the burden of showing beyond a reasonable doubt that it is entitled to summary judgment.” Hicks v. City of Watonga, 942 F.2d 737, 743 (10th Cir. 1991) (quoting Ewing v. Amoco Oil Co., 823 F.2d 1432, 1437 (10th Cir.1987)). Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter. Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 891 (10th Cir.1991).

Discussion

Although defendants’ present motions for summary judgment could readily be mistaken for motions attacking the merits of the case, which is beyond the Court’s present inquiry, defendants’ primary

⁴ It appears that the individual defendant, Thompson, has not moved for summary judgment at this time.

jurisdictional contention is that they, as private entities, are not amenable to suit under § 1983. That is, defendants argue that plaintiffs' § 1983 claims must fail because defendants are not state actors and they did not operate under color of state law, which is a jurisdictional requisite for a § 1983 action. Polk County v. Dodson, 454 U.S. 312, 315 (1981). In this respect, defendants contend that plaintiffs cannot satisfy any of the four tests identified by the Supreme Court and Tenth Circuit for use in determining whether challenged conduct occurs under color of state law.⁵

It is well settled that to "state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." West v. Atkins, 487 U.S. 42, 48 (1988). For purposes of their present motions, defendants do not dispute that plaintiffs properly alleged a violation of their rights under the Eighth and Fourteenth Amendments since a sexual assault clearly violates plaintiffs' constitutional right to bodily integrity.⁶ Giron v. Corrections Corp. of America, 14 F.Supp.2d. 1245, 1247 (D.N.M. 1998). Thus, the only question which the Court must address with regard to the § 1983 claim at this time is whether plaintiffs properly allege that defendants were state actors or acting under color of state law at the time of the alleged assaults.

"Under Section 1983, liability attaches only to conduct occurring 'under color of law.' Thus, the only proper defendants in a Section 1983 claim are those who 'represent [the state] in some capacity,

⁵ These tests are known as 1) the nexus test, 2) the symbiotic relationship test, 3) the joint activity test, and 4) the public function test. Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1447 (10th Cir. 1995).

⁶ Of course, defendants claim that they cannot be held responsible for the alleged assaults because they did not participate in the attacks and because defendant Thompson's alleged conduct was not taken pursuant to a policy, practice, or custom of defendants'. However, these matters go to the merits of the action and are beyond the limited scope of the Court's present review. Moreover, plaintiffs contend that discovery will be conducted regarding these issues once the Court makes its jurisdictional ruling, and plaintiffs argue that these issues raise federal questions that are within the Court's jurisdiction.

whether they act in accordance with their authority or misuse it.” Gallagher, 49 F.3d at 1447 (quoting NCAA v. Tarkanian, 488 U.S. 179, 191 (1988)). “The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.’” West, 487 U.S. at 49. The “‘conduct allegedly causing the deprivation of a federal right’ must be ‘fairly attributable to the State.’” Gallagher, at 1447 (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)). “In order to establish state action, a plaintiff must demonstrate that the alleged deprivation of constitutional rights was ‘caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible.’ In addition, ‘the party charged with the deprivation must be a person who may fairly be said to be a state actor.’” Id.

Plaintiffs predicate their state action argument on the public function test. Plaintiffs argue that Freedom House, in operating a facility to house inmates under contract with DOC, was performing the traditional state function of operating a prison. Plaintiffs contend that “the very act of operating an inmate facility satisfies the ‘state actor’ function for purposes of potential § 1983 liability.” With respect to Borg-Warner, plaintiffs argue that the function of the guards supplied by defendant was a traditional state action, i.e., guarding prison inmates. Plaintiffs argue that the prisoners, including plaintiffs, were not free to leave while being supervised by Borg-Warner guards and could be subject to punishment if they disobeyed the commands of Borg-Warner’s guards. Plaintiffs contend that the State of Oklahoma has an obligation to imprison convicted criminals and provide security personnel to guard the prison population. Since Borg-Warner contracted to supply guards for this purpose, plaintiffs argue that it stepped into the shoes of the state and, therefore, is a state actor. Plaintiffs further contend that since Borg-Warner guards were providing off-site security while supervising inmate work-crews, Borg-Warner was, in effect, operating as a prison through the use of its guards. The Court will address each argument in turn.

“If the state delegates to a private party a function ‘traditionally exclusively reserved to the State,’ then the private party is necessarily a state actor.” Gallagher, 49 F.3d at 1456. The Tenth Circuit has noted that the public function test is difficult to satisfy since very few government functions have been exclusively reserved to the State. Id. However, the Court agrees with plaintiffs, and the court in Giron, supra, that operating a facility to house and supervise state inmates is a public function. As the court in Giron stated, “[t]he function of incarcerating people, whether done publicly or privately, is the exclusive prerogative of the state. This is a truly unique function and has been traditionally and exclusively reserved to the state.” Id., 14 F.Supp.2d. at 1249. See also Street v. Corrections Corp. of America, 102 F.3d 810, 814 (6th Cir. 1996) (defendants were acting under color of state law in performing the traditional state function of operating a prison).

Freedom House, in its reply brief, argues that plaintiffs have failed to show that it operates a private prison. Rather, Freedom House maintains that it merely operates a halfway house, which is distinct from a jail or prison. The Court disagrees. Freedom House states that it operates under contract with DOC to “house inmates who participate in Prisoner Public Works Programs set up through the DOC.” Thus, Freedom House necessarily admits that it houses, cares for, guards and supervises inmates of the State of Oklahoma. As inmates, the residents of Freedom House are not free to leave whenever they wish. Rather, inmates, such as plaintiffs, housed at the Freedom House facility, are convicted criminals who are serving out their sentences at the facility under contract with DOC. Moreover, throughout the briefs and affidavits submitted by Freedom House, the residents of Freedom House are, with a few exceptions, referred to as “inmates” of the State of Oklahoma. In her affidavit, Freedom House’s chief executive officer states that “Freedom House operated under a contract with the Oklahoma Department of Corrections to provide a residential setting for DOC *inmates* who work in work crews set up by the

DOC.”⁷ Further, at the status conference, Freedom House’s counsel stated that “the *inmates* that are assigned to [Freedom House] can either take the job picking up the trash on the roadways or they can work outside.” The Court then inquired, “So then the Department of Corrections places these people in their care and custody for the purpose of these types of programs?” Freedom House’s counsel responded, “Correct. That’s right.” Freedom House’s counsel also stated earlier in the proceedings that Freedom House contracted with DOC to “house . . . minimum security [inmates].” Thus, notwithstanding Freedom House’s present contention to the contrary, Freedom House is not merely a “residential setting for treatment and the provision of various social services to clients.” It is inescapable that Freedom House is, in fact, a facility which houses DOC inmates who have been convicted and sentenced to a term of imprisonment by the State of Oklahoma, and that such inmates are serving their prison time while residing at Freedom House.

Freedom House additionally relies on Graves v. Narcotics Service Counsel, Inc., 605 F.Supp. 1285 (E.D.Mo. 1985), for the proposition that a halfway house is not a state actor under § 1983. In Graves, the plaintiff complained that defendants, including the Narcotics Service Counsel (Nasco), failed to properly treat him for his drug addiction and prematurely released him from a drug detoxification program. The court found that Nasco is a non-profit corporation which serves as a halfway house and rehabilitation facility for inmates, former inmates, parolees, and non-inmates. Although the court found that Nasco received much of its support from the federal government and the State of Missouri, the court held that plaintiff failed to show that it acted under color of law. In reaching this conclusion, the court reasoned that Nasco is much like the nursing homes or the private schools wherein state action has been found to be lacking. Id. at 1287. Graves is distinguishable. While Nasco is more like a nursing home setting, in that

⁷ In a later affidavit, attached to Freedom House’s reply brief, the CEO of Freedom House states that “persons who resided there were referred to as residents or clients.”

its mission is the treatment of alcohol and drug abusers, there is no evidence that Freedom House has a similar mission. Further, while Nasco treated inmates, former inmates, and non-inmates, the only evidence before this Court is that Freedom House only houses inmates who are "coming out of prison." This suggests that the residents of Freedom House are not yet discharged by DOC. There is no indication that any inmate stays at Freedom House after they have completed their sentence and are discharged by DOC. Further, the plaintiff in Graves complained about being released prematurely from Nasco, and that he attended Nasco as a condition of his probation. Plaintiffs in the present case, however, were continuing to serve out their actual sentences of confinement while residing at Freedom House, and, as Freedom House admits, it has no authority to make decisions regarding release from DOC.

