

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

FEB 19 1999 *SAC*

IN RE )  
 )  
BILLY RAY CONLEY and )  
SHERRI LORENE CONLEY, )  
 )  
Debtors, )  
 )  
State of Oklahoma, ex rel., OKLAHOMA )  
EMPLOYMENT SECURITY COMMISSION, )  
 )  
Appellant, )  
 )  
vs. )  
 )  
BILLY RAY CONLEY and SHERRI LORENE )  
CONLEY, )  
 )  
Appellees. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 98-CV-538-H(J) ✓

ENTERED ON DOCKET  
DATE FEB 19 1999

**REPORT AND RECOMMENDATION**

The Oklahoma Employment Security Commission ("OESC") filed a Complaint to Determine Dischargeability after the Bankruptcy Court had granted a discharge to the debtors. OESC claims that notice of the conversion of the case from Chapter 13 to Chapter 7 was mailed by the court clerk to the wrong address and that OESC did not receive notice. The Bankruptcy Court concluded that OESC had not overcome the rebuttable presumption that the notice had been mailed to and received by OESC and denied OESC's motion. For the reasons discussed below, the United States Magistrate Judge recommends that the decision of the Bankruptcy Court be **AFFIRMED**.

## **I. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

The Debtors, Billy and Sherri Conley filed a Chapter 13 petition on April 17, 1996. Notice of the filing of the petition was mailed to OESC at:

Oklahoma Employment Security Commission - Legal Division  
2401 N. Lincoln Blvd.  
206 Will Rogers Memorial Office  
Oklahoma City, OK 73105-4495

This address is hereafter referred to as "the Street Address."

OESC filed a Proof of Claim on June 11, 1996. The address used by OESC on the Proof of Claim was:

OESC - Legal Dept  
P.O. Box 53039  
Oklahoma City, OK 73152-3039

This address is hereafter referred to as "the Post Office Address."

The Conleys note that OESC mailed correspondence to the Conleys' attorney using the Street Address as a return address.

On January 28, 1997, the Conleys voluntarily converted their Chapter 13 case to a case under Chapter 7 of the Bankruptcy Code. The deadline to file a Complaint to Determine Dischargeability is 60 days after the date set for the meeting of creditors which, in this case, was scheduled for April 26, 1997.

The Notice of Conversion was mailed to OESC by the Court Clerk of the Bankruptcy Court at the Street Address.<sup>1/</sup> OESC filed no objections to the discharge, and the Conleys were granted a discharge on May 14, 1997.

OESC asserts that OESC discovered that the case was converted from Chapter 13 to Chapter 7 when OESC conducted a routine review of the file and checked docket entries on the PACER system. OESC filed a Complaint to Determine Dischargeability of Debt on November 3, 1997, almost six months after the discharge.

The Conleys filed a Motion to Dismiss the Complaint as untimely. The Bankruptcy Court granted the Conleys' motion to dismiss the OESC's complaint on March 11, 1998. OESC filed an Amended Complaint and a Motion for Reconsideration of the Bankruptcy Court's Order on March 23, 1998. The Bankruptcy Court denied the Motion and dismissed OESC's Complaint on June 2, 1998.

## **II. STANDARD OF REVIEW**

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

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<sup>1/</sup> The Conleys note that three separate notices were mailed by the Bankruptcy Court to the OESC and that each of the notices was mailed to the Street Address. The Conleys additionally state that the Street Address was the address provided by OESC to the Conleys for correspondence.

In re Branding Iron Motel, Inc., 798 F.2d 396 (10th Cir. 1986) (citations omitted). See also O'Connor v. Mbank Dallas, N.A., 808 F.2d 1393 (10th Cir. 1987) (whether debtors provided adequate protection to creditors was question of fact to be judged on review under clearly erroneous standard).

### **III. ANALYSIS**

The Bankruptcy Court granted the Conleys' motion to dismiss OESC's Complaint to Determine Dischargeability of Debt on March 11, 1998. The Bankruptcy Court noted that a complaint to determine dischargeability must be filed no later than 60 days after the first date set for the meeting of creditors, with the court giving all creditors not less than 30 days notice. The Bankruptcy Court observed that OESC claimed it did not receive notice because the notice was mailed to the Street Address rather than the Post Office Address. The Bankruptcy Court concluded that OESC had actual notice of the conversion due to a rebuttable presumption created by the mailing to OESC at the Street Address. The Bankruptcy Court concluded that OESC had not overcome this rebuttable presumption and granted the Conleys' motion to dismiss OESC's Complaint as untimely.

OESC acknowledges that its Complaint to Determine Dischargeability was untimely. OESC asserts that the Bankruptcy Court should have used its equitable powers to permit OESC to file the untimely complaint because OESC did not receive notice at the correct address.

Federal Rule of Bankruptcy Procedure 2002(g) requires that:

All notices required to be mailed under this rule to a creditor . . . shall be addresses as such entity or an authorized agent may direct in a filed request; otherwise, to the address shown in the list of creditors or the schedule whichever is filed later. If a different address is stated in a proof of claim duly filed, that address shall be used unless a notice of no dividend has been given.

Federal Rule of Bankruptcy Procedure 2002(g)(emphasis added). In accordance with this Rule, the notice should have been mailed to the Post Office Address because the Post Office Address was included in OESC's proof of claim. The parties do not dispute that the notice was mailed to the Street Address rather than the Post Office Address. Consequently, a violation of the rule occurred.

Although the Bankruptcy Court acknowledges that the rule was not properly followed, the Bankruptcy Court concluded that OESC received actual notice of the conversion. The notice of commencement was mailed to the Street Address, and OESC acknowledged receiving that notice. The notice of conversion, which OESC claims not to have received, was also mailed to the Street Address. The Bankruptcy Court cites Crude Oil Corp. of America v. Commissioner, 161 F.2d 809, 810 (10th Cir. 1947). "When mail matter is properly addressed and deposited in the United States mails, . . . there is a rebuttable presumption of fact that it was received by the addressee in the ordinary course of mail." Id. This rebuttable presumption can be overcome, but only by clear and convincing evidence that the mailing did not occur. The Bankruptcy Court noted that OESC had made no such allegations and had done nothing more than merely deny that it received the notice. The Bankruptcy Court

concluded that a mere denial was insufficient to overcome the rebuttable presumption that the mailing occurred.

The mailing requirements of the Bankruptcy Rule were not met, and OESC claims not to have received notice of conversion.<sup>2/</sup> OESC filed, approximately six months after the debtors were discharged, a Complaint to Determine Dischargeability of Debt. OESC's motion was, pursuant to the rules, untimely. However, the Bankruptcy Court has equitable powers which permit the Bankruptcy Court to accept such untimely filings.<sup>3/</sup> In this case, the presumption is that OESC received actual notice of the conversion. The Bankruptcy Court found that OESC received actual notice of the conversion. OESC was unable to rebut this presumption. OESC had actual notice of the conversion yet failed to file a Complaint until six months after the discharge of the debtors. The Bankruptcy Court therefore concluded that it should not exercise its equitable powers to permit OESC to file an untimely Complaint.

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<sup>2/</sup> The notice was mailed to the Street Address rather than the Post Office Address.

<sup>3/</sup> OESC provided the Court with an example of the Bankruptcy Court exercising its equitable powers under seemingly similar circumstances. Appellant attached to Appellant's Brief a copy of State of Oklahoma ex rel Oklahoma Employment Security Commission v. Sonya Lynn Blake, which was decided by the same Bankruptcy Court. In Blake, the Bankruptcy Court used its equitable powers to grant the State of Oklahoma additional time to file a complaint because the record did not indicate that the notice of conversion was mailed to the correct address. Appellant suggests that because Blake is similar to the facts in this case the Bankruptcy Court should have given Appellant additional time in this case. The decision of the Bankruptcy Court in Blake does not indicate the address to which the notice was mailed, and the Bankruptcy Court does not discuss the issues of whether or not notice was presumed to have been received. In addition, as pointed out by Appellant, the power to grant such additional time is within the equitable power of the Bankruptcy Court, and in Blake, the Bankruptcy Court exercised it. The same Bankruptcy Court declined to exercise this power under the circumstances in this case. The record before this Court does not readily point out the differences between this action and Blake, but this Court must review the facts before it on the record before it. In addition, this Court notes that the Bankruptcy Court is certainly in a better position to initially determine whether or not the Bankruptcy Court should exercise its equitable powers.

The basic premises of the Bankruptcy Court's findings are not challenged. OESC does not challenge that the mailing creates a rebuttable presumption, or that OESC has not overcome this rebuttable presumption.<sup>4/</sup> Based on these premises, this Court must assume OESC received notice of the discharge. Therefore, OESC is requesting permission to file, almost six months after a discharge, an adversary proceeding regarding whether a debt should be discharged simply because the notice was sent to the wrong address. The Magistrate Judge recommends that the decision of the Bankruptcy Court be **AFFIRMED**.

### RECOMMENDATION

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

### OBJECTIONS

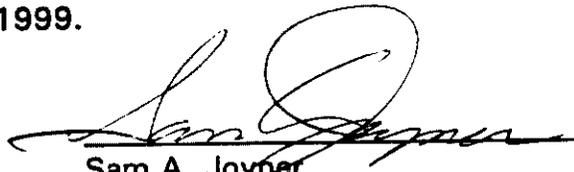
The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and

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<sup>4/</sup> Appellant does argue that appellant did not receive notice, but does not specifically challenge the Bankruptcy Court's findings regarding the rebuttable presumption that notice is presumed to have been received and does not present evidence to overcome the presumption. Appellant focuses on due process. Of course since the Bankruptcy Court concluded that Appellant received "actual notice," the due process concerns identified by Appellant are not implicated.

Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 19th day of February 1999.

  
Sam A. Joyner  
United States Magistrate Judge

CERTIFICATE OF SERVICE

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

19 Day of February, 1999.

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

**FILED**

FEB 17 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

FREDERIC DORWART and  
REINE-ANNE W. DORWART,  
husband and wife,

Plaintiffs,

vs.

REX and GWEN BENHAM,  
husband and wife,

Defendants.

Case No. 99-CV-0103B (E)

ENTERED ON DOCKET

DATE FEB 19 1999

**DISMISSAL WITH PREJUDICE**

The Plaintiffs, Frederic Dorwart and Reine-Anne W. Dorwart, pursuant to F.R.C.P.,  
Rule 41(a)(1), hereby dismiss this action with prejudice as to its refiling.

DATED this 16th day of February, 1999.

Respectfully submitted,

Frederic Dorwart, OBA #2436  
J. Michael Medina, OBA # 6113  
Richard J. Cipolla, Jr. OBA #13674  
FREDERIC DORWART, LAWYERS  
Old City Hall  
124 East Fourth Street  
Tulsa, Oklahoma 74103-5010  
(918) 583-9922

Counsel for Plaintiffs,  
Frederic and Reine-Anne Dorwart,  
husband and wife

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**CERTIFICATE OF MAILING**

I hereby certify that on this 16th day of February, 1999, I caused a true and correct copy of the above and foregoing document to be mailed, with proper postage fully prepaid thereon, to:

Rex and Gwen Benham  
13606 County Farm Road  
Little Rock, AR 72212



\_\_\_\_\_

J. Michael Medina

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

**F I L E D**

FEB 13 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

PHILIP DAVID ELIAS and )  
NANCY J. ELIAS, )

Plaintiffs, )

vs. )

STATE OF OKLAHOMA ex rel. )  
OKLAHOMA EMPLOYMENT SECURITY )  
COMMISSION; TULSA VETERANS )  
READJUSTMENT COUNSELING CENTER; )  
and JOE HERNANDEZ, )

Defendants. )

Case No. 99-CV-0019E(J)

ENTERED ON DOCKET

DATE FEB 19 1999

**ORDER**

Upon the Plaintiffs' Dismissal Without Prejudice of Defendant Tulsa Veterans Readjustment Counseling Center, this Court, having reviewed the record and being fully advised, finds that this Court lacks subject matter jurisdiction, and accordingly, this matter should be and hereby is **REMANDED** to the District Court of Tulsa County, State of Oklahoma, Case No. CJ-98-05712, pursuant to 28 U.S.C.A. § 1447(c).

SO ORDERED this 17<sup>TH</sup> day of Feb, 1999.

  
\_\_\_\_\_  
District Judge

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

**FILED**

FEB 17 1999

JONNA B. BOSTIAN,

Plaintiff,

vs.

PEPSI-COLA CO., et al,

Defendant.

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)

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 98-C-138-B

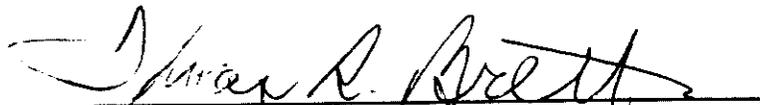
ENTERED ON DOCKET  
DATE **FEB 19 1999**

ADMINISTRATIVE CLOSING ORDER

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

If, by 5-3-99, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this *17th* day of February, 1999.



THOMAS R. BRETT, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

**FILED**

FEB 16 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

CYNTHIA D. KIRK,

Defendant.

No. 98CV927B(E)

ENTERED ON DOCKET  
DATE FEB 19 1999

**DEFAULT JUDGMENT**

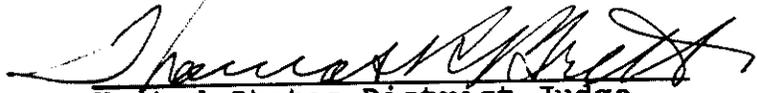
This matter comes on for consideration this 11<sup>th</sup> day of Feb, 1999, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Cynthia D. Kirk, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Cynthia D. Kirk, was served with Summons and Complaint on December 8, 1998. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

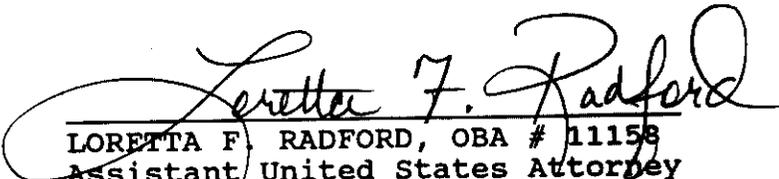
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Cynthia D. Kirk, for the principal amount of \$2,428.52, plus accrued interest of \$1,840.89, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of

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\$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 4.584 percent per annum until paid, plus costs of this action.

  
United States District Judge

Submitted By:

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

LFR/llf

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

**FEB 18 1999**

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

**BRENDA F. DUNIPHIN,** )  
 )  
 )  
 **Plaintiff,** )  
 )  
 )  
 **v.** )  
 )  
 )  
 **KENNETH S. APFEL, Commissioner,** )  
 **Social Security Administration,<sup>1</sup>** )  
 )  
 )  
 **Defendant.** )

**Case No. 95-CV-1070-EA**

**ENTERED ON DOCKET**

**DATE FEB 19 1999**

**ADMINISTRATIVE CLOSING ORDER**

On November 1, 1996, this case was ordered held in abeyance pending a decision of the Appeals Council. More than two years have elapsed, and there has been no notice of a decision of the Appeals Council.

**IT IS HEREBY ORDERED** that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation. A motion to reopen must be made within thirty (30) days of receipt of the Appeals Council decision.

If, by November 1, 1999, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

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

IT IS SO ORDERED this 18<sup>th</sup> day of February, 1999.