Finding that Freedom House is a state actor or engages in state action, generally, due to its status as a private facility organized for the purpose of housing state inmates, however, does not resolve the issue currently before the Court. It is undisputed that, although plaintiffs resided at Freedom House as inmates of the State of Oklahoma, the alleged sexual assaults were committed by a third party, private security officer while plaintiffs were voluntarily participating in a public works program away from Freedom House's property. Thompson was not hired, supervised, directed, or paid by Freedom House, and the evidence reveals that Freedom House had no contract whatsoever either with Thompson or his employer, Borg-Warner. The evidence further reveals that Freedom House had no power to exercise any authority or responsibility over Thompson or any other Borg-Warner employee, and there is no evidence that Freedom House had any obligation to supervise inmates while in the custody of Borg-Warner guards. Rather, Borg-Warner and its employees acted solely pursuant to an agreement with the City of Tulsa to take custody of those inmates who perform tasks for the City under the DOC public works program. Freedom House merely operated under contract with DOC to provide housing for inmates, such as plaintiffs, who performed work for the City of Tulsa as part of DOC's public works program. Further,

even if Freedom House knew of misconduct or abuse occurring while inmates were away on work detail and in the custody of the City through Borg-Warner security personnel, there is no evidence to suggest that Freedom House had any power or authority to remedy the violations or prevent future violations. Additionally, there is no evidence that Freedom House had any authority to refuse to turn inmates over to Borg-Warner security guards when the guards arrived to transport inmates to public works sites.

On the record currently before the Court, the Court finds that the function of Thompson, a Borg-Warner employee, is not a function under color of state law of Freedom House. Thus, the Court has no jurisdiction over Freedom House under § 1983 for the constitutional violations alleged by plaintiffs. Under the structure of the public works program, Freedom House was not a state actor with respect to plaintiffs during the times that plaintiffs were under the control and custody of the City of Tulsa through Borg-Warner employees. The Court agrees with Freedom House that “the act of housing inmates, without a causal connection to the alleged incidents of sexual misconduct by the Borg-Warner security officer, . . . fails to satisfy the public function test for purposes of finding Freedom House to be a state actor with respect to the Plaintiffs’ specific allegations of constitutional deprivations.” See also Gill v. Mooney, 824 F.2d 192, 196 (2d Cir. 1987) (a defendant cannot be held liable under § 1983 unless he was personally involved in the deprivation of plaintiff’s rights under federal law). If the alleged acts had occurred at the hands of a Borg-Warner security officer while guarding inmates on Freedom House premises, or if Borg-Warner had an agreement with Freedom House to supervise inmates while away from Freedom House, the result would, of course, be different. However, under the facts presented to the Court, it appears that plaintiffs are correct in their argument that Borg-Warner, by providing off-site security at public works sites, was essentially “operating as a prison through the use of its guards.” Thus, from the time that the Borg-Warner guards retrieved and took custody of inmates from Freedom House, under Borg-Warner’s contract with the City of Tulsa, until the time that the inmates were returned, the Borg-Warner guards, in

effect, replaced Freedom House as the state actor with respect to such inmates. Moreover, plaintiffs offer no evidence that Freedom House either participated in the alleged acts of sexual abuse or that Thompson acted pursuant to a policy, practice, or custom of Freedom House. Rather, it appears from plaintiffs' briefs that they would like to have time to discover if such facts exist. The Court therefore finds and concludes that, on the record currently before it, plaintiffs have failed to make the requisite jurisdictional showing that Freedom House was a state actor with respect to plaintiffs at the time they suffered the alleged attacks.⁸

With respect to Borg-Warner's status as a state actor or an entity who engages in state action for purposes of § 1983, Borg-Warner argues that its only action in this case was the leasing of security guards to the City of Tulsa for use by the City for whatever purposes it deemed necessary. Borg-Warner points out that the decision to use its guards to supervise inmates under the Prisoner Public Works Program was a decision made only by the City of Tulsa. Borg-Warner argues that its security guards are not police officers and are not, therefore, state actors. As outlined above, plaintiffs argue that the function of the Borg-Warner security guards cannot be separated from the traditional state function of guarding prison inmates. Plaintiffs argue that the state has an obligation to provide security personnel to guard prison inmates, and plaintiffs maintain that Borg-Warner stepped into the shoes of the state when it contracted to supply guards for this purpose. The Court finds plaintiffs' arguments persuasive.

Accepting plaintiffs' allegations against Thompson as true for the purposes of the present matter, the Court finds that Thompson, while acting in the capacity of a security guard, licensed by the state and assigned the duty of guarding and supervising state inmates, "used the state power as a coercive force to further [his] wrongful acts against" plaintiffs. Gwynn v. Transcor America, Inc., 26 F.Supp.2d 1256, 1265 (D.Co. 1998). Thompson had custody and control of plaintiffs as an agent and prison guard of the

⁸ In the event some evidence surfaces which shows that Freedom House participated in the alleged acts of Thompson, the Court will reconsider this ruling.

state, pursuant to a contract between his employer, Borg-Warner, and the City of Tulsa. Accepting the allegations as true, it is clear, with respect to Thompson, that the abuse was perpetrated in the performance of his assigned tasks. Id., at 1266. “Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it.” Id. (quoting Screws v. United States, 325 U.S. 91, 111 (1945)). Thompson was performing the traditional state function of guarding inmates of the state while away from the housing facility. “But for the cloak of state authority which brought [plaintiffs] under his exclusive control, [Thompson] could not have performed the alleged sexual assaults.” Id. See also Terry v. Adams, 345 U.S. 461, 469-70 (1953) (if a private actor is functioning as the government, he becomes the state for purposes of state action); Fundi v. DeRoche, 625 F.2d 195, 196 (8th Cir. 1980) (state action is present when private security guards act in concert with police or pursuant to customary procedures agreed to be police departments); Giron, 14 F.Supp.2d. at 1250 (if a state must satisfy certain constitutional obligations when carrying out its functions, it cannot avoid those obligations and deprive individuals of their constitutionally protected rights by delegating governmental functions to the private sector); Stokes v. Northwestern Memorial Hospital, 1989 WL 84584 (N.D.Ill. 1989) (the police power is quintessentially a governmental function; when the state gives a private party the same powers as the police, permits him to wear a uniform, carry a gun and wear a badge, and the private party abuses these powers, there is state action sufficient to hold the private party liable under § 1983). Thus, it is clear to the Court that Thompson, in his capacity as a private officer assigned the task of guarding and supervising inmates of DOC, is a state actor for purposes of § 1983.

The more difficult question is whether Borg-Warner, Thompson’s employer, is a state actor or has engaged in state action. The issue would be less troublesome if Borg-Warner contracted directly with DOC to supply private guards to supervise inmates. However, in the present case, the evidence indicates that the City of Tulsa contracted with DOC and was charged with the duty of supervising the inmates who

participated in the public works program. The City in turn entered into a contract with Borg-Warner to supply guards for use by the City. Nevertheless, the Court agrees with plaintiffs that, in the final analysis, Borg-Warner agreed to perform the traditional state function of providing security guards to supervise state inmates. Moreover, although Borg-Warner would have the Court believe that it merely leased guards to the City and had no further dealings or responsibility with respect to the duties and functions of the leased guards, the contracts between the City and Borg-Warner reveal a different set of facts: Borg-Warner agreed to maintain responsibility for the negligence of the guards, ensure that the guards are at their stations at assigned times, train new guards, furnish only properly informed guards, pay the guards, and provide insurance coverage. Further, Borg-Warner does not contend that it had no knowledge that its guards would be assigned by the City to guard state inmates.

In support of its argument, Borg-Warner relies heavily on Wade v. Byles, 83 F.3d 902 (7th Cir. 1996). Wade involved the use of a private security guard employed by a private company, T Force, and supplied under contract to the Chicago Housing Authority (CHA). The guard was stationed in a lobby of a CHA residential building. Plaintiff entered the lobby, at which point an altercation erupted between him and the security guard. The guard ultimately shot plaintiff, and plaintiff brought a § 1983 action against the guard and T Force. The Seventh Circuit found that the duties assigned to the private guard included monitoring the lobby of CHA buildings, controlling access to the buildings, asking trespassers to leave, detaining those persons who refused to leave, and calling the police when problems arose. After describing the duties of the T Force guard, the court concluded that the guard's "function as a lobby security guard with . . . limited powers is not traditionally the exclusive prerogative of the state. The fact that [the guard] performed his duties on public property, or for the public's benefit, does not make him a state actor." Id. at 906. The court likened the guard to "armed security guards who are commonly employed by private companies to protect private property." Id. The court also found that "CHA bore

no affirmative constitutional duty to provide security in the lobbies of CHA buildings.” Id. Holding that the guard was not a state actor, the circuit court affirmed summary judgment in favor of defendants. The Court finds Wade distinguishable.

In the present case, Thompson was assigned to guard state inmates under contract between the City of Tulsa and his employer, Borg-Warner. As a party assigned this task, Thompson assumed a role traditionally exercised by the state of guarding prison inmates. The evidence suggests that Thompson had all of the authority and power of state prison guards to guard and supervise the inmate work-crews, and Borg-Warner knew that some of its guards would be used by the City for such purposes. The Court therefore agrees with plaintiffs that Borg-Warner guards, assigned to this duty, possessed greater powers than a security guard hired merely to protect a residential lobby. Moreover, while the court in Wade found that the T Force security guard possessed no greater powers than armed security guards who are commonly employed by private companies to protect private property, private companies do not employ the services of a security agency to guard prison inmates. Rather, such duties are assigned, either directly or indirectly, by the state, which has the ultimate authority, power, and responsibility to confine and supervise its inmates. It would be anomalous to permit Borg-Warner to derive a benefit from the act of providing security guards to supervise state inmates, which represents a traditional state function, while, at the same time, find that Borg-Warner had not engaged in a traditional state activity. While the question of whether particular conduct is private or state action “admits of no easy answer” in the present case, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-50 (1974), the Court finds and concludes that Borg-Warner engaged in state action by leasing Thompson to the City of Tulsa for the purpose of supervising and transporting state inmates. As noted above, the Court agrees with plaintiffs that, from the time that Borg-Warner took custody of inmates from Freedom House, pursuant to its agreement with the City of Tulsa, until the time it returned the inmates, it essentially operated a private prison through the use

of its guards. Of course, this conclusion does not bring the matter to a close. Plaintiffs bear the ultimate burden of proving that Borg-Warner is liable for their injuries under § 1983, which will be no easy task. See Street, 102 F.3d at 817-818. However, the Court is satisfied, at this point, that it has jurisdiction to permit the § 1983 claims to go forward against Borg-Warner.

The Court now turns to defendants' arguments attacking the Court's jurisdiction to entertain plaintiffs' Violence Against Women Act (VAWA) claims. Defendants argue that plaintiffs cannot show that they committed a crime of violence against plaintiffs that was motivated by gender. However, defendants' arguments, while possibly meritorious, go beyond the Court's present inquiry and do not address the Court's jurisdiction to entertain plaintiffs' claims. Plaintiffs argue that they have alleged a crime of violence motivated by gender and that the facts underlying defendants' omissions or participation will be more fully examined through discovery. Because the Court is, at this point, only concerned with its jurisdiction to permit the matter to go forward, the Court overrules defendants' arguments. However, a cursory review of the merits indicates that plaintiffs have no real claim against defendants under the VAWA. It will indeed be surprising if plaintiffs' claims under this Act, with respect to Borg-Warner and Freedom House, survive a future summary judgment motion.

Accordingly, Freedom House's motion for summary judgment on plaintiffs' § 1983 claim, on the grounds that the Court lacks jurisdiction over the claim, is hereby GRANTED; Borg-Warner's motion for summary judgment on plaintiffs' 1983 claim and both defendants' motions for summary judgment on plaintiffs' VAWA claim, on the grounds that the Court lacks jurisdiction, are hereby DENIED.

IT IS SO ORDERED this 2nd day of February, 1999.


H. DALE COOK
United States District Judge

Case Management conference is set 3/30/99, at 1:15 p.m.

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

ERA FRANCHISE SYSTEMS, INC.,

Plaintiff,

v.

COPLEN REALTY, INC. and
WALT COPLEN,

Defendants.

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ENTERED ON DOCKET

DATE FEB 3 1999

CASE NO. 98-CV-0499K (M)

FILED

FEB 03 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This action came on for hearing on the application of Plaintiff ERA Franchise Systems, Inc. ("ERA") for a default judgment pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure. It appears to the Court that ERA's Verified Complaint for Injunctive Relief, among other papers, in this action was filed in this Court on July 8, 1998, and that service of the Summons and Verified Complaint was duly effected on Defendants Coplen Realty, Inc. and Walt Coplen (collectively "Defendants") on August 20, 1998. Therefore, pursuant to Fed. R. Civ. P. 12(a)(1)(A), Defendants' answer date was September 9, 1998. The Court finds that no answer or other defense was filed by the Defendants on or before September 9, 1998. Defendants have thus far failed to answer or otherwise defend in this action. Accordingly, Plaintiff ERA's Application for Default Judgment is hereby granted.

The Court hereby enters a preliminary and permanent injunction against Defendants Coplen Realty and Walt Coplen, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them, restraining them from using the ERA trade names, trademarks and service marks ("ERA Marks"). Defendants are ordered to immediately cease using

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the ERA Marks and de-identify the facility located at 1718 East 15th Street, Tulsa, Oklahoma 74136 ("the Facility") through such methods which include, but are not limited to, removing all signs at the Facility or elsewhere bearing the ERA Marks; removing all advertisements wherever located, including interstate billboards, bearing the ERA Marks; removing all items on the exterior of and interior of the Facility bearing the ERA Marks; removing and ceasing use of all business cards bearing Defendant Walt Coplen's name in connection with the ERA Marks; and otherwise cease infringing the ERA Marks. Defendants are further enjoined from all future infringement of the ERA Marks.

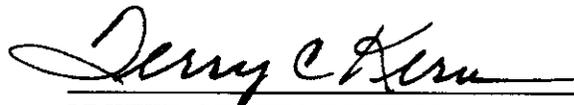
Judgment is further entered in favor of Plaintiff ERA and against Defendants, jointly and severally, for past due Periodic Payments in the amount of \$28,226.53 under the Membership Agreement.

Judgment is further entered in favor of Plaintiff ERA and against Defendants, jointly and severally, for Periodic Payments due during the period of unlawful use of ERA Marks.