*Claire V Eagan*

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CLAIRE V. EAGAN  
UNITED STATES MAGISTRATE JUDGE

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

**FILED**

FEB 16 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

VERONICA WILSON and PETE TERRELL WILSON, )  
)  
Plaintiffs, )

vs. )

Case No. 97-C-910-E

KENNETH MUCKALA, M.D., COLUMBIA DOCTORS )  
HOSPITAL OF TULSA, INC., d/b/a COLUMBIA )  
DOCTORS HOSPITAL, COLUMBIA HEALTH TRUST, )  
INC., COLUMBIA/HCA HEALTHCARE )  
CORPORATION; LESTER J. BOYLE; JOHN F. )  
KEOWN, JR., M.D.; ANTHONY R. YOUNG; HERMAN )  
C. ROBBINS; A. GEORGE EBER; NANCY J. KACHEL; )  
ROBERT H. AIKMAN, M.D.; ROBERT C. HARRIS, )  
M.D.; JAMES C. KING, M.D.; RICHARD M. STAMILE, )  
M.D.; LUIS GOROSPE, M.D., DAVID GRIFFITHS, M.D.; )  
and DAVID SCHOLL, M.D., )  
Defendants. )

ENTERED ON DOCKET  
DATE FEB 18 1999

**ORDER**

Now before the Court is the Motion for Summary Judgment (Docket #69) of Defendants Columbia/HCA Healthcare Corporation and Healthtrust, Inc. - The Hospital Company; the Motion to Dismiss (Docket #34) of the Defendant Board Members', Lester J. Boyle, John F. Keown, Jr., M.D., Anthony R. Young, Herman C. Robbins, A. George Eber, Nancy J. Kachel, Robert H. Aikman, M.D., Robert C. Harris, M.D., Richard M. Stamile, M.D., Luis Gorospe, M.D., and David Griffiths, M.D.; the Motion for Summary Judgment (Docket #68) of Defendants Columbia Doctors Hospital of Tulsa, Inc. and the Board Members'; the Motion for Summary Judgment (Docket #75) of Kenneth Muckala, M.D; and the Motion for New Trial, and/or to Alter Judgment (Docket #105) of the Plaintiffs Pete Terrell Wilson and Veronica Wilson.

In this case, Plaintiff Veronica Wilson brings claims based on her alleged sexual harassment by Dr. Kenneth Muckala who was Vice Chief and Chief of Staff of Columbia Doctors Hospital while Wilson worked there as a psychiatric nurse. Ms. Wilson claims that Dr. Muckala sexually harassed her from September of 1996 to March of 1997, and that it led to her resignation on May 21, 1997. She makes claims against Columbia Doctors Hospital of Tulsa, Inc., Columbia/HCA Healthcare Corporation, and Healthtrust, Inc. - The Hospital company based on Title VII and negligence. She makes claims against the individual Board members based on negligence only. She brings state law claims against Dr. Muckala for invasion of privacy, tortious interference with business relations, and sexual assault and battery. All defendants seek summary judgment based on a variety of arguments.

#### Legal Analysis

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Widon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is 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."

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).

### 1. Ownership of the Hospital

Two corporate entities, Columbia/HCA Healthcare Corporation and Healthtrust, Inc.-The Hospital Company, seek summary judgment on the grounds that they do not currently own Doctors Hospital, nor did they own the Hospital during the relevant time frame of September, 1996 through March, 1997. The undisputed evidence in this case demonstrates that from September to December of 1996, the Hospital was owned by Notami Hospitals of Oklahoma, Inc., an Oklahoma Corporation, and that, on December 31, 1996, the Hospital was sold to Columbia Doctors Hospital of Tulsa, Inc., an Oklahoma Corporation.

Plaintiffs, in urging that the ownership of the Hospital is a jury question, presents two arguments. First, Plaintiffs urge that the Defendants did not specifically deny the assertion in the Complaint that each of the named corporations owned or operated the hospital during the events in question. Second, Plaintiffs argue that the answer to an interrogatory about “names by which the corporation has been known and/or has used” contradicts the arguments of the Defendants.

The Court rejects these arguments. The ownership of the Hospital is not a jury question. It is concrete fact that can be proved with evidentiary materials such as Bills of Sale and other contracts. Moreover, the plaintiff has no evidence which in any way contradicts the documentary evidence submitted by defendants. Lastly a direct correlation cannot necessarily be drawn between “names by which the Hospital has been known” and ownership of the hospital. There is no evidence to support the assertion that either Columbia/HCA Healthcare Corporation or Healthtrust, Inc.-The Hospital Company owned the Hospital during the period in question. This Motion for Summary Judgment is granted.

### 2. Liability of the Individual Governing Board Members

These defendants, who were Board members of the defendant hospital in 1996 and 1997 argue that Veronica Wilson's claims of negligence and Pete Wilson's claim of loss of consortium are not actionable because the Board members had no duty under Oklahoma law to protect Ms. Wilson from sexual harassment in the workplace, because Title VII and Oklahoma's Anti-Discrimination Act shield individuals from civil liability for workplace harassment, and because Ms. Wilson failed to exhaust her administrative remedies with respect to these Defendants. Plaintiff argues that the board members had a duty to learn of and prevent the wrongdoing of Dr. Muckala because they knew or should have known of his reputation and activities regarding sexual harassment, and that his duty gives rise to a personal liability. Sumner-Coal Mining Co. v. Pleasant, 259 P. 1055, 1056 (Okla. 1927). Plaintiffs also argue that the negligence of the board stems from failure to prevent the assault and battery of Dr. Muckala, which is separate and apart from the sexual harassment claim.

The Court is unpersuaded that there is personal liability on behalf of the individual board members for any type of negligence. The Court finds that not only is there no duty at common law to protect one from sexual harassment, but also that liability for sexual harassment does not extend to an individual. Haynes v. Williams, 88 F.3d 898 (10<sup>th</sup> Cir. 1996). Moreover, the Court rejects plaintiffs' attempt to separate, for the purposes of personal liability, the assault and battery of Dr. Muckala from the claim for sexual harassment, and Brown v. Ford, 905 P.2d 223 (Okla. 1995) does not support plaintiffs' argument.

The Motion to Dismiss is granted.

### 3. Sufficiency of the Evidence on the Title VII Claims

The remaining defendant, Columbia Doctors Hospital of Tulsa, Inc. (Columbia), argues that

summary judgment is appropriate in its favor because plaintiff was not constructively discharged, because the evidence is not sufficient to support the claim for sexual harassment, and/or the Supreme Court's affirmative defense is proved by the undisputed evidence.

a. Constructive Discharge

Defendant argues that it is entitled, as a matter of law, to judgment on plaintiff's constructive discharge claim. Defendant argues that plaintiff must prove, by a preponderance of evidence, that 1) due to intolerable working conditions, she had no choice but to quit, and 2) that the intolerable working conditions were imposed on her because of her sex. Winsor v. Hinckley Dodge, Inc., 79 F.3d 996, 1002 (10<sup>th</sup> Cir. 1996). In arguing that at the time plaintiff chose to leave she was not subjected to intolerable working conditions, and therefore she cannot establish that she had no choice but to resign, defendant relies on the following facts:

- the last incident of alleged sexual harassment occurred on March 9, 1997;
- Dr. Muckala was confronted about the alleged sexual harassment on March 10, 1997 by Judy Moore, Director of Geriatric Services;
- Dr. Muckala's patient on plaintiff's unit was reassigned to another physician on March 10, 1997;
- plaintiff submitted her request for leave of absence on March 19, 1997 and her termination on May 21, 1997.

Defendant's argument is not well taken. First, whether the actions of Judy Moore in confronting Dr. Muckala and having his patient reassigned to another physician was a sufficient manner of dealing with plaintiff's complaints is a question of fact. Moreover, even though nothing happened between March 10 and March 19, it is for a jury to decide whether Plaintiff's fear of continued harassment was reasonable in light of the response of the hospital. Certainly it is undisputed that not all harassment took place in the context of Dr. Muckala treating a patient on the unit in which plaintiff

worked.

b. Negligence or **Recklessness** of the Hospital

An employer has liability for **sexual harassment** either when it was negligent or reckless (Restatement (Second) of Agency, §219 (2)(b)), or if some theory of vicarious liability is applicable (Restatement, §219(2)(d)). Burlington Industries v. Ellerth, — U.S.—, 118 S.Ct. 2257, 2267, 141 L.Ed. 2d 633 (1998). Defendant asserts that plaintiff's proof fails on the theory of its direct negligence or recklessness. Defendant argues, that in order to proceed under this theory, plaintiff must prove that defendant knew of should **have known** of the harassment and failed to respond in a reasonable manner. Adler v. Wal-Mart Stores, Inc., 1998 WL 24700, 9-10 (10<sup>th</sup> Cir. (Colo.)). Defendant's argument, apparently, is that **the Hospital** knew about the alleged harassment, and, as a matter of law responded in a reasonable **manner**. This assertion is not borne out by the evidence. In light of the statements of the Hospital **employees**, Debbie Block and Judy Moore, it is possible to conclude that no investigation was **initiated**, nor any attempt made to prevent further discrimination, until March 10, 1997. **Whether this** is reasonable is a question of fact for the jury.

c. Vicarious Liability for **Sexual Harassment** by Dr. Muckala

Defendant argues that it cannot be **held liable** for the alleged sexual harassment of Dr. Muckala under any theory of vicarious liability. Vicarious liability is proved if "the [harassing employee] purported to act or speak on **behalf** of the [employer], and there was reliance on the apparent authority, or the [harassing employee] was aided in accomplishing the tort by the existence of the agency relation." Ellerth, 118 S.Ct. at 2267 (citing the Restatement, §219(2)(d)). In this instance, Dr. Muckala was not an **employee of the hospital**, and plaintiff had been assured, from the first time she reported the harassment, that **he** could not effect her job. Thus, vicarious liability

based on apparent authority is not present here.

“Aided in the agency relation,” however, presents a more difficult question. While here it is clear that Dr. Muckala did not take any **tangible** employment action against plaintiff, a question of fact remains as to whether he was “**aided in the agency relation**” in furthering any harassment.

d. **The Affirmative Defense**

Defendant also argues that it is **entitled** to summary judgment based on the affirmative defense discussed in Ellerth, and Farragher v. Boca Raton, --- U.S.—, 118 S.Ct. 2275, 141 L.Ed. 2d 662 (1998). Proof of this defense, which is applicable only if there is no tangible employment action taken against the employee, requires a) that the employer exercised reasonable care to prevent and correct promptly any sexually **harassing** behavior, and b) that the plaintiff employee unreasonably failed to take advantage of any **preventive** or corrective opportunities provided by the employer or to avoid harm otherwise. Ellerth, 118 S.Ct., at p. 2270. While defendant appears to argue that this affirmative defense bars any **liability** based on Title VII for harassment, this is a misreading of Ellerth. The affirmative **defense** in Ellerth is one to vicarious liability only and not applicable to liability based on Restatement §219(2)(b). Id., at p. 2270.

This affirmative defense, however, **certainly** is not proved at this point as a matter of law. While it is undisputed that Dr. Muckala **did not** take any tangible employment action against plaintiff, Defendant’s argument on the **remaining** two factors ignores evidence unfavorable to defendant, including witness statements **which**, at the very least, shed doubt on whether an “investigation” was ever undertaken prior to **March 10, 1997**. This is in spite of the fact that “[u]nder the Hospital’s sexual harassment policy, **employees** who are subjected to sexual harassment are advised to complain to their supervisor, **department** manager, or the Human Resources Director. The

policy further states that an investigation will ensue and if the employee is not satisfied with the result, he or she should go to the Director of Human Resources.” (Br. of Columbia, p.13). Questions of fact remain with respect to **the reasonableness** of the actions of both plaintiff and defendant.

e. **Negligent Infliction of Emotional Distress**

The Hospital also argues that **plaintiff fails** to state a claim for negligent infliction of emotional distress because she fails to **allege and prove** physical manifestation of the distress and because defendants responded appropriately to her complaints. As has been noted above, the appropriateness of the Hospital’s response is a question of fact for the jury. In addition, the argument regarding injury is, at best, premature in **absence** of the testimony of plaintiff’s psychologist.

Defendant’s motion for summary judgment on the substance of plaintiff’s claims is denied.

4. Liability of Dr. Kenneth Muckala

Dr. Muckala seeks summary judgment, arguing that the evidence does not support a claim for invasion of privacy or a claim for assault and battery.

The invasion of privacy claim **pled by plaintiffs** is actually one for intrusion upon seclusion, set forth in the Restatement (Second) of Torts, §652B, which provides:

One who intentionally intrudes, **physically** or otherwise, upon the solitude or seclusion of another, or his private **affairs** or concerns, is subject to liability to the other for invasion of his privacy, **if the intrusion** would be highly offensive to a reasonable person.

Under Oklahoma law, two elements are **required** to prove this claim: 1) nonconsensual intrusion 2) which was highly offensive to a reasonable **person**. Gilmore v. Enogex, Inc., 878 P.2d 360 (Okla. 1994). Defendant, relying on Kansas law, **stops short** of arguing that an invasion of physical privacy is necessary, but asserts that sexual **comments** and brief incidents of grabbing and touching do not

constitute an actionable invasion of privacy claim. Haehn v. City of Hoisington, 702 F. Supp. 1526, 1532 (D. Kan. 1988). The analysis in this case, pursuant to Kansas law, centers on the manner in which an individual obtains information. **The Court** is aware of no Oklahoma case which similarly limits the intrusion on seclusion claim, **and holds that** a question of fact exists regarding the two elements of the claim.

Similarly, the assault and battery claim presents questions of fact for a jury to decide. While plaintiffs', in their complaint, use the term "sexual assault and battery," the Court, in Brown, 905 P.2d, at p. 230, makes it clear that the common law tort of assault and battery covers such a claim, and that the sexual aspects "are merely evidentiary and explanatory of the actor's offending conduct." Thus, the issue is whether a question of fact exists with regard to the element of assault and battery. Those elements, as set forth in the Restatement (Second) of Torts, §§13 and 21, are:

**Battery: Harmful Contact**

An actor is subject to liability to another for battery if

- (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
- (b) a harmful contact with the person of the other directly or indirectly results.

**Assault**

(1) An actor is subject to liability to another for assault if

- (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
- (b) the other is thereby put in such imminent apprehension.

(2) An action which is not done with the intention stated in Subsection (1,a) does not make the actor liable to the other for an apprehension caused thereby although the act involves an unreasonable risk of causing it and, therefore, would be negligent or reckless if the risk threatened bodily harm.

While defendant argues that the physical contact and touching by Dr. Muckala are not actionable, this argument ignores the aspect of placing plaintiff in "imminent apprehension" of offensive contact. The Court holds that a question of fact exists with regard to the assault and battery claim.

### 5. Viability of the Tortious Interference with Contract Claim

This Court has previously granted a motion to dismiss plaintiffs' claims for tortious interference with contract and economic opportunity, holding that a tortious interference claim cannot be brought against a person acting in a representative capacity for one of the parties to the contract. Plaintiffs seek reconsideration of that Order, arguing that it has not been determined in this case whether Dr. Muckala was acting in a representative capacity for the Hospital. This, however, is an argument that was not raised previously in the briefing on the motion to dismiss. Moreover, plaintiffs pled in their complaint that Dr. Muckala acted while in a representative capacity for the hospital, and the motion to dismiss must be decided while presuming that all plaintiff's factual allegations are true. Riddle v. Mondragon, 83 F.3d 1197, 1201 (10<sup>th</sup> Cir. 1996). Plaintiffs' Motion for New Trial and/or to Alter Judgment is Denied.

### Conclusion

The Motion for Summary Judgment (Docket #69) of Defendants Columbia/HCA Healthcare Corporation and Healthtrust, Inc. - The Hospital Company is GRANTED; the Motion to Dismiss (Docket #34) of the Defendant Board Members', Lester J. Boyle, John F. Keown, Jr., M.D., Anthony R. Young, Herman C. Robbins, A. George Eber, Nancy J. Kachel, Robert H. Aikman, M.D., Robert C. Harris, M.D., Richard M. Stamile, M.D., Luis Gorospe, M.D., and David Griffiths, M.D. is GRANTED; the Motion for Summary Judgment (Docket #68) of Defendants Columbia Doctors Hospital of Tulsa, Inc. and the Board Members' is DENIED; the Motion for Summary Judgment (Docket #75) of Kenneth Muckala, M.D is DENIED ; and the Motion for New Trial, and/or to Alter Judgment (Docket #105) of the Plaintiffs Pete Terrell Wilson and Veronica Wilson is DENIED.