Judgment is further entered in favor of Plaintiff ERA and against Defendants, jointly and severally, for taxable court costs in the amount of \$150 and for \$6,300.00 as reasonable and necessary attorneys' fees and expenses incurred by ERA in prosecuting this action for injunctive relief from Defendants' acts of trademark infringement and collection of past due Periodic Payments.

Plaintiff shall have all writs and processes proper to enforce and collect its judgment.

SO ORDERED, this 2 day of February, 1999.


UNITED STATES DISTRICT JUDGE

teb:kw-01-08-99

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

FIRST MARINE INSURANCE COM-)
PANY, a Missouri Corporation)

Plaintiff,)

v.)

- 1) JAMES W. COULANDER,)
- 2) BEVERLY COULANDER,)
- 3) STILLWATER NATIONAL BANK,)
- 4) WILLIAM B. GADDIS, JR.,)
- 5) JAMES W. LEE,)
- 6) JEREMY A. BARLOW,)
- 7) BILLY RAY BARLOW,)
- 8) BERNADINE KAY JOHNSON,)

Defendants.)

ENTERED ON DOCKET

DATE FEB 3 1999

Case No.: 98 CV 560K (M) ✓

FILED

FEB 03 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER DISMISSING BARLOW DEFENDANTS ONLY

FOR GOOD CAUSE SHOWN, the Court accepts the stipulation for Order of Dismissal between the Plaintiff First Marine Insurance Company and the Defendants Jeremy A. Barlow and Billy Ray Barlow.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court, that the Defendants Jeremy A. Barlow and Billy Ray Barlow be dismissed with prejudice from this action. All claims and causes of action between the Plaintiff and these named Defendants have been resolved with each party to bear his or her own attorney's fees and costs.


JUDGE OF THE DISTRICT COURT

THOMAS E. BAKER, OBA #11054
Daniel, Baker & Howard
2431 East 51st Street, Ste. 306
Tulsa, Oklahoma 74105
(918) 749-5988

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

FILED
FEB - 3 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MICHAEL MARES, an individual,)
)
Plaintiff,)
)
vs.)
)
BW/IP INTERNATIONAL, INC.,)
a Delaware corporation,)
)
Defendant.)

Case No. 97-CV-92-K

ENTERED ON DOCKET

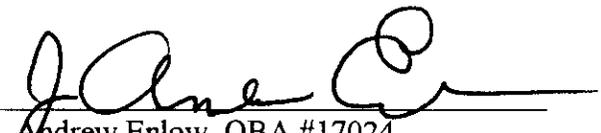
DATE FEB - 3 1999

JOINT STIPULATION OF VOLUNTARY DISMISSAL WITH PREJUDICE

The parties, pursuant to Fed. R. Civ. P. 41(a)(1) agree that the above-styled case may be dismissed with prejudice and that each party will bear its own costs and attorneys fees.

J. ANDREW ENLOW, P.C.
Attorneys for Plaintiff
MICHAEL MARES
320 South Boston, Suite 1024
Tulsa, Oklahoma 74103
(918) 583-8220

By:



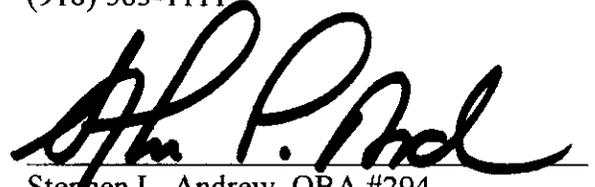
J. Andrew Enlow, OBA #17024
Ike Hobough, OBA #17197

-and-

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STEPHEN L. ANDREW & ASSOCIATES
A Professional Corporation
Attorneys for Defendant
BW/IP INTERNATIONAL, INC.
125 West Third Street
Tulsa, Oklahoma 74103
(918) 583-1111

By:

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Stephen L. Andrew, OBA #294
D. Kevin Ikenberry, OBA #10354

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

FILED

FEB - 3 1999

FLOWSERVE, INC., a corporation)
KENT JOHNSON, an individual,)
and STEVE SIMONE, an individual,)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Plaintiffs,)

vs.)

Case No. 97-CV-895-H(J)

MICHAEL MARES,)

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Defendant.)

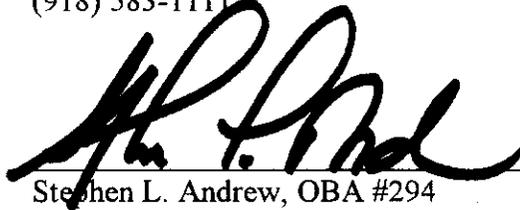
DATE FEB - 3 1999

JOINT STIPULATION OF VOLUNTARY DISMISSAL WITH PREJUDICE

The parties, pursuant to Fed. R. Civ. P. 41(a)(1) agree that the above-styled case may be dismissed with prejudice and that each party will bear its own costs and attorneys fees.

STEPHEN L. ANDREW & ASSOCIATES
A Professional Corporation
Attorneys for Plaintiffs
FLOWSERVE, INC., STEVE SIMONE AND
KENT JOHNSON
125 West Third Street
Tulsa, Oklahoma 74103
(918) 583-1111

By:



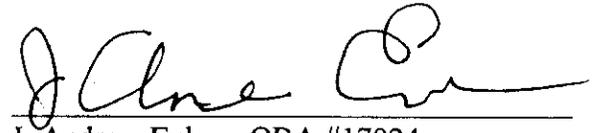
Stephen L. Andrew, OBA #294
D. Kevin Ikenberry, OBA #10354

-and-

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J. ANDREW ENLOW, P.C.
Attorneys for Defendant
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Tulsa, Oklahoma 74103
(918) 583-8220

By:

A handwritten signature in black ink, appearing to read "J. Andrew Enlow", written over a horizontal line.

J. Andrew Enlow, OBA #17024
Ike Hobaugh, OBA #17197

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

FILED

FEB 01 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN LEE JOHNSON,

Plaintiff,

vs.

Case No.99-CV-4-H (M)

TULSA COUNTY, Oklahoma; TIM
HARRIS, Tulsa County District Attorney;
TULSA MUNICIPAL COURT,
arraignment judge; JUDGE CLARKE;
JUDGE TURNBULL,

Defendants.

ENTERED ON DOCKET

DATE FEB 2 1999

REPORT AND RECOMMENDATION

Plaintiff, an inmate at the Oklahoma State Penitentiary, has filed a civil rights complaint seeking relief under 42 U.S.C. §1983. Pursuant to 28 U.S.C. §1915A, the undersigned United States Magistrate Judge has conducted a review of Plaintiff's allegations and concludes that Plaintiff's complaint should be dismissed because it seeks monetary relief from defendants who are immune from such relief, and fails to state a claim upon which relief can be granted.

Plaintiff seeks money damages from: Tim Harris, Tulsa County District Attorney; Tulsa Municipal Court, arraignment judge; Judge Clarke; Judge Turnbull; and Tulsa County. Plaintiff has asserted that a 9-day delay between his arrest and arraignment, and a 6 to 7 month delay between arraignment and trial constitute violations of his rights to a speedy trial and due process.

Prosecutors and judges are entitled to absolute immunity for their prosecutorial and judicial functions. *Mireles v. Waco*, 502 U.S. 9, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991) (judicial immunity); *Imbler v. Pachtman*, 424 U.S. 409, 424-25, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) (prosecutorial immunity). Plaintiff cannot maintain this action against Tim Harris, Tulsa County District Attorney; Tulsa Municipal Court, arraignment judge; Judge Clarke; or Judge Turnbull. Therefore, the undersigned United States Magistrate Judge recommends that Plaintiff's claims against these defendants be dismissed pursuant to 28 U.S.C. §1915A(b)(2).

Plaintiff has also named Tulsa County as a defendant. In order to state a claim against a municipality, or county, 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, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). There are two requirements for liability based on custom: (1) the custom must be attributable to the city 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. *Id.* 436 U.S. at 692-94; *see also City of Canton, Ohio v. Harris*, 489 U.S. 378, 385, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). After liberally construing the allegations in the complaint in the light most favorable to the Plaintiff in accordance with *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 596, 30 L.Ed.2d 652 (1972), the court concludes that Plaintiff has failed to allege a county custom or policy with regard to arraignment and trial delay. Accordingly, the action

against Tulsa County should be dismissed pursuant to 28 U.S.C. §1915A(b)(1) for failing to state a claim upon which relief can be granted.

Under appropriate circumstances, delay between arrest and arraignment or trial may provide the basis for habeas corpus relief. *See Harvey v. Shillinger*, 76 F.3d 1528, 1533 (10th Cir. 1996)(collection of cases and circumstances cited). Again, construing Plaintiff's allegations liberally, the Court will treat his complaint as asserting a petition for habeas corpus under 28 U.S.C. §2254. A state prisoner bringing a federal habeas corpus action bears the burden of showing he has exhausted all available state remedies. *Miranda v. Cooper*, 967 F.2d 392 (10th Cir. 1992), *cert. denied*, 506 U.S. 924, 113 S.Ct. 347, 121 L.Ed.2d 262 (1992). In his complaint, Plaintiff indicated he has not instituted any other suits dealing with the same facts involved in this action. The court therefore concludes that available state remedies have not been exhausted. Accordingly, the claims construed as asserting a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 should be dismissed pursuant to 28 U.S.C. §2254(B)(1)(a) for failure to exhaust state remedies.

The undersigned United States Magistrate Judge RECOMMENDS that Plaintiff's § 1983 action be DISMISSED pursuant to 28 U.S.C. §1915A, because it seeks monetary relief from defendants who are immune from such relief, fails to state a claim upon which relief can be granted, and seeks habeas corpus relief without having exhausted state remedies.

Plaintiff is hereby placed on notice that this action constitutes one of his three dismissals under the terms of 28 U.S.C. §1915(g) which provides:

(g) 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.

Plaintiff is cautioned that he will be barred from bringing future actions in this or other Districts without pre-payment of filing fees if he is found to have brought, on 3 or more prior occasions, actions (such as the instant lawsuit) which were dismissed pursuant to 28 U.S.C. § 1915(c)(2)(B) or 28 U.S.C. § 1915A(b)(1), unless he alleges that he is under imminent danger of serious physical injury.

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

DATED this 1st Day of ^{Feb.} January, 1999.

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 3rd Day of February, 1999.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

FILED

FEB 01 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PERRY LEE JONES, JR.,

Plaintiff,

vs.

TULSA COUNTY DISTRICT COURT, et
al.,

Defendants.

Case No. 99-CV-27-K(M) ✓

ENTERED ON DOCKET

DATE FEB 2 1999

REPORT AND RECOMMENDATION

Plaintiff, an inmate or detainee at the Tulsa County Jail, has filed a complaint seeking redress from employees of governmental entities under 42 U.S.C. §1983. Pursuant to 28 U.S.C. §1915A, the undersigned United States Magistrate Judge has conducted a review of Plaintiff's allegations and concludes that Plaintiff's complaint should be dismissed because it seeks monetary relief from a defendant who is immune from such relief, and fails to state a claim upon which relief can be granted.

Plaintiff seeks money damages from: Leisa Weintraub, "District Attorney-Prosecuting Attorney;" Chris Witt, Tulsa Police Department Detective; Joyce Porter, Department of Human Services; Roger O. Blevins, R.N., and Thomas Fitzgibbons, Tulsa County Sheriff's Office. Plaintiff alleges the defendants committed violations of his 5th and 14th Amendment rights by coercing witnesses, preparing false evidence against him, and by not acting in good faith as to all charges. He also claims that Defendant Thomas Fitzgibbons interrogated him upon the request of Judge Michael Gassett, and that he was denied bond reduction. Although Judge Gassett is

not listed as a defendant, the Tulsa County District Court is listed on the caption as a defendant.

Prosecutors and judges are entitled to absolute immunity for their prosecutorial and judicial functions. *Mireles v. Waco*, 502 U.S. 9, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991) (judicial immunity); *Imbler v. Pachtman*, 424 U.S. 409, 424-25, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) (prosecutorial immunity). Plaintiff cannot maintain this action against the District Court of Tulsa County, Leisa Weintraub, or Judge Michael Gasset therefore, the undersigned United States Magistrate Judge recommends that Plaintiff's claims against them be dismissed pursuant to 28 U.S.C. §1915A(b)(2).

According to his complaint, Plaintiff has been charged with sexually and physically abusing his 8 children. Plaintiff alleges that "witness coordinators" have trained and practiced witnesses, apparently his children, outside of his presence which he claims has violated his civil rights. He alleges that Defendants Joyce Porter, Chris Witt, and Roger Blevins will offer false testimony concerning their respective investigations, interviews, and physical examinations.

Knowing use of perjured testimony violates a defendant's right to due process. *United States v. Wolny*, 133 F.3d 758, 762 (10th Cir. 1998). Under the appropriate circumstance, a writ of habeas corpus may be issued to require a new trial. *Smith v. Roberts*, 115 F.3d 818, 820 n. 2 (10th Cir 1997); *McBride v. United States*, 446 F.2d 229, 232 (10th Cir. 1971).

In *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 2372, 129 L.Ed.2d 383 (1994), the Supreme Court ruled that when a state prisoner seeks damages in a

§1983 civil rights suit, and the district court determines that a judgment in favor of the Plaintiff would imply the invalidity of his conviction or imprisonment, the complaint must be dismissed unless the Plaintiff can demonstrate that the conviction or sentence has already been invalidated. A §1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated. *Id.* 114 S.Ct. at 2374. In the present case, it appears that Plaintiff has not yet been convicted as the complaint indicates that his Tulsa County case is still pending. Further, he alleges, not that perjured testimony has been offered, but that it will be. [Dkt. 1, attachments]. Based on these circumstances, the court finds that Plaintiff's allegations fail to state a claim upon which relief can be granted.

Plaintiff also alleges that his bond has been set inappropriately high. Construing Plaintiff's pro se pleading liberally as required by *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106 (10th Cir. 1991), the Court will treat this allegation as asserting a pre-trial petition for habeas corpus under 28 U.S.C. §2241. Plaintiff raised this same issue in a previous pre-trial petition for writ of habeas corpus filed June 4, 1998, Case No. 98-CV-402-B(J). The court denied the petition for habeas corpus concluding that pre-trial habeas corpus relief was not available because Petitioner had not afforded the courts of the State of Oklahoma the opportunity to consider and correct any violations of the Constitution by raising the issues at trial and, if convicted, on direct appeal. [Case No. 98-CV-402-B(J); Dkt. 3]. The current petition should be dismissed for the same reason. Intervention by this court at this

stage in the prosecution of petitioner by the State of Oklahoma would violate the doctrine of exhaustion.

Accordingly, the undersigned United States Magistrate Judge RECOMMENDS that Plaintiff's § 1983 action be dismissed pursuant to 28 U.S.C. § 1915A, because it seeks monetary relief from defendants who are immune from such relief, fails to state a claim upon which relief can be granted, and seeks habeas corpus relief without having exhausted state remedies.

Plaintiff is hereby placed on notice that this action constitutes one of his three dismissals under the terms of 28 U.S.C. § 1915(g) which provides:

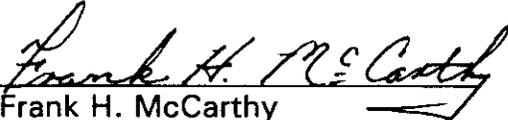
(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed 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.