IT IS SO ORDERED THIS <sup>12<sup>th</sup></sup> ~~12~~ DAY OF <sup>February</sup> ~~JANUARY~~, 1999.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT



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

**FILED**

FEB 16 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

WADRESS H. METOYER, JR., )  
)  
Petitioner, )  
)  
vs. )  
)  
U. S. ATTORNEY'S OFFICE, N. D., )  
et al., )  
)  
Respondents. )

Case No. 98-CV-819-B (J)

ENTERED ON DOCKET  
DATE FEB 18 1999

**ORDER**

Before the Court are Petitioner's motion for appointment of counsel (#5) and motion to dismiss without prejudice (#7). Petitioner originally filed this action on October 21, 1998, as a 42 U.S.C. § 1983 civil rights complaint. However, by Order entered November 3, 1998, this Court found the issues raised and the relief requested to be in the nature of habeas corpus and converted Petitioner's § 1983 complaint to a 28 U.S.C. § 2254 petition for writ of habeas corpus.

Petitioner has moved to dismiss this action without prejudice in order to exhaust state remedies as to his habeas claims. Pursuant to 28 U.S.C. § 2254(b), this Court cannot consider an application for writ of habeas corpus unless the applicant has exhausted the remedies available in the state courts. Petitioner states that he has not exhausted available state remedies as to each claim raised in his petition. Therefore, the Court finds Petitioner's motion to dismiss without prejudice should be granted to allow Petitioner to exhaust his remedies in state court. As a result of this decision, Petitioner's motion for appointment of counsel has been rendered moot.

**ACCORDINGLY, IT IS HEREBY ORDERED that:**

1. Petitioner's motion for appointment of counsel (#5) is **denied as moot**.
2. Petitioner's motion to dismiss without prejudice (#7) is **granted**.
3. This action is **dismissed without prejudice**.

SO ORDERED THIS 12<sup>th</sup> day of Feb., 1999.

  
THOMAS R. BRETT, Senior Judge  
UNITED STATES DISTRICT COURT

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

**F I L E D**

FEB 18 1999 SAZ

LOUISE LEWIS obo EUGENE B.  
ROGERS, a minor,  
497-86-9600

Plaintiff,

vs.

KENNETH S. APFEL,  
Commissioner,  
Social Security Administration,

Defendant.

Case No. 97-CV-1019-M ✓

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE FEB 18 1999

**JUDGMENT**

Judgment is hereby entered for Plaintiff and against Defendant. Dated this  
18<sup>th</sup> day of February, 1999.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

14.

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

**F I L E D**

LOUISE LEWIS obo EUGENE B.  
ROGERS, a minor,  
497-86-9600

Plaintiff,

vs.

KENNETH S. APFEL,  
Commissioner,  
Social Security Administration,

Defendant.

FEB 18 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 97-CV-1019-M ✓

ENTERED ON DOCKET

DATE FEB 18 1999

**ORDER**

Plaintiff, Louise Lewis, grandmother and guardian of Eugene B. Rogers, a minor, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.<sup>1</sup> In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge.

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

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<sup>1</sup> Plaintiff's January 18, 1994, application for Supplemental Security Income was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held March 6, 1995. By decision dated November 3, 1995, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on September 15, 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.

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

Eugene Rogers was born April 19, 1983, and was 11 years old at the time of the hearing. Plaintiff claims Eugene is disabled since birth due to Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder (ODD) and depression. The ALJ determined that Eugene is not under a disability as defined in the Social Security Act. Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ failed to perform an adequate analysis of Eugene's impairments under the Listings of Impairments. For reasons expressed below, the Court concludes that the case must be reversed and remanded for a thorough analysis of the applicable Listings.

The statutory and regulatory criteria in effect at the time of the ALJ's decision required the decision maker to apply a four-step evaluation process to a claim of

disability benefits made on behalf of a child. See 42 U.S.C. § 1382c(a)(3)(A)(1994), as implemented by 20 C.F.R. § 416.924(b)(1994).<sup>2</sup>

In this case, the ALJ determined "Eugene Rogers does not have an impairment which meets or equals the criteria of any of the listed impairments of Appendix 1. Moreover, he does not have any impairment or combination of impairments which causes the same functional limitations as any of the listed impairments." [R. 13]. The ALJ then engaged in an extensive discussion of his determination at step four that, although Eugene has an attention deficit hyperactivity disorder, the record does not reflect an impairment or combination of impairments of comparable severity to that which would disable an adult. [R. 14-18]. The ALJ concluded Eugene has no significant limitation in the area of cognitive/communicative functions, motor development, or social functioning. [R. 16]. He has moderate limitations in personal/behavioral patterns, and moderate limitation in concentration, persistence, and pace. [R. 18]. The ALJ determined that these limitations do not so adversely affect his ability to function independently, appropriately and effectively in an age-appropriate manner that he has an impairment which would prevent an adult from engaging in

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<sup>2</sup> First, the ALJ was required to determine whether the claimant was engaged in substantial gainful activity. See 20 C.F.R. § 416.924(c). If so, he was not disabled. *Id.* If the claimant was not engaged in substantial gainful activity, the ALJ had to determine whether he had a severe impairment. *Id.* § 416.924(d). If not, he was not disabled. *Id.* If the claimant had a severe impairment, the ALJ had to determine whether that impairment met or equaled an impairment listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1 (Listings). *Id.* § 416.924(e). If a Listing was met or equaled, the claimant would be deemed disabled. *Id.* If no Listing was met, the evaluation would proceed to the fourth step, where an individualized functional assessment (IFA) would be made to determine whether the claimant had an impairment or impairments of comparable severity to that which would prevent an adult from engaging in substantial gainful activity. *Id.* § 416.924(f).

substantial gainful activity. The ALJ determined Eugene was not under a disability as defined in the Social Security Act. [R. 19].

Subsequent to the ALJ's decision, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act, Pub.L. No. 104-193, 110 Stat. 2105. The Act amended the standard for evaluating children's disability claims, as follows:

An individual under the age of 18 shall be considered disabled ... if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C. § 1382c(a)(3)(C). Section 211(d)(1) of the Act, found in the notes following 42 U.S.C.A. § 1382c, states that the new standard for evaluating children's disability claims applies to all cases which have not been finally adjudicated as of the effective date of the Act, August 22, 1996, including those cases in which a request for judicial review is pending. Thus, the new version of the Act is applied to this case. *Brown v. Callahan*, 120 F.3d 1133 (10th Cir. 1997).

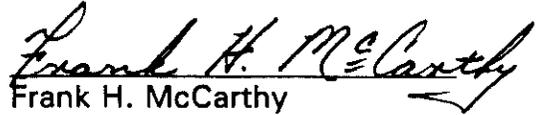
Under the new statute, a child is considered disabled only if his or her condition meets or equals a Listing at step three of the sequential evaluation process. Consequently, analysis of the medical evidence in light of the Listings is of primary importance. Although the ALJ's decision contains a thorough discussion of the evidence, the ALJ did not identify the applicable Listing or specifically discuss the evidence in light of the applicable Listing. The Social Security Act requires the Commissioner to make findings of fact based on the evidence and to discuss the

evidence, stating the reasons for any unfavorable decision. 42 U.S.C. § 405(b)(1). In particular, the ALJ is required to discuss the evidence and explain why he found that the claimant was not disabled under the Listings. *Clifton v. Chater*, 79 F.3d 1007, 1009 (10th Cir. 1996). Where, as here, the ALJ's decision contains findings concerning the Listings which are not accompanied by specific weighing of the evidence the Court cannot assess whether relevant evidence adequately supports the ALJ's conclusion that Plaintiff's impairments do not meet or equal a listed impairment, or whether the correct legal standards were applied to arrive at that conclusion. *Id.* Therefore, the case must be remanded for the ALJ to set out the reasons for his determination that Eugene's impairments do not meet or equal a listed impairment.

The Court notes that analysis of the criteria for meeting Part B of the Listing for Attention Deficit Hyperactivity Disorder, 112.11, will be similar to the individualized functional assessment (IFA) the ALJ has already performed, as many of the same terms are employed. However, there are important differences in the focus of the Listing evaluation compared to the IFA. For instance, under the Listing analysis the functional restrictions "must be the result of the mental disorder which is manifested by the medical findings" required by the specific Listing. 20 C.F.R. §112.00(A). The Listing regulations specifically provide that valid standardized test scores which are two standard deviations below the norm for the test will be considered a marked restriction. 20 C.F.R. §112.00(C). And, the effect of medication must be discussed in terms of the functional limitations which persist, despite medication. 20 C.F.R. §112.00(F).

The decision of the Commissioner is REVERSED and the case REMANDED for further proceedings consistent with this Order.

SO ORDERED this 18<sup>th</sup> Day of February, 1999.

  
Frank H. McCarthy  
UNITED STATES MAGISTRATE JUDGE

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

JAMES EUGENE TEAGLE,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 99-CV-0072-H (E)

ENTERED ON DOCKET

DATE FEB 17 1999

**FILED**

FEB 18 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

The Court has for consideration the Report and Recommendation (the "Report") of the U.S. Magistrate Judge filed on January 27, 1999, in this habeas corpus action brought pursuant to 28 U.S.C. § 2254. The Magistrate Judge recommends that pursuant to 28 U.S.C. § 2241(d), this petition be transferred to the United States District Court for the Eastern District of Oklahoma. Neither party has filed an objection to the Report.

Having reviewed the Report and the facts of this case, and pursuant to 28 U.S.C. § 636(b)(1)(C), the Court concludes that the Report should be adopted and affirmed.

**ACCORDINGLY, IT IS HEREBY ORDERED** that the Report and Recommendation of the Magistrate Judge (Docket #3) is **adopted and affirmed** and this action is **transferred** to the United States District Court for the Eastern District of Oklahoma.

IT IS SO ORDERED.

This 17<sup>TH</sup> day of FEBRUARY 1999.

  
Sven Erik Holmes  
United States District Judge

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

LEWIS AARON COOK  
SSN: 445-44-5042

Plaintiff,

v.

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

Defendant.

**F I L E D**

**FEB 18 1999**

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

No. 98-CV-74-J ✓

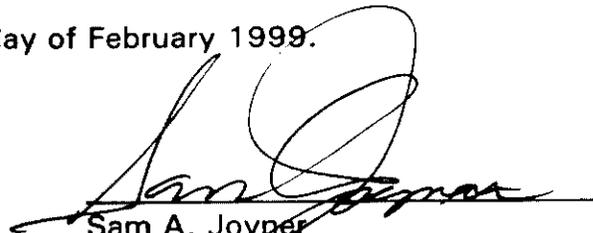
**ENTERED ON DOCKET**

**DATE FEB 18 1999**

**JUDGMENT**

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

It is so ordered this 18th day of February 1999.

  
Sam A. Joyner  
United States Magistrate Judge

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

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

LEWIS AARON COOK )  
SSN: 445-44-5042 )

Plaintiff, )

v. )

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

Defendant. )

FEB 18 1999 SAC

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 98-CV-74-J ✓

**ENTERED ON DOCKET**  
**DATE FEB 18 1999**

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

Plaintiff, Lewis Aaron Cook, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.<sup>3/</sup> Plaintiff asserts that the Commissioner erred because (1) the record does not support the ALJ's findings that Plaintiff could perform medium work, and (2) the hypothetical questions posed to the vocational expert failed to include all of Plaintiff's limitations. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

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

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

<sup>3/</sup> Administrative Law Judge Stephen C. Calvarese (hereafter "ALJ") concluded that Plaintiff was not disabled by decision dated October 4, 1996. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on November 25, 1997. [R. at 4].

## I. PLAINTIFF'S BACKGROUND

Plaintiff was born January 4, 1946, and completed high school. Plaintiff was 50 years old at the time of the decision by the ALJ. Plaintiff's prior work was performed while Plaintiff was in prison and was not considered vocationally relevant by the ALJ. Plaintiff claims he is disabled due to pain in his shoulder, swelling in his feet, hypertension, headaches, and bad eyesight.

## II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

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

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

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

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

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

42 U.S.C. § 423(d)(2)(A).

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

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

"The finding of the Secretary<sup>5/</sup> as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to

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<sup>5/</sup> Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

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

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

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

By decision dated October 4, 1996, the ALJ concluded that Plaintiff could perform medium work with the additional restrictions of not performing tasks which require overhead reaching with his left arm or acute vision with his left eye, or quick changes in position. Based on the testimony of a vocational expert, the ALJ concluded that Plaintiff could perform numerous jobs in the community and was not disabled.

### **IV. REVIEW**

#### **RFC TO PERFORM MEDIUM WORK**

Plaintiff initially notes that the ALJ decided this case at Step Five and that the burden is therefore on the Commissioner to establish that Plaintiff can perform a significant number of jobs despite his limitations. Plaintiff asserts that the ALJ

improperly rejected all of the limitations set forth by Plaintiff's treating physicians. Plaintiff claims that the medical evidence establishes that he has degenerative arthritis in multiple levels of his cervical spine, a bone spur in his left shoulder, and that due to his arthritis Plaintiff had a restriction to lifting 15 - 20 pounds with no prolonged standing, no frequent bending, and no stooping.

Plaintiff's first reference to his physician-imposed restrictions is to a form completed by a doctor titled "Federal Correctional Institution Hospital." [R. at 132]. It indicates that Plaintiff has a standing restriction of no more than fifteen minutes per one-half hour while on duty. The form was completed June 20, 1990, and indicates that the restriction is "thru 12 midnight permanent 1990." This could be interpreted as indicating that Plaintiff has a "permanent" restriction for standing, or that Plaintiff is restricted "permanently" through 1990. Regardless, the next reference by Plaintiff is to a similar form completed May 31, 1994. [R. at 134]. This form indicates that Plaintiff should lift only 15 pounds, that Plaintiff should not engaged in prolonged standing or in frequent bending or stooping. The form indicates that Plaintiff can resume his "usual occupation" on August 30, 1994. This second form would indicate that the first form did not impose "permanent" restrictions on Plaintiff as suggested by Plaintiff.

Plaintiff asserts that the ALJ's conclusions that Plaintiff's weight restrictions had been lifted by the doctors was incorrect because Dr. Strong, in March 1995, wrote that Plaintiff was on a duty and weight restriction. Dr. Strong's notes do not indicate that the 1990 or 1994 restrictions were never lifted. The March 1995 notes

indicate that Plaintiff informed the doctor that Plaintiff was restricted to no lifting over 20 pounds. The notes indicate that Plaintiff's left shoulder was tender with crepitus where the clavicle was resected. The reference to Plaintiff's prior duty and weight restrictions is not fully legible, but appears to be in the records of the P.A. It states "discussed convalescence with Mr. Nichols [P.A.] but he does not recommend it as patient is already on duty and weight restrictions, therefore no further convalescence at present." [R. at 100]. The notation does not indicate the current duty or weight restrictions, but when read with the other notations made on March 30, 1995, indicate that Plaintiff had informed them of a 20 pound weight restriction. These notes indicate that the individuals treating Plaintiff believed that no additional restrictions beyond a 20 pound lifting restriction were necessary. The record does not indicate a time limit for the lifting restriction, and does not indicate whether Plaintiff could lift more than 20 pounds.<sup>6/</sup>

Plaintiff additionally asserts that he was involved in a motor vehicle accident which exacerbated his condition. Plaintiff refers to the records from his treating chiropractor. The chiropractor states that Plaintiff was treated from 12/6/95 until 1/12/96 for injuries from an auto accident. "After treating him for these injuries he still complains of neck pain and left shoulder pain which becomes worse with activities. It is in my opinion that Louis will experience pain and discomfort in these

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<sup>6/</sup> The record indicates that Plaintiff had informed them of a prior lifting restriction of 20 pounds, and that nothing in Plaintiff's recent examination indicated that an increase in the lifting restriction, or additional restrictions was needed. The record does not indicate whether or not if Plaintiff had not had a restriction of lifting 20 pounds the doctors would have placed such a restriction on Plaintiff.

areas for a number of reasons, [sic] first he is limited to working as a laborer which will place repeated stress in the areas of complaints. Secondly he has had previous injuries to his shoulder joint which provides a less mobile, more sensitive joint." [R. at 117].

A Residual Functional Capacity Assessment completed on October 12, 1995 by Thruma Fiegel, M.D., indicates that Plaintiff can occasionally lift 50 pounds, frequently lift 25 pounds, stand or walk for six hours out of an eight hour day, sit for six hours in an eight hour day and push or pull an unlimited amount. [R. at 77]. The record assessment indicates Plaintiff has a good range-of-motion. [R. at 77].

A consulting examination conducted on September 25, 1995 by Jerry D. First, M.D., indicated that Plaintiff had a mild decrease range-of-motion in his left shoulder, but no joint swelling or redness. [R. at 112]. The doctor indicated that Plaintiff could climb on and off of the examination table, walk up and down the thirty foot examination hall without difficulty, and that Plaintiff's gait and station were appropriate. [R. at 112]. Plaintiff's gross and fine motor coordination and strength were reported as normal in both upper extremities. [R. at 112].

The Court concludes that the record contains substantial evidence to support the Commissioner's conclusion that Plaintiff could perform the exertional demands of medium work.<sup>7/</sup>

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<sup>7/</sup> The vocational expert listed only one job in the "medium" category which Plaintiff could perform. The remainder of the jobs listed by the vocational expert involve light or sedentary work. The record certainly contains substantial evidence to support a conclusion that Plaintiff can perform sedentary or light work. The Court is well aware that at Plaintiff's age, if Plaintiff can perform only sedentary work, a finding of "disabled" is directed by the Grids. However, in this case, the record contains substantial evidence to indicate Plaintiff can perform light work or medium work which would not direct a finding of disability under the Grids.

## HYPOTHETICAL QUESTION TO VOCATIONAL EXPERT

Plaintiff acknowledges that the vocational expert provided, in addition to the medium and sedentary jobs which Plaintiff could perform, some light jobs. Plaintiff acknowledges that the light jobs "might fall into Mr. Cook's lifting abilities," but asserts that the hypothetical question did not properly include bending and stooping as well as limitations in prolonged standing which are established by Plaintiff's treating physicians. As discussed above, and as pointed out in Defendant's briefs, the record does not indicate that Plaintiff had permanent bending and stooping or prolonged standing limitations. Plaintiff does not complain about any other aspects of the hypothetical question posed by to the vocational expert. See Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995) (an ALJ need include only those limitations in the question to the vocational expert which he properly finds are established by the evidence).

Accordingly, the Commissioner's decision is **AFFIRMED**.

Dated this 18 day of February 1999.



Sam A. Joyner  
United States Magistrate Judge

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE FEB 18 1999

FILED

FEB 18 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

BRENDA J. COLLIER, )  
Plaintiff, )  
vs. )  
KENNETH S. APEL, Commissioner )  
Social Security Administration, )  
Defendant. )

Case No. 98-CV-492-J ✓

**ORDER OF DISMISSAL WITHOUT PREJUDICE**

Having considered the *Stipulation of Dismissal* submitted by the parties herein, IT IS  
HEREBY ORDERED that the *Complaint* of the Plaintiff filed on July 7, 1998, is hereby  
dismissed.

Dated this 18 day of February, 1999.

  
United States Magistrate Judge

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

**FILED**

FEB 17 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

BRIAN R. ELLIS,

Plaintiff,

v.

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

Defendant.

CASE NO. 98-CV-426-M ✓

ENTERED ON DOCKET

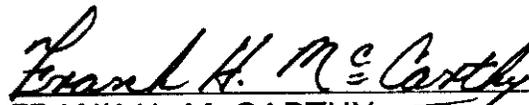
**FEB 18 1999**

DATE \_\_\_\_\_

**AMENDED JUDGMENT**

Judgment is hereby entered for Plaintiff and against Defendant. Dated

this 17<sup>th</sup> day of Feb., 1999.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

VW CREDIT, INC., )  
)  
Plaintiff, )  
)  
v. )  
)  
MEMORIAL VOLKSWAGON, INC., )  
d/b/a MEMORIAL VOLKSWAGON/ )  
AUDI, et al., )  
)  
Defendants. )

DATE FEB 18 1999

97-CV-163-H(E) ✓

**FILED**  
FEB 18 1999  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**JUDGMENT**

The Court, having granted VW Credit, Inc.'s Motion for Summary Judgment, hereby orders, adjudges, and decrees:

That VCI have and hereby receives judgment in its favor and against Defendants Memorial Volkswagon, Inc. and Steven Kitchell, jointly and severally, in the amount of \$267,937.77, including costs assessed against the defendants, with interest thereon pursuant to 28 U.S.C. § 1961, and for which execution may immediately issue. It os further ordered that VW Credit's Replevin Bond, as filed herein, in the amount of \$3,035,890.00, be and is hereby released.

IT IS SO ORDERED.

This 17<sup>TH</sup> day of February, 1999.

  
Sven Erik Holmes  
United States District Judge

8/1

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

VW CREDIT, INC., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 MEMORIAL VOLKSWAGON, INC., )  
 d/b/a MEMORIAL VOLKSWAGON/ )  
 AUDI, et al., )  
 )  
 Defendants. )

97-CV-163-H(E) ✓

**FILED**

FEB 18 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

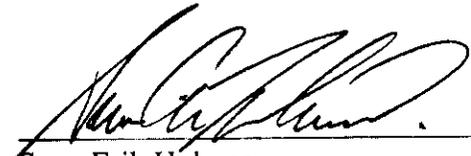
This matter comes before the Court on the Judgment entered in this case on October 29, 1998 (Docket # 69), and Defendants' Objections to an Award of Additional Damages filed October 30, 1998 (Docket # 70). In Defendants' Supplemental Response Brief filed December 28, 1998 (Docket # 75), Defendants challenge the award of legal fees and expenses included in the October 29, 1998 Judgment in the amount of \$111,107.01 and the additional \$60,085.54 sought by VCI for legal fees and expenses incurred after May 30, 1998 as unreasonable given the outcome of this case. The Court notes that no objection to the amount of legal fees contained in the original judgment was made either in Defendants' Response to Summary Judgment or in the Defendants' initial Objection to VCI's motion for an award of additional attorney's fees. However, in the interest of justice, the Court finds that the original Judgment entered in this case should be modified to exclude the initial award of legal fees to VCI in the amount of \$111,107.01 and the amount of legal fees to be awarded to VCI should be reconsidered in light of the Defendants' proportionality objection. Further, the Court finds that the question of the proper amount of legal fees which should be awarded to VCI in this case should be referred in its

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entirety to the Magistrate Judge for report and recommendation. A modified judgment consistent with this Order will be issued forthwith.

IT IS SO ORDERED.

This 17<sup>th</sup> day of February, 1999.



---

Sven Erik Holmes  
United States District Judge

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

RANDY DWAYNE SIMS, )  
)  
Plaintiff, )  
)  
vs. )  
)  
TULSA COUNTY SHERIFF'S DEPT., )  
)  
Defendant. )

No. 98-CV-852-H (J) ✓

**FILED**  
FEB 18 1999  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET  
FEB 18 1999  
DATE \_\_\_\_\_

**ORDER**

On November 10, 1998, Plaintiff submitted for filing a civil rights complaint pursuant to 42 U.S.C. § 1983 along with a motion for leave to proceed *in forma pauperis*. By order entered November 25, 1998 (#3), the Court informed Plaintiff of deficiencies in his papers. Specifically, Plaintiff was advised that (1) he was required to submit an amended complaint identifying additional defendants; (2) he was required to supplement his motion for pauperis status by submitting both the required certification and trust fund accounting statement; and (3) he was required to submit a properly completed summons and USM form for service upon the named Defendant. In addition, the Clerk of Court was directed to mail to Plaintiff the forms and information necessary for preparing the documents as ordered by the Court. Plaintiff was also advised that these deficiencies were to be cured by December 20, 1998, and that "[f]ailure to comply . . . may result in dismissal of this action without prejudice and without further notice." As of the date of this Order, Plaintiff has neither submitted the requested documents nor shown cause in writing for failing to do so. Further, no correspondence from the Court to Plaintiff has been returned.

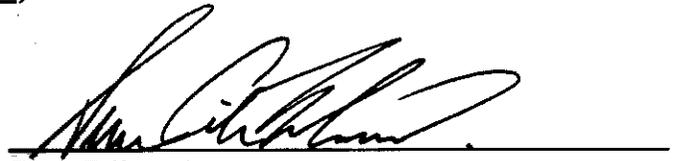
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Because Plaintiff has not complied with the Court's Order of November 25, 1998, this action may not proceed and should, therefore, be dismissed without prejudice for failure to prosecute.

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

IT IS SO ORDERED.

This 17<sup>TH</sup> 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 18 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

PERCY EDMUNDSON, )  
)  
Plaintiff, )  
)  
vs. )  
)  
LISA HIRN, )  
Defendant. )

NO. 98-CV-945-H (J) ✓

ENTERED ON DOCKET

DATE ~~FEB 18 1999~~

**ORDER**

Plaintiff, a state prisoner appearing *pro se* and *in forma pauperis*, has paid the initial partial filing fee to commence this civil rights action pursuant to 42 U.S.C. § 1983.

As a preliminary matter and of particular significance in the disposition of this case, the Court takes notice that Plaintiff raised substantially the same "false statement" claim against the defendant named in this case in a previous civil rights action, Case No. 96-C-104-H. In that 1996 action, upon initial review of the complaint, the Court granted Plaintiff's motion for pauper status and, pursuant to Neitzke v. Williams, 490 U.S. 319, 324 (1989) and 28 U.S.C. § 1915(d), concluded that Plaintiff's action lacked an arguable basis in law. The Court dismissed the complaint *sua sponte* as frivolous by order entered March 12, 1996.

**ANALYSIS**

**A. The Prison Litigation Reform Act**

Pursuant to 28 U.S.C. § 1915(e)(2)(B), as amended by the Prison Litigation Reform Act, the district court shall dismiss a civil claim against any defendant at any time if the court determines that the action "(i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such

relief." 28 U.S.C. § 1915(e)(2)(B). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989); Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A suit is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

**B. Plaintiff's Claim Fails to State a Claim on which Relief may be Granted and is Legally Frivolous**

The doctrine of *res judicata* prohibits relitigation of claims that have been, or could have been, litigated in a prior action. Allen v. McCurry, 449 U.S. 90, 94 (1980). "A claim is barred by *res judicata* if three elements exist: (1) a final judgment on the merits in the prior suit; (2) the prior suit involved identical claims as the claims in the present suit; and (3) the prior suit involved the same parties or their privies." Satsky v. Paramount Communications, Inc., 7 F.3d 1464, 1467 (10th Cir. 1993) (citing Allen, 449 U.S. at 94). Parties cannot defeat the application of *res judicata* by simply alleging new legal theories. Clark v. Haas Group, Inc. 953 F.2d 1235, 1238 (10th Cir. 1992).

In Plaintiff's prior suit, Percy Edmundson v. Lisa Deann Hirn, 96-C-104-H, the Court determined that Plaintiff's action lacked an arguable basis in law, that Plaintiff had not alleged a constitutional violation, and that the conduct of Ms. Hirn did not constitute an action under color of state law for purposes of a section 1983 violation. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970) (holding that for a complaint under section 1983 to be sufficient a plaintiff must allege that defendant deprived him of a right secured by the Constitution and laws of the United

States, and that defendant acted under color of law). Consequently, because the action lacked an arguable basis in law, it was dismissed as **legally frivolous**. A dismissal based upon “an indisputably meritless legal theory” is a **dismissal on the merits**. See Restatement (Second) of Judgments § 19 comment d (1982) (stating that a dismissal based on insufficiency of the complaint bars another action by the plaintiff on the same claim); Federated Department Stores, Inc. V. Moitie, 452 U.S. 394, 399 n.3 (1981); Bell v. Hood, 327 U.S. 678, 682 (1946). Thus the first requirement for application of *res judicata* is satisfied.

Furthermore, Plaintiff’s prior suit involved essentially the same allegations about the same underlying series of events as the **instant lawsuit**. Therefore, the claims in the two suits are identical and the second element is satisfied.

The third element required for application of *res judicata* is also satisfied because the present suit names the same defendant named in the prior suit (“Lisa Deann Hirn”). Therefore, after liberally construing Plaintiff’s **pro se pleading**, see Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that as to the Defendant, all three elements of *res judicata* are satisfied. Plaintiff’s action fails to state a claim upon which relief can be granted as it is clear from the face of the complaint that Plaintiff’s claim based on an allegedly “false statement” made by Defendant is barred by *res judicata*. Plaintiff has had a “full and fair opportunity” to present his false accusation claim pursuant to 42 U.S.C. §§ 1983 against this Defendant and there is “no reason to doubt the quality, extensiveness, or fairness of procedures followed in [the] prior litigation.” Montana v. United States, 99 S.Ct. 970 (1979). Because Plaintiff’s claim was actually raised and fully litigated in the previous § 1983 action, he has forgone the right to raise this claim or allege new legal theories against the Defendant.

**CONCLUSION**

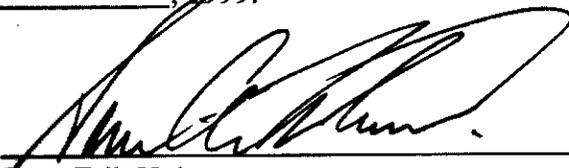
Plaintiff's civil rights claim against Defendant Lisa Hirn is barred by *res judicata* and should, therefore, be dismissed for failure to state a claim on which relief can be granted. The Court concludes that the complaint should be dismissed with prejudice pursuant to 28 U.S.C. §§ 1915(e). This dismissal counts as "a prior occasion" as defined under 28 U.S.C. § 1915(g).<sup>1</sup>

**ACCORDINGLY, IT IS HEREBY ORDERED** that:

1. Plaintiff's action is **dismissed with prejudice** for failure to state a claim.
2. The Clerk is directed to "**flag**" this dismissal as a "prior occasion" under 28 U.S.C. § 1915(g).

IT IS SO ORDERED.

This 17<sup>TH</sup> day of FEBRUARY, 1999.

  
\_\_\_\_\_  
Sven Erik Holmes  
United States District Judge

---

<sup>1</sup>Section 1915(g) provides: 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.

*Horn*

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

FEB 18 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GALEN E. HORN,

Defendant.

)  
)  
)  
)  
) Case No. 98CV810H(E)  
)  
)  
)  
)

ENTERED ON DOCKET

DATE FEB 18 1999

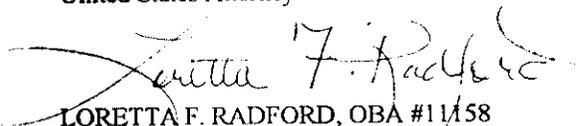
**NOTICE OF DISMISSAL**

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 18<sup>th</sup> day of February, 1999.

UNITED STATES OF AMERICA

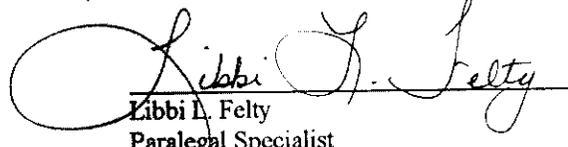
Stephen C. Lewis  
United States Attorney



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

**CERTIFICATE OF SERVICE**

This is to certify that on the 18<sup>th</sup> day of February, 1999, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Galen E. Horn, 1706 S. 132nd E. Ct., Tulsa, OK 7410-86911.