Plaintiff is cautioned that he will be barred from bringing future actions in this or other Districts without pre-payment of filing fees if he is found to have brought, on 3 or more prior occasions, actions (such as the instant lawsuit) which were dismissed pursuant to 28 U.S.C. § 1915(c)(2)(B) or 28 U.S.C. § 1915A(b)(1), unless he alleges that he is under imminent danger of serious physical injury.

In accordance with 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within

the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 15th Day of ~~January~~^{Feb.}, 1999.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 17 Day of February, 1999.

Christelle J. Murphy

F I L E D

FEB 02 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

MARILYN D. KENDALL,)
)
Plaintiff,)
v.)
)
KENNETH S. APFEL,)
Commissioner of Social Security)
Administration,)
)
Defendant.)

Case No. 97-CV-299-M ✓

ENTERED ON DOCKET
DATE **FEB 2 1999**

ORDER

On December 15, 1998, this Court reversed the Commissioner's decision denying plaintiff's claim for Social Security disability benefits and remanded the case to the Commissioner for an award of benefits. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney fees under the EAJA, 28 U.S.C. § 2412(d), filed on or around January 19, 1999, the parties have stipulated that an award in the amount of \$2,050.00 for attorney fees and \$150.00 for costs for all work done before the district court is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees of \$2,050.00 and costs of \$150.00 under the Equal Access To Justice Act in the amount of \$2,200.00.

Frank H. McCarthy 2-2-99

 Frank H. McCarthy
 United States Magistrate Judge

26

500

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

FILED

FEB - 1 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORYX ENERGY COMPANY,)
)
PLAINTIFF,)
)
VS.)
)
UNITED STATES DEPARTMENT)
OF THE INTERIOR,)
)
DEFENDANT.)

CASE No. 97CV-337BU(W).

ENTERED ON DOCKET

DATE FEB 2 1999

STIPULATION OF DISMISSAL

COME NOW the respective parties through their counsel pursuant to Fed.R.Civ.P. 41(a)(1)(ii), and hereby stipulate that this action may be and it is dismissed with prejudice. Each party shall bear its own costs and attorney fees incurred in this matter.

DATED this 25th day of January, 1999.

Respectfully submitted,



Patrick O'Connor, OBA #6743
MOYERS, MARTIN, SANTEE, IMEL & TETRICK
320 South Boston, Suite 920
Tulsa, Oklahoma 74103
(918) 582-5281

Attorneys for Plaintiff,
ORYX ENERGY COMPANY

CB

Caroline M. Blanco
Ⓟ Caroline M. (Zander) Blanco
Department of Justice
Environmental and Natural Resources Division
General Litigation Section
P. O. Box 663 Ⓟ
Washington, D.C. 20044-0663

Attorneys for Defendant,
UNITED STATES DEPARTMENT OF THE INTERIOR

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

FILED

FEB 2 1999 *gc*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SPIRITBANK, N.A., a National Association Bank,)
)
)
Plaintiff)

vs.)

Case No. 98 CV 0440K(E) ✓

THE CENTRAL OKLAHOMA HOUSING DEVELOPMENT AUTHORITY, an Oklahoma Public Trust, ORLIE BOEHLER, an Individual, RON FRAZE, an Individual, and EASTERN DEVELOPMENT, INC., a Texas Corporation,)
)
)
Defendants.)

ENTERED ON DOCKET
DATE 2/2/99

STIPULATION OF DISMISSAL OF ORLIE BOEHLER WITHOUT PREJUDICE TO REILING

The Plaintiff, SPIRITBANK, N.A., "SpiritBank," and Defendant, Orlie Boehler, through their attorneys of record, hereby stipulate to dismissal of all claims without prejudice to reiling. The Dismissal is made in accordance with Fed. Rule. Civ. Pro. 41 (a)(1) and is signed be all remaining parties.

Respectfully Submitted,

MEIER, COLE & O'DELL

LATHAM & WAGNER, P.C.



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918/584-1295 fax



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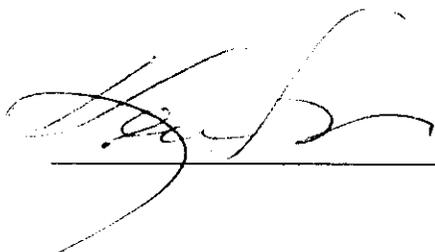
B

CERTIFICATE OF MAILING

I hereby certify that on the 29th day of January, 1999, a true and correct copy of the above and foregoing was mailed, properly addressed and postage fully prepaid to:

Ken Wagner
5100 E. Skelly Drive
Suite 1050
Tulsa, OK 74135

Gregory G. Meier
MEIER, COLE & O'DELL, P.A.
1524 S. Denver Ave.
Tulsa, Oklahoma 74119-3829



UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

FEB 1 1999 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES L. RAYL,)
)
Plaintiff,)
)
v.)
)
METROPOLITAN LIFE)
INSURANCE COMPANY,)
)
Defendant.)

97-CV-505-H(M)✓

ENTERED ON DOCKET
DATE ~~FEB 1~~ - 2 1999

ORDER

This matter comes before the Court on Defendant Metropolitan Life Insurance Company's ("MetLife") Motion for Summary Judgment (Docket # 37) and Plaintiff James L. Rayl's Motion for Partial Summary Judgment (Docket # 36) and Motion to Amend Complaint (Docket # 54). For the reasons set forth below, the Court concludes that Plaintiff's Motion to Amend Complaint and Motion for Partial Summary Judgment should be denied and that Defendant's Motion for Summary Judgment should be granted in all respects.¹

I

For purposes of the instant motions, the following facts are undisputed:

1. Plaintiff James Rayl was hired by MetLife on April 9, 1962. MetLife is in the business of selling insurance and other financial products.
2. Mr. Rayl worked in the auditing department for the first ten years of his employment with MetLife, transferred to MetLife's Tulsa facility in 1973 as the

¹In his Motion to Amend Complaint, Mr. Rayl requests that this Court dismiss with prejudice Counts III (Breach of Contract), IV (Negligence), and V (Intentional Infliction of Emotional Distress) of his Second Amended Complaint. Based on a review of the record and consistent with Mr. Rayl's request, the Court hereby dismisses those claims with prejudice.

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manager of cash control and accounting, was promoted to divisional manager in 1977, and was transferred to the human resources manager position in Tulsa when his divisional manager position was eliminated in 1983.

3. In 1986, Mr. Rayl became the manager of Tulsa's teleservicing operation. The teleservicing center was primarily responsible for providing service to MetLife customers in the Tulsa region with inquiries regarding individual life insurance policies.
4. In 1994, MetLife began a company-wide reengineering and restructuring program called MetLife Express which included a comprehensive review of MetLife's customer service operation and teleservicing centers.
5. Following this review, MetLife decided to reduce the number of teleservicing centers from twenty-two to four centers and to consolidate all call center responsibilities in those four centers with each center managed by a "site leader." The four call centers were to be located in Tulsa, Oklahoma; Dayton, Ohio; Utica, New York; and Warwick, Rhode Island.
6. Instead of operating independently as they had in the past, the four call centers were to operate as a virtual call center; in other words, the four centers would operate consistently and uniformly, and would be electronically linked so that calls received by one center could be immediately re-routed to another center. To function in this manner, the four centers had to coordinate their operations, including their technology, procedures, policy, and management.
7. Ralph Jeffrey coordinated the consolidated call center organization and reported

- to Dr. William Friedewald, the head of MetLife's customer service operation.
8. At the time the site leader positions were created, MetLife had a job posting program which encouraged eligible employees to apply for jobs within the company for which they were qualified. This program is set forth in the MetLife Job Posting Program which is distributed to persons who have a role in filling job vacancies for their use.
 9. Effective late June 1996, MetLife modified its Job Posting Program to extend priority consideration to all qualified employees who were displaced as a result of MetLife Express or other reorganization initiatives. If eligibility to post for a particular job was limited to a particular department or line of business, hiring managers were to give qualified displaced employees in that department or line of business first consideration for the job.
 10. MetLife posted the call center site leader positions company-wide on April 5, 1996.
 11. With the approval of MetLife's corporate staffing department, MetLife concurrently recruited external candidates for the four site leader positions.
 12. Mr. Rayl applied for the Tulsa call center site leader position on April 10, 1996.
 13. On April 30, 1996, Mr. Rayl was interviewed in New York for the site leader position by Dr. Freidewald, Mr. Jeffrey, and James Gemus, the human resources liaison to MetLife's customer service organization.
 14. A few weeks after interviewing Mr. Rayl, Dr. Freidewald removed Mr. Jeffrey as the head of the call center organization and set up a temporary call center

organization until Mr. Jeffrey's replacement was in place. Dr. Freidewald appointed the incumbent managers of the call centers, including Mr. Rayl, "interim site coordinators."