Libbi L. Felty  
Paralegal Specialist

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c15

*File*

**FILED**

FEB 18 1999

*SA*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
vs. )  
)  
DIANNA WEST, )  
)  
Defendant. )

Case No. 98CV840K(M) ✓

ENTERED ON DOCKET

DATE FEB 18 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 18<sup>th</sup> day of February, 1999.

UNITED STATES OF AMERICA

Stephen C. Lewis  
United States Attorney

*Loretta F. Radford*

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

CERTIFICATE OF SERVICE

This is to certify that on the 18<sup>th</sup> day of February, 1999, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Dianna West, 609 N. Ross, Sapulpa, OK 74066.

*Libbi L. Felty*  
\_\_\_\_\_  
Libbi L. Felty  
Paralegal Specialist

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ENTERED ON DOCKET  
DATE FEB 18 1999

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

ROBERT L. ROBINSON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 WAYNE ALLEN, SGT., )  
 )  
 Defendant. )

No. 98-CV-815-H (M)

**FILED**  
FEB 18 1999 *SLC*  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

On October 20, 1998, Plaintiff submitted for filing a civil rights complaint pursuant to 42 U.S.C. § 1983 along with a motion for leave to proceed *in forma pauperis*. By order entered November 5, 1998, the Court granted Plaintiff's motion for leave to proceed *in forma pauperis* and informed Plaintiff of deficiencies in his papers. Plaintiff was advised that this action could not proceed unless he paid an initial partial filing fee of \$5.17 by December 7, 1998, and that he must continue making monthly payment until the full \$150.00 filing fee is paid. Plaintiff was also directed to sign and resubmit the USM form for service upon the named Defendant. The Court advised Plaintiff that these deficiencies were to be cured by December 7, 1998, and that "[f]ailure to comply . . . may result in dismissal of this action without prejudice and without further notice." However, to date, Plaintiff has neither submitted the initial partial filing fee nor shown cause in writing for failing to do so. Also, Plaintiff has not resubmitted the USM form as directed. Further, no correspondence from the Court to Plaintiff has been returned.

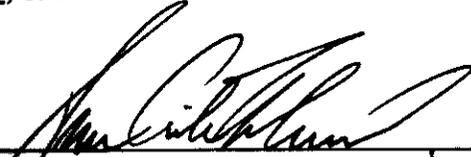
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Because Plaintiff has not paid the initial partial filing fee in compliance with the Court's Order of November 5, 1998, the Court finds that this action may not proceed and should, therefore, be dismissed without prejudice for failure to prosecute.

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

IT IS SO ORDERED.

This 17<sup>th</sup> day of FEBRUARY, 1999.

  
\_\_\_\_\_  
Sven Erik Holmes  
United States District Judge

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

BEVERLY J. MILAZZO,

Plaintiff,

v.

METROPOLITAN LIFE INSURANCE  
COMPANY, a New York Corporation, Claims  
Administrator; and THE RAYTHEON  
COMPANY, a Delaware corporation, Trustee,  
The Raytheon Employee's Disability Trust,  
Plan Administrator,

Defendants.

ENTERED ON DOCKET

FEB 18 1999

DATE

Case No. 97-C-436-H

**FILED**

FEB 18 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

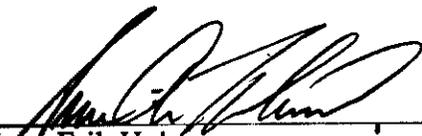
**JUDGMENT**

This matter came before the Court on a Motion for Summary Judgment and on a Motion to Dismiss by Defendants. The Court duly considered the issues and rendered a decision in accordance with the order filed on October 9, 1998.

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

IT IS SO ORDERED.

This 17<sup>TH</sup> day of February, 1999.

  
Sven Erik Holmes  
United States District Judge

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

ROBERT ROBINSON, )  
)  
Plaintiff, )  
)  
vs. )  
)  
STANLEY GLANZ and BILL THOMAS, )  
)  
Defendants. )

No. 98-CV-759-H (M)

**FILED**  
FEB 18 1999 SAR  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE FEB 18 1999

**ORDER**

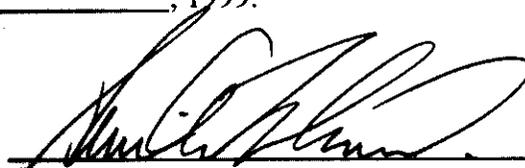
On October 5, 1998, Plaintiff submitted for filing a civil rights complaint pursuant to 42 U.S.C. § 1983 along with a motion for leave to proceed *in forma pauperis*. By order entered October 23, 1998, the Court granted Plaintiff's motion for leave to proceed *in forma pauperis* and informed Plaintiff of deficiencies in his papers. Plaintiff was advised that this action could not proceed unless he paid an initial partial filing fee of \$5.17 by November 23, 1998. The Court advised Plaintiff that unless he paid the initial partial filing or showed cause in writing for failure to pay by the specified date, "this action will be subject to dismissal without prejudice to refileing." (#3). On December 2, 1998, Plaintiff submitted the service documents as ordered. However, to date, Plaintiff has neither submitted the initial partial filing fee nor shown cause in writing for failing to do so. Further, no correspondence from the Court to Plaintiff has been returned.

Because Plaintiff has not paid the initial partial filing fee in compliance with the Court's Order of October 23, 1998, the Court finds that this action may not proceed and should, therefore, be dismissed without prejudice for failure to prosecute.

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

IT IS SO ORDERED.

This 17<sup>TH</sup> day of FEBRUARY, 1999.



Sven Erik Holmes  
United States District Judge

CR

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

**F I L E D**

FEB 17 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CAT SCALE COMPANY, an Iowa Corporation, )

Plaintiff, )

v. )

MAPCO INC., a Delaware Corporation, )

Defendant. )

Case No. 99CV0035K(E)

ENTERED ON DOCKET

DATE **FEB 17 1999**

**NOTICE OF DISMISSAL WITHOUT PREJUDICE**

The parties hereto, plaintiff, CAT SCALE COMPANY, and defendant, MAPCO INC., having agreed to settle the cause that was the subject of this action, and defendant not having filed an Answer to plaintiff's Complaint herein, notice is hereby given pursuant to Rule 41(a)(1), Fed.R.Civ.P. that plaintiff's Complaint filed herein is hereby dismissed without prejudice.

CAT SCALE COMPANY, an Iowa corporation, Plaintiff

By: 

SEAN H. MCKEE, OBA #14277  
WOODSTOCK, MCKEE & MCARTOR  
1518 S. Cheyenne  
Tulsa, Oklahoma 74119  
(918) 583-1511  
(918) 585-2099

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Of Counsel:

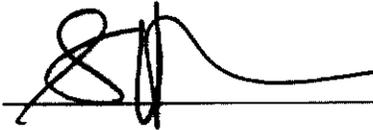
Madeline H. Devereux  
MARSHALL, O'TOOLE, GERSTEIN,  
MURRAY & BORUN  
6300 Sears Tower  
233 South Wacker Drive  
Chicago, Illinois 60606-6402  
(312) 474-6300

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing NOTICE OF DISMISSAL was duly served upon defendant, MAPCO INC., by forwarding said copy by U.S. First Class mail, postage prepaid, to:

Jennifer E. Mustain  
One Williams Center, Suite 4100  
Tulsa, Oklahoma 74172

this 17<sup>th</sup> day of FEB., 1999.



---

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA,

**F I L E D**

FEB 16 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JACQUITA WORKMAN, )  
SSN: 507-78-0428 )

Plaintiff, )

v. )

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

Defendant. )

No. 96-C-36-E

ENTERED ON DOCKET  
DATE FEB 17 1999

**ORDER**

Now before the Court is the Application for Attorney Fees and Costs (Docket # 16) of the plaintiff, Jaquita Workman.

Workman, who received an Order reversing and remanding this matter to the Commissioner for the development of the testimony of a vocational expert, seeks attorney fees and costs under the Equal Access to Justice Act, 28 U.S.C. §2412 (EAJA), in the amount of \$3288.81. The Commissioner argues that the EAJA permits an award of attorney fees to a prevailing party "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. §2412(d)(1)(A); Fulton v. Heckler, 784 F.2d 348, 349 (10<sup>th</sup> Cir. 1986). The Commissioner asserts that, in this case, its position was substantially justified. The Court rejects that argument for the same reasons set forth in its Order of July 17, 1998. Specifically, under the facts of this case, considering the entire

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

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record before the ALJ, failure to develop the testimony of a vocational expert was not substantially justified.

In the alternative, the Commissioner argues that the attorney fees and costs should be reduced by \$270.31 because of charges for work of a clerical nature, charges not necessary to the prosecution of the case, charges where the billed -for time is clearly excessive, and requests for reimbursement of expenses that are not allowable under the EAJA. The Court has carefully reviewed plaintiff's application, and the specific time and expense entries called into question by the Commissioner, and agrees that the attorney fees and costs allowed should be reduced by the amount of \$270.31.

Plaintiff's Application for Attorney Fees and Costs Under the Equal Access to Justice Act (Docket #16 ) is granted, and plaintiff is awarded fees and costs in the amount of \$3018.50.

Dated this 16<sup>th</sup> day of February, 1999.

  
\_\_\_\_\_  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

FEB 17 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JAMES L. BLAND,  
SSN: 448-44-7891,  
  
PLAINTIFF,  
  
vs.  
  
KENNETH S. APFEL,  
Commissioner of the Social  
Security Administration,  
  
DEFENDANT.

CASE NO. 97-CV-38-M ✓

ENTERED ON DOCKET

DATE FEB 17 1999

**ORDER**

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

The role of the Court in reviewing the decision of the Commissioner under 42 U.S.C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co.*

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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 May 22, 1947 and was 49 years old at the time of the decision. [R. 78, 260]. He claims to have been unable to work since February 15, 1986 due to frequent bouts of pneumonia, aching lungs, reduced right hand grip strength, chest pains, shortness of breath, fatigue, depression, trouble sleeping, forgetfulness, difficulty completing tasks and pain from arthritis in his knees and hands. [Plaintiff's Brief, p. 1-2].

Plaintiff applied for Supplemental Security Income Benefits on November 6, 1990 and Disability Insurance Benefits on December 3, 1990. His claims were denied initially and upon reconsideration. An Administrative Law Judge (ALJ) denied benefits on October 13, 1993, a decision which was upheld by the Appeals Council on April 8, 1994. Plaintiff appealed to the District Court which remanded the claim to the Social Security Administration for the sole purpose of obtaining pulmonary testing. [R. 274-279]. Pulmonary Function Studies were conducted on October 10, 1995. A second hearing before a different ALJ was held July 30, 1996 and benefits were again denied on September 10, 1996. [R. 283, 310, 266].

The ALJ determined that Plaintiff has severe impairments consisting of weak right hand and pulmonary problems but that he retained the residual functional capacity (RFC) to perform light work subject to gross manipulation with his right dominant hand and no exposure to dust and fumes. [R.265]. He determined that Plaintiff is unable to return to his past relevant work (PRW) but found that Plaintiff was able to do alternative work which exists in significant numbers in the economy. [R. 265]. 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 the ALJ failed to consider a doctor's report which "could have established a disability" and that he did not link his conclusion that Plaintiff is not disabled with the evidence relied upon to reach his conclusions. Plaintiff also contends the ALJ improperly analyzed Plaintiff's subjective allegations of pain and that he failed to properly develop the record because he refused to reschedule "testing." [Plaintiff's Brief, p. 2].

For the reasons discussed below, the Court affirms the decision of the Commissioner.

#### **Dr. Hickman's Report**

Plaintiff claims the ALJ failed in his duty to consider objective medical evidence in the record. Specifically, he claims the ALJ ignored a report by John W. Hickman, Ph.D., dated June 23, 1993. He contends the report supports his assertion that he suffers from a somatoform disorder. The language Plaintiff cites from the report

reflects Dr. Hickman's generalized profile of individuals with like MMPI scores who "often show classic conversion symptoms." [R. 234]. After reviewing the entire report, however, the Court notes that language in Dr. Hickman's report pertaining strictly to his examination and evaluation of Plaintiff indicated there was "nothing significant about his test scores other than a borderline score in comprehension reflecting difficulty with everyday reasoning and judgment." [R. 234]. The ALJ discussed Dr. Hickman's report and compared it with Dr. Thomas Goodman's report<sup>1</sup> and Dr. Niebergall's notes regarding his assessment of Plaintiff's anxiety disorder. [R. 261]. It is clear the ALJ considered Dr. Hickman's report, weighed it with the other evidence, including Plaintiff's testimony, and determined there was no support for Plaintiff's contention that his mental condition precludes him from engaging in gainful employment.

#### **Discussion of the Evidence**

Contrary to Plaintiff's contention, the ALJ discussed the evidence upon which he relied in making the disability determination. He compared the medical evidence with Plaintiff's claims, noting in particular the lack of objective evidence to support Plaintiff's claims of chest pain related to a heart condition, lack of medical treatment and medication for severe pain and the lack of discomfort shown by Plaintiff at the hearing. The medical records support the finding of the ALJ that Plaintiff has right

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<sup>1</sup> It is noteworthy that Dr. Hickman's assessment of Plaintiff's ability to make occupational, performance and personal-social adjustments is actually less restrictive than that of Dr. Goodman. Compare R. 236 with R. 242 and R. 237 with 244.

hand weakness and pulmonary problems if he is not in a clean air environment. [R. 262]. Plaintiff does not challenge the ALJ's findings as to these physical impairments and his RFC to do light work subject to those limitations. Plaintiff's objection to the ALJ's evaluation of his mental status is an extension of Plaintiff's disagreement with the ALJ's treatment of Dr. Hickman's report. As stated above, the Court finds the ALJ did consider Dr. Hickman's report and properly weighed and evaluated it in accordance with the regulations. See 20 CFR 416.927(d). While the ALJ's written decision is perhaps not as precise as Plaintiff would like, the rationale required by *Kepler v. Chater*, 68 F.3d 387 (10th Cir. 1995) is there. The Court finds that the ALJ applied the correct legal standards established by the Commissioner and the courts in discussing his conclusions.

#### **Pain Analysis**

Plaintiff contends the ALJ failed to properly analyze his claims of pain. He claims the ALJ's failure to consider the effect of Dr. Hickman's report of Plaintiff's "condition", presumably a somatoform disorder, prevented his analysis from being in accordance with law.

The legal standards for evaluating pain are outlined in 20 C.F.R. §§ 404.1529 and 416.929, and were addressed by the Tenth Circuit Court of Appeals in *Luna v. Bowen*, 834 F.2d 161 (10th Cir. 1987). First, the asserted pain-producing impairment must be supported by objective medical evidence. *Id.* at 163. Second, assuming all the allegations of pain as true, a claimant must establish a nexus between the impairment and the alleged pain. "The impairment or abnormality must be one which

` could reasonably be expected to produce' the alleged pain." *Id.* Third, the decision maker, considering all of the medical data presented and any objective or subjective indications of the pain, must assess the claimant's credibility. [I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence. *Id.* at 164.

Having failed to prove a pain-producing impairment by objective medical evidence, Plaintiff relies upon portions of Dr. Hickman's report to support his claim that his physical ailments arise from his personality which is "such as a personality one would have who has been diagnosed with a somatoform disorder." [Plaintiff's Brief, p. 3]. He argues that the ALJ failed in his duty under *Luna* because he did not consider Dr. Hickman's report. As discussed above, the Court finds no merit in Plaintiff's contention that the ALJ ignored Dr. Hickman's report. Furthermore, none of Plaintiff's treating physicians opined that Plaintiff suffered from a somatoform disorder. The only evidence offered by Plaintiff is his contention that he "very well might" meet the criteria of the Listing for somatoform disorder, 20 CFR Pt. 404, Subpt. P, App. 1, § 12.07. There is no objective medical evidence to support this contention. The ALJ was not obligated to accept as true, Plaintiff's subjective complaints that are not accompanied by medical evidence. *Taylor v. Heckler*, 765 F.2d 872, 876 (9th Cir.1985). Such complaints may be disregarded if they are unsupported by clinical findings. *Maounis v. Heckler*, 738 F.2d 1032, 1034 (9th Cir.1984); *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). The Court finds

the ALJ evaluated the record, Plaintiff's credibility and subjective complaints and properly assessed Plaintiff's RFC in accordance with the correct legal standards established by the Commissioner and the courts.