15. MetLife hired Stan St. John to replace Mr. Jeffrey as the head of MetLife's call center. Mr. St. John was previously employed with AT&T and joined MetLife on July 1, 1996.
16. One of Mr. St. John's responsibilities was to continue and complete the site leader selection process.
17. Upon his arrival at MetLife, Mr. St. John immediately began to work with the interim site coordinators, including Mr. Rayl, on call center planning and transition issues. On or around July 17, 1996, Mr. St. John visited the Tulsa call center to observe its operations first hand and to evaluate whether Mr. Rayl was suited for the site leader position. Following his visit, Mr. St. John concluded that the Tulsa call center was not meeting service level standards, that it had an unsatisfactory organizational infrastructure, and that it lacked a cohesive management team.
18. In late July or early August 1996, after having considered Mr. Rayl, the other interim site leader coordinators and several other internal and external candidates, Mr. St. John contacted Karen Hemenway about the site leader position.
19. Ms. Hemenway had worked with Mr. St. John at AT&T and reported directly to him during part of her employment there. Ms. Hemenway worked at five different call centers over the course of approximately seventeen years and held

positions similar to MetLife's site leader position. Ms. Hemenway was in charge of about 350 customer service representatives at the time she was contacted by Mr. St. John regarding the site leader position in Tulsa.

20. Ms. Hemenway interviewed for the position and Mr. St. John, Dr. Friedewald, and Mr. Gemus agreed that she was the best candidate for the position.
21. On August 22, 1996, Mr. St. John notified Mr. Rayl by telephone that he had not been selected for the Tulsa site leader position. Mr. St. John asked Mr. Rayl to continue as the interim site coordinator in Tulsa until the permanent site leader was in place, but Mr. Rayl refused and went on paid vacation.
22. On August 23, Mr. St John announced the selections for the four site leader positions, appointing Ms. Hemenway as the Tulsa site leader.
23. Mr. Rayl had, on several occasions prior to August 1996, reported violations of internal company policies and external government regulations to various executive officers and insisted that they act on these reports.
24. Mr. Rayl subsequently applied for and was selected to become the director of inforce management in MetLife's Individual Business organization. When he transferred to this position, Mr. Rayl received the same pay he received as interim site coordinator.
25. Around December 1996, MetLife began recruiting qualified internal and external candidates for the vacant position of Operations Officer in Tulsa. The Operations Officer is responsible for managing all insurance and annuity operations in Tulsa. The Operations Officer is one of two officer positions at Tulsa's MetLife facility,

and reports directly to Richard Anderson, Vice President of Client Support Services.

26. In November 1997, Mr. Anderson appointed Sharon Condello to the Operations Officer position. Mr. Anderson believed Ms. Condello was the best qualified applicant for the position. Mr. Anderson did not consider Mr. Rayl for the position because he did not believe Mr. Rayl was qualified for the position based on his experience working with Mr. Rayl, including supervising his work as director of inforce management. Specifically, Mr. Anderson observed that Mr. Rayl was often unwilling to accept or consider views and approaches different from his own and believed that Mr. Rayl lacked the consensus-building and leadership qualities necessary to manage the Tulsa organization.
27. In January 1998, Mr. Anderson reviewed Mr. Rayl's performance, for the first time, as director of inforce management. He rated Mr. Rayl's overall performance for that year as "generally effective," a satisfactory rating. Mr. Anderson gave him this rating because Mr. Rayl failed to fulfill all the demands of his position. In particular, Mr. Rayl failed to foster cooperation among the various units in Tulsa, communicated with coworkers in a manner that created conflict and controversy, and demonstrated an inability to be a team leader. Mr. Anderson testified that his review of Mr. Rayl's performance was in no way based on the fact that he filed an EEOC charge or a lawsuit against MetLife.
28. Mr. Rayl alleges that as a result of stress caused by the job transition, he suffered a degeneration of his arteriosclerosis and underwent a triple-bypass operation in

January 1997. Mr. Rayl further alleges that in October 1998 he was informed by his physician that he must leave his position with MetLife to relieve stress or face substantial physical consequences.

II

The Court first turns to Mr. Rayl's arguments contained in his Motion to Amend Complaint. As noted above, the Court accepts this motion insofar as Plaintiff requests that Counts III, IV and V of his Second Amended Complaint be dismissed with prejudice. In addition, Mr. Rayl's motion seeks to amend his Second Amended Complaint to add claims for constructive discharge and for breach of a third-party beneficiary contract. Defendant objects to such amendment on the basis that the motion is untimely and that any such amendment would be futile. The Court agrees.

Under Fed. R. Civ. P. 15(a), "leave [to amend] shall be freely given when justice so requires." The Court may refuse leave to amend upon as showing of undue delay or undue prejudice to the opposing party. See Castleglen, Inc. v. Resolution Trust Corp., 984 F.2d 1571, 1585 (10th Cir. 1993). The Court concludes that both factors are present here. The scheduling order for this case set the deadline for amendment at May 15, 1998. Each of Plaintiff and Defendant completed discovery and filed a motion for summary judgment on July 8, 1998. Allowing the amendment would require the reopening of discovery in this case and likely precipitate summary judgment briefing on the new claims. Under these circumstances the Court finds it would be improper to allow amendment of the Second Amended Complaint at this late date.

Furthermore, the Court may deny a motion to amend a complaint if the amendment

would be futile. -See Ketchum v. Cruz, 961 F.2d 916, 920 (10th Cir. 1992). With respect to Mr. Rayl's breach of third-party beneficiary claim, the Court concludes that such amendment would be futile. As discussed below, even were Mr. Rayl to establish the existence of a contract to which he is a third-party beneficiary, see Anderson v. Gibbs Lumber Co., 10 P.2d 416, 417 (Okla. 1932), a third-party beneficiary may not recover under a contract unless the contract is expressly made for his benefit. See Keel v. Titan Construction Corp., 639 P.2d 1228, 1231 (Okla. 1981). The record regarding the MetLife Job Posting Program indicates only that the Job Posting Program was intended as a guide to hiring personnel and contained no express promises or guarantees to any job applicant, whether external or internal. Moreover, Mr. Rayl has not alleged in his proposed amended complaint further facts not in the summary judgment record which would support such a conclusion. Accordingly, Mr. Rayl's amended complaint does not and could not state a claim upon which relief may be granted as to the third-party beneficiary claim, and his motion to amend is denied as to that claim.

Similarly, as pled, Mr. Rayl's proposed constructive discharge claim fails to state a claim upon which relief may be granted. Even assuming Mr. Rayl's disability leave may be construed as "discharge" for purposes of a constructive discharge claim, Mr. Rayl alleges his leave was caused by his doctor's recommendations, not because of any discriminatory actions on the part of MetLife. See Large v. Acme Engineering and Mfg. Corp., 790 P.2d 1086, 1090 (Okla. 1990). Accordingly, Mr. Rayl's Motion to Amend Complaint (Docket # 54) is hereby denied.