#### Development of the Record

Plaintiff's claim was remanded to the Commissioner by the District Court on April 8, 1994. [R. 274-279]. The express purpose of the remand was to obtain pulmonary testing as an aid in determining the extent of Plaintiff's pulmonary problems. [R. 278]. This was done on October 10, 1995. [R. 283-288A]. The interpretation, which was signed by Dr. J.D. Mayfield, stated:

There is a minimal obstructive lung defect. The airway obstruction is confirmed by the decrease in flow rate at 50% and 75% of the flow volume curve. On the basis of this study, more detailed pulmonary function testing may be useful if clinically indicated.

[R. 285].

This report corresponds with the medical evidence and supports the ALJ's finding of "pulmonary problems if he is not in a clean air environment." [R.262].

Plaintiff claims the ALJ's refusal to reschedule appointments for tests after the hearing resulted in failure to properly develop the record. Plaintiff does not contend the findings of the ALJ as to Plaintiff's pulmonary impairment are not based upon substantial evidence. Nor does Plaintiff explain why further testing was necessary or how it might have benefitted Plaintiff's claim. There is some confusion about whether further testing in addition to the pulmonary function test was initially scheduled or whether the three appointments that Plaintiff failed to keep were actually for another

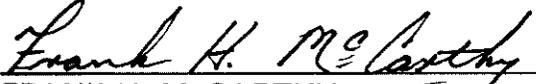
physical examination. [R. 289]. The term "testing" was used by Plaintiff's counsel during the hearing on July 30, 1996. However, the ALJ pointed out during that same hearing that the pulmonary testing was done and that it was a physical examination that had been scheduled and rescheduled twice at Plaintiff's request. [R. 345]. The ALJ's explanation for not rescheduling a fourth appointment was his conclusion that another consultative examination was not necessary to determine Plaintiff's claim. [R. 345]. The ALJ has broad latitude in ordering a consultative examination. *Diaz v. Secretary of Health & Human Servs.*, 898 F.2d 774, 777 (10th Cir. 1990). Furthermore, the discussion between Plaintiff's counsel and the ALJ at the hearing, indicates that an agreement was reached to forego an additional consultative examination in favor of updated medical records from Plaintiff's treating physician. [R. 320, 345, 350]. Plaintiff produced medical records from his treating physician on August 19, 1996. [R. 295-309]. Plaintiff's attorney was provided ample opportunity to submit any additional evidence to support his claims. [R. 282, 350]. At any rate, the record contains no evidence to suggest that a consultative examination would have produced material information in this case. A consultative examination is required only if the record establishes that such an examination is necessary to enable the ALJ to make the disability decision. See *Turner v. Califano*, 563 F.2d 669, 671 (5th Cir. 1977). There is no direct conflict in the medical evidence requiring resolution and additional tests are not required to explain a diagnosis already contained in the record. *Hawkins v. Chater*, 113 F.3d 1162, 1166 (10th Cir. 1997). The Court finds the ALJ

did not fail to properly develop the record by not scheduling further tests or a consultative examination.

**Conclusion**

The ALJ's decision demonstrates that he considered all of the medical reports and other evidence in the record in his determination that Plaintiff retained the capacity to perform light duty work with restrictions that allow for his right hand and pulmonary problems. The record as a whole contains substantial evidence to support the determination of the ALJ that Plaintiff is not disabled. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

Dated this 17<sup>th</sup> day of Feb., 1999.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

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

**F I L E D**

FEB 17 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JAMES L. BLAND,  
SSN: 448-44-7891,

Plaintiff,

v.

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

Defendant.

CASE NO. 97-CV-38-M ✓

ENTERED ON DOCKET

DATE FEB 17 1999

**JUDGMENT**

Judgment is hereby entered for Defendant and against Plaintiff. Dated  
this 17<sup>th</sup> day of Feb., 1999.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

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

FILED

FEB 17 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

BRIAN R. ELLIS, )  
)  
Plaintiff, )  
)  
v. )  
)  
KENNETH S. APFEL, )  
Commissioner of the Social Security )  
Administration, )  
)  
Defendant. )

CASE NO. 98-CV-426-M ✓

ENTERED ON DOCKET

DATE FEB 17 1999

**JUDGMENT**

Judgment is hereby entered for Plaintiff and against Defendant. Dated  
this 17<sup>th</sup> day of Feb., 1998.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED  
IN OPEN COURT

FEB 17 1999 SAC

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

UNITED STATES OF AMERICA, )  
on behalf of the Secretary of Veterans Affairs, )  
) )  
Plaintiff, )  
v. )  
) )  
DELBERT A. JONES, a single person; )  
MOLLY C. PAYNE; )  
CROSS ROADS FINANCIAL SERVICES, INC.; )  
SW MORTGAGE, INC.; )  
THE FLORIDA GROUP, INC.; )  
FEDERAL DEPOSIT INSURANCE )  
CORPORATION as Successor to Resolution Trust )  
Corporation as Receiver for Cross Roads Savings )  
and Loan Association, Checotah, Oklahoma, and its )  
subsequent successors and assigns; )  
COUNTY TREASURER, Creek County, )  
Oklahoma; )  
BOARD OF COUNTY COMMISSIONERS, )  
Creek County, Oklahoma, )  
) )  
Defendants. )

ENTERED ON DOCKET  
DATE FEB 19 1999

CIVIL ACTION NO. 96-CV-1149-HV

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 17th day of February, 1999, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on January 6, 1999, pursuant to an Order of Sale dated October 23, 1998, of the following described property located in Creek County, Oklahoma:

Lot Five (5), Block One (1), MEADOW LAKE ACRES ADDITION, a subdivision in the W<sup>1</sup>/<sub>2</sub> NW<sup>1</sup>/<sub>4</sub> and the N<sup>1</sup>/<sub>2</sub> N<sup>1</sup>/<sub>2</sub> N<sup>1</sup>/<sub>2</sub> NW<sup>1</sup>/<sub>4</sub> SW<sup>1</sup>/<sub>4</sub> of Section Twenty-four (24), Township Seventeen (17) North, Range Eleven (11) East, Creek County, Oklahoma according to the Amended Plat thereof.

Appearing for the United States of America is Peter Bernhardt, Assistant United States Attorney. Notice was given the Defendants, Delbert A. Jones, a single person, by mail; Molly C. Payne, by mail; Cross Roads Financial Services, Inc., by publication; SW Mortgage, Inc., by publication; The Florida Group, Inc., by publication; Federal Deposit Insurance Corporation as Successor to Resolution Trust Corporation as Receiver for Cross Roads Savings and Loan Association, Checotah, Oklahoma, and its subsequent successors and assigns, through its attorney Gary G. Lyon, by mail; County Treasurer and Board of County Commissioners, Creek County, Oklahoma, through Michael S. Loeffler, Assistant District Attorney, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Sapulpa Legal News, a newspaper published and of general circulation in Creek County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Veterans Affairs, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Veterans Affairs, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

*Claire V. Egan*  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

**STEPHEN C. LEWIS**  
United States Attorney

**PETER BERNHARDT, OBA #741**  
Assistant United States Attorney  
333 West 4th Street, Suite 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

Report and Recommendation of United States Magistrate Judge  
Case No. 96-CV-1149-H (Jones)

PB:csa

OFFICIAL STATE OF OKLAHOMA  
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.

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED  
IN OPEN COURT

FEB 11 1999

SA

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

UNITED STATES OF AMERICA, )  
on behalf of the Secretary of Housing and )  
Urban Development, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
GARY C. SANDERS; )  
CAROLE LYNN SANDERS; )  
CITY OF BROKEN ARROW, OKLAHOMA; )  
COUNTY TREASURER, Tulsa County, )  
Oklahoma; )  
BOARD OF COUNTY COMMISSIONERS, )  
Tulsa County, Oklahoma, )  
 )  
Defendants. )

ENTERED ON DOCKET

DATE FEB 10 1999

CIVIL ACTION NO. 98-CV-0495-H (E)

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 17th day of February, 1999, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on January 5, 1999, pursuant to an Order of Sale dated October 23, 1998, of the following described property located in Tulsa County, Oklahoma:

Lot Fifteen (15), Block Six (6), KENTWOOD ESTATES, an Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

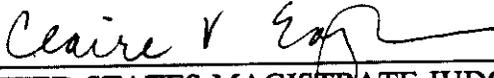
Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Gary C. Sanders; Carole Lynn Sanders; City of Broken Arrow, Oklahoma, through Debra L.W. Kurzban, Assistant City Attorney; and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, through

Dick A. Blakeley, Assistant District Attorney, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Broken Arrow Daily Ledger, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

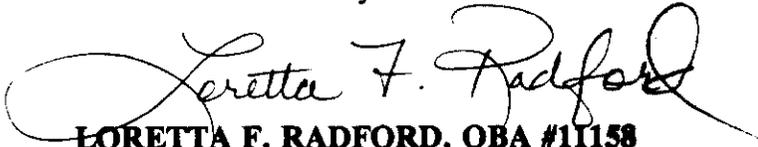
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

  
\_\_\_\_\_  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

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

Report and Recommendation of United States Magistrate Judge  
Case No. 98-CV-0495-H (E) (Sanders)

LFR:cm

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, 19 99.

**FILED**

**FEB 17 1999**

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

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

CARTER R. HARGRAVE, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 COMMERCIAL FINANCIAL SERVICES, )  
 INC., an Oklahoma corporation, )  
 et al., )  
 )  
 Defendants. )

Case No. 98-CV-924-BU(J)✓

**ENTERED ON DOCKET**

**DATE FEB 17 1999**

**ORDER**

This matter came before the Court for hearing on February 17, 1999, on the Joint Application for Stay or for an Administrative Closing Order and to Extend Time to Answer filed by Plaintiff, Carter R. Hargrave and Defendant, William R. Bartmann. Having reviewed the joint application and having heard the oral arguments of counsel, the Court **ORDERS** as follows:

1. The joint application is **GRANTED** to the extent it seeks to administratively close this matter pending the bankruptcy proceedings involving Defendant, Commercial Financial Services, Inc. (Docket Entry #10-1). The Clerk of the Court is directed to administratively terminate this action in his records pending the bankruptcy proceedings involving Defendant, Commercial Financial Services, Inc.;

2. In light of the administrative closing of this matter, the joint application is **DECLARED MOOT** to the extent it seeks a stay pending the bankruptcy proceedings involving Defendant, Commercial Financial Services, Inc. (Docket Entry #10-2);

3. The joint application is GRANTED to the extent it seeks to extend the time for Defendant, William R. Bartmann, to answer or otherwise respond to the Complaint (Docket Entry #10-3). Defendant, William R. Bartmann, shall not be required to answer or otherwise respond to the Complaint until twenty (20) days after the re-opening of this matter; and

4. The parties are directed to notify the Court of the resolution of the bankruptcy proceedings, within ten (10) days thereafter, so that the Court may re-open this matter, if necessary, to obtain a final determination of this litigation.

ENTERED this 17<sup>th</sup> day of February, 1999.

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

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

**FILED**

FEB 17 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

BRIAN KEITH WILLIAMS, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 RITA MAXWELL, )  
 )  
 Respondent. )

Case No. 97-CV-810-BU (E) ✓

ENTERED ON DOCKET  
DATE **FEB 17 1999**

**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 17<sup>th</sup> day of FEBRUARY, 1999.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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

**FILED**

FEB 17 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

BRIAN KEITH WILLIAMS, )  
)  
Petitioner, )  
)  
vs. )  
)  
RITA MAXWELL, )  
)  
Respondent. )

Case No. 97-CV-810-BU (E)

**ORDER**

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, discharged from the custody of the Oklahoma Department of Corrections on May 20, 1998, challenges the revocation of his suspended sentence in Creek County District Court, Case No. CF-94-044. Respondent has filed a Rule 5 response. However, Petitioner has not filed a reply. As more fully set out below, the Court concludes that this petition should be denied as moot.

**BACKGROUND**

On July 11, 1994, in Creek County District Court, Case No. CF-94-044, Petitioner pled guilty to Lewd Molestation and received a five year suspended sentence (#7, Ex. A). On March 23, 1995, the State filed an Application to Revoke Suspended Sentence (#7, Ex. B) based on Petitioner's violations of the terms of his suspended sentence and the Rules and Conditions of Probation. Petitioner entered a plea of not guilty on March 31, 1995 and a trial date of April 18, 1995 was set at that time. On April 18, 1995, the hearing was passed, without a noted objection from either the State or Petitioner's attorney, Glen Hickerson, to April 25, 1995. (See #7, Ex. B, Court Minute filed

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April 19, 1995). At the April 25, 1995 hearing, Petitioner confessed the application to revoke suspended sentence and he was placed in custody of the Oklahoma Department of Corrections to serve 4 ½ years for a full discharge (#7, Ex. C). Petitioner did not appeal the revocation of his suspended sentence. On December 23, 1996, Petitioner sought post-conviction relief, alleging that the trial court did not have jurisdiction to revoke Petitioner's suspended sentence because a hearing was not held on the State's application within the 20-day time limit imposed by Okla. Stat. tit. 22, § 991(b). (#7, Ex. D). The state district court denied the application on May 23, 1997, finding no factual or legal merit to Petitioner's contentions (#7, Ex. E). Petitioner appealed and on August 12, 1997, the Oklahoma Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief, finding that to permit one to "by-pass or waive a timely and direct appeal and proceed under 22 O.S. 1991, § 1080, without supplying sufficient reason erodes the limitations and undermines the purpose of the statutory direct appeal. See Webb v. State, 661 P.2d 904 (Okl.Cr.1983), *cert. denied* 461 U.S. 959, 103 S.Ct. 2434, 77 L.Ed.2d 1319 (1983)." (#7, Ex. F at 2).

Petitioner paid the filing fee and filed the instant § 2254 petition on September 4, 1997. Petitioner raises one claim: that the state trial court lacked jurisdiction to revoke his suspended sentence because no hearing was held on the State's application to revoke suspended sentence within 20 days as required by Okla. Stat. tit. 22, § 991(b). In response to the petition, Respondent initially filed a motion to dismiss, arguing that the petition was barred by the one-year statute of limitations imposed by 28 U.S.C. § 2244(d). On August 7, 1998, this Court denied Respondent's motion to dismiss, finding that the petition was timely filed, and directed Respondent to respond to Petitioner's

claim.<sup>1</sup> On August 20, 1998, Respondent filed her response, arguing that Petitioner's claim should be denied because it is procedurally barred from federal habeas corpus review. Petitioner has not filed a reply to the response. However, by Order dated January 5, 1999, the Court afforded Petitioner another opportunity to submit a reply to Respondent's response. Petitioner was directed to address whether he remains in custody or has any grounds for contesting Respondent's response. In addition, Respondent was directed to advise the Court of Petitioner's current status, i.e., whether or not Petitioner had fully discharged his sentence.

To date, Petitioner has not submitted a reply. However, Respondent supplemented the record by providing a "Final Disposition Report," submitted by a Jess Dunn Correctional Center official, indicating Petitioner was "discharge[d] to street 5-20-98."<sup>2</sup>

### *ANALYSIS*

In Spencer v. Kemna, 523 U.S. 1 (1998), the United States Supreme Court held that the presumption of collateral consequences applicable to criminal convictions even after a habeas petitioner is released from prison does not extend to revocations of parole. Although a habeas petitioner's release from prison did not cause the petition to become moot, on the theory that it no longer satisfied the "in custody" requirement of 28 U.S.C. § 2254, where the petitioner challenges only a revocation of parole and not the validity of his underlying conviction, the injury-in-fact

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<sup>1</sup>Petitioner's copy of the Order denying the motion to dismiss was returned to the Clerk, marked "disch. 5-20-98, 511 East Cleveland, Sapulpa, OK 74066." The Clerk re-mailed the Order on August 21, 1998, to Petitioner at his new address.