III

The Court turns next to the arguments and authorities contained in Defendant's motion for summary judgment. 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).

IV

The Court will address each of Defendant's contentions in turn.

A. Wrongful Termination in Violation of Public Policy -- Whistleblowing

Mr. Rayl alleges he was terminated in violation of public policy for informing executives of violations of internal company policy and external government regulations. To maintain a claim for wrongful termination under Oklahoma law, Mr. Rayl must establish that (1) he was terminated for performing an act that public policy would encourage or for refusing to do something that public policy would condemn; and (2) his employer was motivated by bad faith, malice, or retaliation when it discharged him. See Gilmore v. Enogex, Inc., 878 P.2d 360, 364 (Okla. 1994). Mr. Rayl alleges he was terminated twice -- first on August 23, 1996, when he was denied the Tulsa site leader position, and again in October 1998, when he was placed on disability leave due to his heart problems. The Court concludes that as a matter of law, Mr. Rayl was not terminated in August of 1996. It is undisputed Mr. Rayl never left the payroll and did not suffer any reduction in pay as a result of his failure to secure the site leader position. In fact, MetLife selected Mr. Rayl for the position of director of inforce management shortly thereafter.

Moreover, even assuming Mr. Rayl's disability leave may be construed as "termination" for purposes of the instant motion, Mr. Rayl's claim fails for other reasons. It is undisputed Mr. Rayl informed management of the violations of internal policy and government regulations by internal memoranda. The Tenth Circuit has determined that such internal reporting of other employees' infractions of internal policy or external regulations are not actionable under Oklahoma's wrongful discharge cause of action. See Burk v. Kmart Corp., 956 F.2d 213, 214 (10th Cir. 1991). Further, Mr. Rayl concedes in his response brief that "the evidence submitted . . . does not firmly establish that [his] whistleblowing activity was a factor in the actions taken against him." See Plaintiff's Response Brief at 12. Under applicable law, this concession is fatal to Mr. Rayl's claim.

B. Breach of Contract

Mr. Rayl further alleges that by appointing an external candidate for the site leader position, MetLife breached its contractual obligations created by the Job Posting Program to give displaced employees first preference over external candidates. Based on a review of the record in this case, the Court concludes that the Job Posting Program contained in the manuals distributed to hiring personnel do not form the basis of a contract in this case, as there is no consent, consideration, or clarity of terms. See Corneveaux v. Kuna Mut. Ins. Group, 76 F.3d 1498, 1506 (10th Cir. 1996); Gilmore, 878 P.2d at 368; see also Backlund v. The Gates Corp., 1995 WL 480328, at ** 2 (10th Cir. 1995). Reviewing the manuals and policies in their entirety, it is clear that the provisions of the Job Posting Program were intended to be used by hiring personnel as guidelines, not requirements, and were not intended to limit the discretion of hiring personnel to choose qualified external candidates. Accordingly, MetLife is entitled to summary judgment on

Mr. Rayl's remaining breach of contract claim.

C. Age Discrimination

Mr. Rayl further claims that he was terminated in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, when he applied for and did not secure the position of site leader. Assuming, as the Court does for purposes of the motion, that Mr. Rayl has set forth the elements of his prima facie case the Court finds that MetLife has forwarded a legitimate, nondiscriminatory reason for failing to appoint Mr. Rayl to a site leader position. Furthermore, Mr. Rayl's admission at oral argument on the motion that the record contains no evidence of pretext. Therefore, MetLife is entitled to summary judgment. See, e.g., St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993). Moreover, under the circumstances present here, this Court is not entitled to second-guess MetLife's business judgment that Mr. Rayl was not the most qualified applicant for the job. See, e.g., Sanchez v. Philip Morris, Inc., 992 F.2d 244, 247 (10th Cir. 1993); O'Hara v. Saint Francis Hosp., 917 F. Supp. 1523, 1530 (N.D. Okla. 1995).

D. Negligence

Mr. Rayl further claims that MetLife was negligent in choosing someone other than him for the site leader position. Mr. Rayl's claim is barred by the Oklahoma Worker's Compensation Act because the Act serves as the exclusive remedy for all injuries arising out of employment, including injuries caused by employer negligence. See Whitson v. Oklahoma Farmer's Union Mut. Ins. Co., 889 P.2d 285, 286 (Okla. 1995).

E. Retaliation

Finally, Mr. Rayl alleges that Mr. Anderson's "generally effective" performance rating given during his annual performance review in January, 1998, was a retaliatory act against Mr.

Rayl's filing of an age discrimination claim with the EEOC. Even assuming Mr. Rayl's "generally effective" rating could be considered "employment action" for purposes of a claim of retaliation, see Meredith v. Beech Aircraft Corp., 18 F.3d 890, 896 (10th Cir. 1994), the one-year time period between the filing of the complaint and the alleged employment action is so distant in time that standing alone, the Court finds that the nexus is insufficient as a matter of law. See, e.g., Conner v. Schnuck Markets, 121 F.3d 1390, 1395 (10th Cir. 1997). Since Mr. Rayl conceded at the hearing that there is no other evidence which supports an inference that the alleged employment action was retaliatory in nature, MetLife is entitled to summary judgment on Mr. Rayl's retaliation claim.

For the reasons expressed herein, Defendant MetLife's Motion for Summary Judgment (Docket # 37) is hereby granted in its entirety, and Plaintiff James L. Rayl's Motion for Partial Summary Judgment (Docket # 36) and Motion to Amend Complaint (Docket # 54) are hereby denied.

IT IS SO ORDERED.

This 1st day of February, 1999.



Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 SHARON LYNN STILES,)
)
 Defendant.)

Case No. 98CV0172E

FILED ON DOCKET

DATE FEB 01 1999

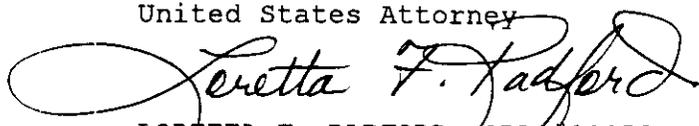
NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis,
United States Attorney for the Northern District of Oklahoma, Plaintiff
herein, through Loretta F. Radford, Assistant United States Attorney, and
hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules
of Civil Procedure, of this action without prejudice.

Dated this 29th day of January, 1999.

UNITED STATES OF AMERICA

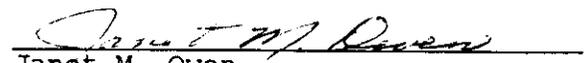
Stephen C. Lewis
United States Attorney



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

CERTIFICATE OF SERVICE

This is to certify that on the 29th day of January, 1999, a
true and correct copy of the foregoing was mailed, postage prepaid thereon,
to: Sharon Lynn Stiles, 8519 E. 133rd Pl., Bixby, OK 74008.


Janet M. Owen
Financial Litigation Unit

RC

mu

7

CPA

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

FILED

FEB - 1 1999 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RANDY D. GRIFFIN,)
)
Plaintiff,)
)
v.)
)
VINEYARD PLATING & SUPPLY CO.,)
)
Defendant.)

Case No. 98-CV-524K(E) ✓

ENTERED ON DOCKET
DATE 2/1/99

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1), F.R.Civ.P., the parties hereby stipulate that the above-captioned case be dismissed with prejudice because the parties have settled the case.

Respectfully submitted,

Mary L. Lohrke

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Mary L. Lohrke, OBA #15806
BOONE, SMITH, DAVIS, HURST & DICKMAN
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ATTORNEY FOR PLAINTIFF