<sup>2</sup>The Court notes that the record provided by Respondent indicates that on 5/20/98, Petitioner was discharged from serving a one-year sentence imposed by Creek County District Court, Case No. 95-137, for Obtaining Cash by Bogus Check. In addition, the Oklahoma Department of Corrections, Department of Offender Records, confirmed by telephone that Petitioner has discharged all sentences.

requirement of Article III cannot be presumed if the petitioner has been released from custody during the pendency of the habeas petition. Id. at 983-86. In Spencer, the petitioner failed to demonstrate concrete injuries-in-fact attributable to his parole revocation. Id. at 986-88. For example, the Court rejected as too speculative the possibility that the petitioner's parole revocation could affect future parole determinations should he be rearrested. Even though the petitioner had already in fact been rearrested on a new offense at the time the Court ruled, future parole determinations still remained "a possibility rather than a certainty or even a probability," and hence too speculative to overcome mootness. Id. at 986. The Court also found too speculative the possibility that parole revocation could be used to increase the length of a future sentence or as evidence in subsequent proceedings. Id. at 986-87. According to the Court, the risk of injury to a party's interest must not be excessively remote if such a contingency is to keep the controversy alive. Id. at 986. Finding that Article III's case-or-controversy requirement is no longer satisfied in such a case, the Court concluded the petition must be dismissed as moot. Id.

The facts of the instant case are analogous to those in Spencer. Petitioner here challenges the state district court's revocation of his suspended sentence based on the trial court's alleged failure to hold a hearing within the 20-day time limit imposed by statute. Significantly, he challenges neither the underlying conviction nor the offenses resulting in the revocation of his suspended sentence. Because he has completed the entire term of imprisonment resulting from the revoked suspended sentence, Petitioner is no longer subject to any direct restraint as a result of the revocation challenged in the instant petition. Furthermore, Petitioner has not alleged or made any showing of continuing collateral consequences resulting from the revocation. As a result, this Court concludes his petition challenging the revocation of his suspended sentence should be denied as moot.

**CONCLUSION**

Because Petitioner has discharged the sentence at issue in this case and has failed to demonstrate the existence of continuing collateral consequences resulting from the revocation of his suspended sentence, the petition for writ of habeas corpus should be denied as moot.

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

SO ORDERED THIS 17<sup>th</sup> day of FEBRUARY, 1999.

  
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MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

**F I L E D**

FEB 11 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

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

RANDY L. MCKINLEY,

Plaintiff,

vs.

No. 98-C-896-B

AIR-X-CHANGERS, a division of  
PATTERSON-KELLY CO., a wholly  
owned subsidiary of HARSCO  
CORPORATION, a Delaware corporation;  
and HARSCO CORPORATION,  
a Delaware corporation,

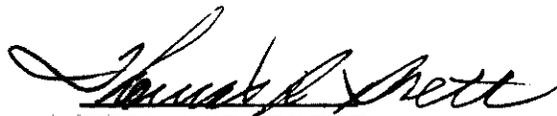
Defendants.

ENTERED ON DOCKET  
DATE FEB 16 1999

**ORDER**

This matter came on for a Case Management Conference on February 11, 1999. Defendants were represented by counsel John Woodard and Paula Quillin. Although ordered to do so by this Court's Order of January 15, 1999 (Docket No. 6), Plaintiff did not make an appearance in person or by substitute counsel at said conference. Thus, pursuant to the January 15, 1999 Order of the Court, the Court dismisses the action without prejudice.

IT IS SO ORDERED this 11<sup>th</sup> day of February, 1999.



THOMAS R. BRETT  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

FEB 16 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ELLA N. CASTILLO,  
SSN: 442-44-9849

Plaintiff,

v.

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

Defendant.

Case No. 98-CV-175-J

ENTERED ON DOCKET

DATE FEB 16 1999

**JUDGMENT**

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

It is so ordered this 16 day of February 1999.

  
Sam A. Joyner  
United States Magistrate Judge

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

FEB 16 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ELLA N. CASTILLO,  
SSN: 442-44-9849

Plaintiff,

v.

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

Defendant.

Case No. 98-CV-175-J

ENTERED ON DOCKET

DATE FEB 16 1999

**ORDER**<sup>1/</sup>

Now before the Court is Plaintiff's appeal of a decision by the Commissioner of the Social Security Administration ("Commissioner") denying her supplemental security income benefits under Title XVI of the Social Security Act. The Administrative Law Judge ("ALJ"), Richard J. Kallsnick, denied benefits at step five of the sequential evaluation process used by the Commissioner to evaluate disability claims.

The ALJ determined that Plaintiff, a 55 year old woman, retained the residual functional capacity ("RFC") to perform a limited range of light work and found that Plaintiff could not return to her past relevant work as a nurse's aide. The ALJ further found that even with her limited RFC, there were still a significant number of jobs in the national economy that Plaintiff could perform. On appeal, Plaintiff argues (1) that the ALJ failed to properly consider the limitations caused by Plaintiff's heart problems, and (2) improperly discounted the severity of the limitations caused by Plaintiff's neck,

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<sup>1/</sup> This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

back and hernia impairments. The Court has meticulously reviewed the entire record and for the reasons discussed below the Commissioner's decision is **REVERSED**.

## I. STANDARD OF REVIEW

A disability under the Social Security Act is defined as the

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

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

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

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

The standard of review applied by this Court to the Commissioner's disability determinations is set forth in 42 U.S.C. § 405(g). According to § 405(g), "the finding

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

of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support the ultimate conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

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

In addition to determining whether the Commissioner's decision is supported by substantial evidence, it is also this Court's duty to determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when he/she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

## II. DISCUSSION

The objective tests in Plaintiff's medical records clearly demonstrate that Plaintiff's heart functions abnormally. All of the ECG's in Plaintiff's medical records demonstrate that Plaintiff's heart has frequent premature ventricular contractions ("PVCs") and occasionally suffers from bradycardia (i.e., a slow heart rate characterized by a pulse below 60 beats per minute).<sup>3/</sup> *R. at 77-81, 92-93, 117, 123, 158, 184, 196, 203-209, 216, and 218.* Plaintiff argues that her heart problems cause her dizziness, lightheadedness, headaches, and a severe loss of energy. Plaintiff argues that "the ALJ failed to give her heart impairment the careful consideration it deserved." Doc. No. 4, p. 3. The Court agrees.

Following is the ALJ's discussion of Plaintiff's heart impairment:

The claimant's premature ventricular complexities have been thoroughly evaluated and no treatment has been required. Her ejection fraction was estimated at 55 to 57 percent by echocardiogram . . . . The claimant was diagnosed with hypothyroidism following a thyroid profile . . . , and has been prescribed medication . . . .

*R. at 17-18.*

The Court does not agree that Plaintiff's heart condition has been thoroughly evaluated. Plaintiff's doctors have advised that Plaintiff needs to undergo a stress test. See, e.g., *R. at 209-210.* There is no evidence in the record that such a stress or exercise tolerance test has been performed on Plaintiff. Given Plaintiff's continued

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<sup>3/</sup> Taber's Cyclopedic Medical Dictionary 259 (17th ed. 1993).

abnormal ECG's, a stress test would seem to be needed to determine if Plaintiff could perform the exertional demands of the jobs identified by the ALJ.

There is also no evidence that Plaintiff has ever had a full workup by a cardiologist. Plaintiff's heart condition was most often detected in connection with her need for several surgeries to repair a recurring hernia. At those times, Plaintiff's heart was evaluated simply to determine if she could withstand a general anesthetic surgery. The ALJ's conclusion that Plaintiff's heart problems have been thoroughly evaluated is not supported by the record.

The ALJ found that no treatment for Plaintiff's heart condition has been required. This conclusion is of limited value in light of the fact that Plaintiff's heart problems have not been fully evaluated. There is also no evidence in the record that Plaintiff's condition is amenable to treatment. Even if the ALJ's conclusion regarding treatment were supported by the record, it is not dispositive in this case. It is reasonable to assume that a patient suffering from PVCs and bradycardia, even if it were being treated, would suffer some dizziness, lightheadedness, and loss of energy. In light of Plaintiff's objectively-established heart condition, and in light of the loose nexus between her heart condition and the symptoms of which she complains, the ALJ simply failed to give sufficient reasons for rejecting Plaintiff's complaints about dizziness, lightheadedness, headaches, and lack of energy. See Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987).

The ALJ's sole reliance on Plaintiff's normal ejection fraction is also not dispositive. The ejection fraction refers to the percentage of blood pumped out of the

heart each time it pumps. Taber's Cyclopedic Medical Dictionary 611 (17th ed. 1993). In this case, however, it is insufficient to find that Plaintiff should suffer no adverse consequences because when her heart does pump it pumps out a good supply of blood. Plaintiff suffers from bradycardia. This means that Plaintiff's heart does not pump as many times in a minute as is normal. The ALJ failed to address Plaintiff's bradycardia.

The Court hereby reverses the Commissioner's decision and remands this case for further administrative review. The ALJ is directed to provide a more detailed analysis of Plaintiff's heart condition and the limitations that Plaintiff's heart condition is likely to cause. The Court notes that the ALJ should consider calling a doctor, with cardiac knowledge, to help the ALJ determine the extent and effect of Plaintiff's heart condition.

IT IS SO ORDERED.

Dated this 16 day of February 1999.

  
Sam A. Joyner  
United States Magistrate Judge

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

IN RE )  
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OTASCO, INC., a Nevada corporation, )  
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 )  
OTASCO, INC., a Nevada corporation )  
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 )  
Plaintiff/Appellee/ )  
Cross-Appellant, )  
 )  
vs. )  
 )  
SCHOTTENSTEIN STORES CORPORATION, )  
a corporation, )  
 )  
 )  
Defendant/Appellant/ )  
Cross-Appellee. )

Case No. 98-CV-189-K(J) ✓

ENTERED ON DOCKET

DATE FEB 16 1999

**F I L E D**

FEB 16 1999 *AC*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**REPORT AND RECOMMENDATION**

The Bankruptcy Court concluded that Schottenstein Stores Corporation ("SSC") owed Otasco Inc. ("Otasco") additional sums pursuant to an agreement between SSC and Otasco. The Bankruptcy Court additionally granted Otasco prejudgment and postjudgment interest. The order of the Bankruptcy Court stated that each side should bear its own attorneys fees and costs. SSC appeals the decision of the Bankruptcy Court that it owes Otasco additional sums under the agreement, and appeals the Bankruptcy Court's award of prejudgment interest. SSC also appeals the decision of the Bankruptcy Court regarding SSC's motion for attorneys fees pursuant to Fed. R.

*28*

Civ. Pro. 68. Otasco cross-appeals asserting that the Bankruptcy Court erred by not granting attorneys fees to Otasco as the prevailing party and by not sanctioning SSC.

For the reasons discussed below, the United States Magistrate Judge recommends that the decision of the Bankruptcy Court be **AFFIRMED** in part and **REVERSED** in part.

## **I. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

Otasco filed a voluntary petition for Chapter 11 reorganization on November 6, 1988. Within the context of the Chapter 11 proceeding, Otasco decided to close 91 stores and to liquidate the merchandise from those stores. In 1988, SSC and Otasco entered an agreement for SSC to liquidate the assets of the affected stores. The agreement provided that SSC would sell the merchandise from the Otasco stores and that the proceeds of the sales would be distributed in accordance with the agreement. The parties disagreed on the deductions which were made by SSC of various expenses from the gross proceeds of the sale.

In December of 1989 Otasco brought an adversary proceeding against SSC requesting judgment against SSC for \$674,038.45, which Otasco requested as Otasco's share of the net proceeds from SSC's sale. In addition, Otasco requested an accounting regarding the sale activities and requested sanctions against SSC for bad faith and breach of fiduciary duty.

The issues were tried to the Bankruptcy Court on April 24, 25, and 26, of 1990. The Bankruptcy Court took the case under advisement, and seven years later

requested submissions of findings of facts and conclusions of laws from the parties.<sup>1/</sup> The Bankruptcy Court entered an Order on May 22, 1997. The Order granted judgment in favor of Otasco for \$617,977.81 plus postjudgment interest, and prejudgment interest. The Order additionally provided that each side was to bear its own costs and attorneys fees.

SSC filed a Motion for Relief from the Memorandum Opinion Order, requesting relief due to clerical or mathematical error. The Bankruptcy Court granted the Motion on July 15, 1997, and the mathematical error was corrected making the judgment in favor of Otasco in the amount of \$251,970.82,<sup>2/</sup> plus postjudgment interest, including prejudgment interest. The Amended Judgment additionally stated that each side was to bear its own costs and attorneys fees.

Otasco filed a motion for postjudgment relief asserting that the Bankruptcy Court failed to rule on whether allowable expenses under the Sale Agreement should be reduced based on SSC's sale of General Electric goods. Otasco requested an increase in the judgment in Otasco's favor by \$232,067.31 plus prejudgment interest. The Bankruptcy Court entered an order on July 15, 1997, denying the relief requested by Otasco.

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<sup>1/</sup> No explanation for the passage of time appears in the record. Otasco submits, in Otasco's appeal, that this passage of time prejudiced Otasco's sanctions motion.

<sup>2/</sup> Otasco notes that it originally sought judgment for \$674,038.45 against SSC in December 1989. Otasco asserts that on April 18, 1990, on the "eve of trial," Otasco received \$229,677.15 of the \$674,038.45 from SSC. Otasco notes that judgment for \$251,970.82 was entered in favor of Otasco, and that Otasco therefore recovered a total of \$481,647.97 from SSC.

Otasco additionally requested that it be awarded attorneys fees as the prevailing party. The Bankruptcy Court denied Otasco's request based on the Bankruptcy Court's initial order that each side should bear its own attorneys fees. The Bankruptcy Court concluded that neither party was a prevailing party.

SSC had filed a pretrial Motion to Confess Judgment pursuant to Fed. R. Civ. Pro. 68 in the amount of \$450,000. SSC filed an Application for Costs requesting that the Bankruptcy Court award costs (including attorneys fees) to SSC based on the rejection by Otasco of SSC's Offer to Confess Judgment, and the failure of Otasco to obtain a judgment greater than the offer to confess. On August 1, 1997, the Bankruptcy Court denied SSC's Rule 68 application based, in part, on the Bankruptcy Court's original Order that each party was to bear its own fees and costs. SSC filed a Motion to Alter or Amend asserting that the Bankruptcy Court improperly focused on the "prevailing party" theory rather than the Offer to Confess Judgment under Rule 68. The Bankruptcy Court, on August 14, 1997, requested that the parties brief the issue of whether or not the Bankruptcy Court had jurisdiction to decide the issue. The Bankruptcy Court, on September 26, 1997, concluded that it lacked jurisdiction to reconsider the attorney fee order because the issue of attorneys fees pursuant to § 936 was already on appeal.

SSC appealed the Bankruptcy Court's decision with respect to the award to Otasco of prejudgment interest and the determination by the Bankruptcy Court of the permissible expenses under the agreement. Otasco cross-appealed the Bankruptcy Court's findings that Otasco was not entitled to recover based on SSC's sale of

General Electric goods, and on the Bankruptcy Court's refusal to sanction SSC. Otasco additionally appealed the Bankruptcy Court's decision not to award attorney fees to Otasco as the prevailing party. SSC also appealed the Bankruptcy Court's attorney fee order asserting the Bankruptcy Court erred by not awarding Rule 68 costs to SSC. SSC additionally asserts that the Bankruptcy Court erred in concluding it did not have jurisdiction to reconsider the award of attorney fees.

## **II. STANDARD OF REVIEW**

The Bankruptcy Court's findings of fact are reviewed under the "clearly erroneous" standard. Conclusions of law are reviewed *de novo*. Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1543 (10th Cir. 1988). "When reviewing factual findings, an appellate court is not to weigh the evidence or reverse the finding because it would have decided the case differently. A trial court's findings may not be reversed if its perception of the evidence is logical or reasonable in light of the record." In re Branding Iron Motel, Inc., 798 F.2d 396 (10th Cir. 1986) (citations omitted). See also O'Connor v. Mbank Dallas, N.A., 808 F.2d 1393 (10th Cir. 1987) (whether debtors provided adequate protection to creditors was question of fact to be judged on review under clearly erroneous standard).

Each of the parties have asserted the applicable standard of review with respect to specific arguments raised by the party on this appeal. These arguments are addressed by the Court in conjunction with the specific issue raised on appeal.

### **III. ANALYSIS**

#### **A. EXPENSE ISSUE**

The Bankruptcy Court concluded that expenses in the amount of \$212,293.64 were not "allowable expenses" pursuant to the Sale Agreement. SSC appeals this determination. SSC claims that these expenses were properly allowable under the terms of the Sale Agreement between the parties. SSC identifies the following as disputed amounts: \$89,300 in bonuses paid to supervisors of the sale; \$32,400 as salary paid to Ted Roberts (independent contractor of SSC); \$10,000 as salary paid to James Schaye (an employee of SSC); \$5,082.12 in travel expenses of personnel used in the sale, and \$74,000 paid by SSC under the GE Agreement.<sup>3/</sup>

#### **Standard of Review**

SSC asserts that this issue is a mixed question of law and fact and is therefore subject to *de novo* review. SSC refers to In re Davidovich, 901 F.2d 1533 (10th Cir. 1990), In re Excalibur Auto. Corp., 859 F.2d 454 (7th Cir. 1988), and In re Daniels-Head & Associates, 819 F.2d 914 (9th Cir. 1987). SSC notes that the standard of review is *de novo* when the issue involves a mixed question of law and facts and the facts are admitted with the only question being whether the facts meet the legal standards. Otasco asserts that if the issues of fact predominate the standard of review is abuse of discretion.

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<sup>3/</sup> SSC mentions the GE Agreement, but SSC does not develop this argument on appeal. Otasco notes that it is not appealing the GE expenses.

Initially, the issue of whether or not the contract is ambiguous is a question of law and therefore subject to *de novo* review. If the contract is found to be ambiguous, parol testimony is admissible to explain the terms of the contract. The admission of such evidence makes the interpretation of the contract a mixed question of law and fact. The Court will review the factual determinations based on an abuse of discretion standard.

**Ambiguity in a Contract**

SSC asserts that the sale agreement between SSC and Otasco was not ambiguous in regard to allowed expenses. SSC notes that if a contract is not ambiguous a court determines the rights of the parties as a matter of law. A court does not change the terms of an unambiguous contract, but only interprets the terms. SSC identifies the "clear and unambiguous" language of the sales agreement as contained in Section 5.1 which defines "allowed expenses."

SSC shall pay the expenses described in subparagraphs (a) and (b) below ("Allowed Expenses")

(a) All direct expenses relative to SSC's preparation for implementation of this Agreement, and the supervision and conduct of sales activities at the Stores, including without limitation:

\* \* \*

(ii) all salaries, wages or expenses of personnel hired or employed by SSC . . .

SSC asserts that this provision establishes that "allowed expenses" include "without limitation, all salaries, wages or expenses of personnel hired or employed by SSC."

SSC notes it was given the authority to hire personnel and determine their compensation. SSC states that "it follows that it was within the contemplation of the parties that SSC could utilize 'independent contractors' and 'consultants' as personnel in the Sale, pay them as SSC decided, and be reimbursed for their expenses." The only restriction on such payment, according to SSC, is the \$3,000,000 cap on allowed expenses.

Initially, Otasco points out that SSC's assertion that the sole limitation on allowed expenses was the \$3,000,000 cap is absurd. Otasco notes that the Bankruptcy Court recognized that SSC was a court-appointed agent and had fiduciary duties including the duty of good faith and fair dealing and the duty to account to the Bankruptcy Court. Consequently, SSC's claimed "allowed expenses" were reviewable to insure that they were "reasonable." Otasco's argument seems well taken. Certainly the \$3,000,000 cap was not intended as carte blanche permission to SSC for the incurrence of any expenses as long as the total did not exceed \$3,000,000.

In addition, SSC's arguments support Otasco's position that the contract is ambiguous. SSC, in explaining that the contract is not ambiguous and that extrinsic evidence should not be admitted, notes that the parties contemplated that independent contractors and consultants would be paid and that bonuses were included as wages.

Otasco argues that SSC waived the argument that the contract was not ambiguous. Otasco asserts SSC recognized, prior to trial, that the issue of whether or not the bonuses and other items paid were include in "allowed expenses" were issues of fact. The positions taken by SSC that the contract is not ambiguous and if

ambiguous should be interpreted in SSC's favor are not contradictory. The Court has reviewed the record and concludes that SSC adequately presented this argument to the Bankruptcy Court and therefore did not waive it.

The Bankruptcy Court concluded that the contract was ambiguous. The Magistrate Judge recommends that the District Court affirm this conclusion. In Devine v. Ladd Petroleum Corp., 743 F.2d 745, 748 (10th Cir. 1984), the Court noted that

The mutual intention of the parties at the time of contracting governs the interpretation of a contract. In determining the intention of the parties, the express language of a contract controls if it is unambiguous on the face and there exists no fraud, accident, or pure absurdity. Hence, when a contract is written, the intention of the parties must be determined from the writing alone, if possible. In the presence of an ambiguity, however, extrinsic evidence may be admitted to determine the parties' intent at the time they entered into the contract. A court is without authority to admit extrinsic evidence unless the contract terms are ambiguous. Finally, regardless of the breadth of the terms used in a contract, the obligations established extend only to those contemplated by the parties.

Certainly several of the terms in the contract are subject to more than one reasonable interpretation. As pointed out by the parties, the differing interpretations that the terms "wages" and "salary" include a bonus and do not include a bonus are both reasonable.<sup>4/</sup> The Bankruptcy Court additionally noted that the sale agreement was

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<sup>4/</sup> The Bankruptcy Court points out that the parties separately agreed that the Otasco employees would be paid a bonus. The record contains a letter from SSC informing Otasco that it would pay the Otasco employees a bonus. Otasco states that it agreed to this separate payment which Otasco characterizes as separate and apart from the agreement between the parties. Otasco additionally asserts that the language in the agreement was much broader with regard to payments to Otasco employees than with regard to payments made to SSC employees.

later amended by the GE agreement and the extension agreement and that the sale agreement by itself or construed with the later agreements were ambiguous in defining and treating allowed expenses. The Magistrate Judge concludes that the Bankruptcy Court did not err in concluding that the agreement was ambiguous.

### 1. Bonuses

SSC asserts that bonuses fall within the definition of wages and therefore are compensable as allowed expenses. SSC refers to Black's Law Dictionary to define "wages." SSC asserts that the \$89,300 paid in bonuses was contemplated by the parties and should therefore have been included as allowed expenses.

The Bankruptcy Court noted that "the contract mentions (though somewhat obscurely) Otasco's plan to pay a \$1,000 bonus to each of its store managers who stayed on to help conduct the liquidation sales. The contract makes no mention of any other bonuses paid to any other personnel." Bankruptcy Court Order at 31-32. The Bankruptcy Court concluded based on the contracts and the testimony of the parties that there was "no meeting of the minds" with regard to bonuses to SSC personnel and independent contractors. The Court therefore concluded that such bonuses were not included in recoverable allowed expenses.

SSC asserts that the Bankruptcy Court erred by applying a provision in section 5.1(b) to section 5.1(a) when the provisions are separate. SSC is correct that 5.1(b) applies to amounts paid by SSC for the use of Otasco's employees. As this Court understands the Bankruptcy Court's Order, however, the parties specifically intended to include bonuses with regard to Otasco's employees but made no such provision

with regard to SSC's employees. SSC is additionally correct that the agreement does not seem to specify bonuses with regard to Otasco's employees. However the extrinsic evidence indicates that the parties specifically contemplated bonuses to Otasco's employees.<sup>5/</sup>

The Magistrate Judge recommends that the District Court affirm the decision of the Bankruptcy Court that the \$89,300 in bonuses paid to SSC employees were not covered by the agreement.

## 2. Salary to Ted Roberts and James Schaye

The Bankruptcy Court additionally held that the salaries paid to Roberts (\$32,400) and Schaye (\$10,000) were not intended to be included in the allowed expenses. SSC asserts that this is error based on section 5.1. Section 5.1 provides:

SSC shall pay the expenses described in subparagraphs (a) and (b) below ("Allowed Expenses")

(a) All direct expenses relative to SSC's preparation for implementation of this Agreement, and the supervision and conduct of sales activities at the Stores, including without limitation:

\* \* \*

(2) all salaries, wages or expenses of personnel hired or employed by SSC;

The provision specifically provides for the payment by Otasco of all salaries wages or expenses of personnel hired or employed by SSC.

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<sup>5/</sup> For example a letter dated December 20, 1988 indicated Otasco's "intent" "as we discussed" to pay a \$1,000 bonus per store to expedite the effort. Otasco additionally points to the testimony of Glen Taylor and Jerry Goodman that the parties never discussed the payment of bonuses to the SSC independent contractors.

The Bankruptcy Court held that interpreting the provision as written would lead to the absurd result of requiring Otasco to pay all salaries of all SSC employees. The Bankruptcy Court is correct that this would indeed be an absurd result. The Bankruptcy Court's solution was to interpret the language "direct expenses" in section 5.1(a) as requiring payment only for "additional expenses over and above SSC's normal operating budget, which SSC was forced to incur in order to set up and conduct the Otasco liquidation sales." See Bankruptcy Court Order at 32-33. This Court concludes that the Bankruptcy Court was partially correct.

Obviously, the agreement was not intended to require Otasco to pay all salaries of all SSC employees. SSC does not request such an interpretation. However, the Bankruptcy Court's interpretation that "direct expenses" requires exclusion of any expenses or salaries of Roberts or Schaye because they were already employed by SSC is equally unavailing. The provision specifies "direct expenses," including salaries, wages, or expenses of personnel "hired or employed" by SSC. Therefore the agreement certainly contemplated the payment by Otasco of SSC employees. The record indicates that Roberts and Schaye worked on the Otasco sale. The Magistrate Judge recommends reversing the Bankruptcy Court's decision that such salaries are not included in the "allowed expenses." Based on the record, however, this Court is unprepared to determine the amount of such salaries which constitute "direct expenses." Otasco suggests that Schaye testified that he had no idea how the \$10,000 sum claimed for his services was derived; that such a sum was approximately one-seventh of his salary and that he did not spend an equivalent

amount of time working on the SSC sale.<sup>6/</sup> The Magistrate Judge recommends that this portion of the decision of the Bankruptcy Court be reversed, and on remand, the Bankruptcy Court should determine the portion of expenses allocated to Roberts and Schaye that are "direct expenses," and those sums should be awarded to SSC.

### 3. Travel Expenses

The Bankruptcy Court concluded that the travel and hotel expenses were either unnecessary or unrelated to the Otasco sales. SSC asserts that the agreement did not require necessary and related expenses and that no evidence indicated that the expenses were not necessary or related. Neither party devotes much to developing this argument. Otasco refers generally to the testimony of Lyn Blackwell but references no page numbers. Mr. Blackwell testified, in part, that he adjusted travel charges for first class air fair to coach, and adjusted hotel upgrade charges for times when SSC employees were not in Tulsa. See Testimony of Lyn Blackwell, Transcript of Trial Proceedings, Volume I, at 65. Such adjustments seem reasonable. The Magistrate Judge recommends that the decision of the Bankruptcy Court be affirmed with respect to travel expenses.

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<sup>6/</sup> SSC's interpretation of the facts differs significantly from Otasco's. SSC notes that Schaye's compensation was \$320,000, with a base salary of \$75,000. The Magistrate Judge concludes that these issues are best resolved by the finder of fact.

## **B. PREJUDGMENT INTEREST**

The Bankruptcy Court awarded prejudgment interest pursuant to federal law. The parties disagree on whether or not interest was properly awarded under federal law and, absent an award of interest under federal law, whether or not interest may be awarded pursuant to Oklahoma law.

Neither party addresses whether or not federal or state law regarding prejudgment interest is applicable to a contract action based on state law<sup>7/</sup> which arises in an adversary proceeding in Bankruptcy Court. The Tenth Circuit Court of Appeals has held that in diversity cases involving issues of state law, the determination of prejudgment interest is determined by state law. See Rositer v. Bob Toomey Truck Leasing, Inc., 567 F.2d 938 (10th Cir. 1977). In Walhout v. TFL, Inc., 133 B.R. 76 (Bankr. W.D. Mich. 1991), the Bankruptcy Court noted that "the award of prejudgment interest is a matter controlled by state substantive law when the bankruptcy court is called upon to determine a state law cause of action." Id. at 89. The Court concludes that the appropriate law for the determination of an award of prejudgment interest based on a substantive state law issue is the law of the state.

The Oklahoma prejudgment interest statute provides that

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<sup>7/</sup> Both parties assert the application of Oklahoma contract law to the disputed agreement. SSC, in SSC's Brief of Appellant asserts that a federal bankruptcy court would apply Oklahoma law in a breach of contract action in federal court. SSC does not further develop this argument in their Reply Brief. The Bankruptcy Court noted that although state law applies in a "diversity action," because the action in Bankruptcy Court was not a diversity action it would not apply state law. See Bankruptcy Order filed September 26, 1997 at 5. Although the parties did not arrive in bankruptcy court courtesy of the diversity laws, the applicable substantive law is Oklahoma contract law. As such, the applicable law regarding prejudgment interest should also be Oklahoma substantive law.

Any person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt.

23 O.S. 1991, § 6. The courts have generally concluded that damages must be either liquidated or capable of ascertainment by calculation prior to judgment for this statute to apply.

The parties do not specifically set out each item of damages for which prejudgment interest was awarded.<sup>8/</sup> The Magistrate Judge recommends that the District Court reverse the decision of the Bankruptcy Court in regard to prejudgment interest with instructions to apply Oklahoma state law.<sup>9/</sup>

### **C. COSTS UNDER FED. R. CIV. PRO. 68**

SSC notes that pursuant to Fed. R. Civ. Pro. 68, if a pretrial offer that is made by a Defendant and rejected by the Plaintiff is more favorable than the judgment

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<sup>8/</sup> The Bankruptcy Court merely awarded prejudgment interest on the entire award to Otasco with an adjustment due to the amount of time which had passed prior to the entry by the Bankruptcy Court of the judgment in favor of Otasco.

<sup>9/</sup> SSC suggests that the amounts requested by Otasco were not liquidated or capable of calculation because such amounts required a reasonableness interpretation by the Bankruptcy Court and because Otasco did not recover all that they requested. Otasco did not recover all that they requested and some of Otasco requests for damages were not liquidated. However, some of Otasco's damages requests appear to be liquidated or capable of calculation. For instance, this Court has determined that the Bankruptcy Court properly concluded that bonus payments were not properly included in "allowed expenses." The amounts paid as bonuses certainly seem capable of calculation by the parties prior to the determination of the Bankruptcy Court. The parties may have disagreed upon the interpretation of the agreement, that is, whether or not the agreement provided for the payment of such bonuses. However, this interpretation does not preclude the parties from calculating the amount assuming such amount is owed. However, as noted above, this Court leaves for the Bankruptcy Court the determination of the specific portions of Plaintiff's claims to which prejudgment interest is proper under Oklahoma law.

obtained by Plaintiff the Defendant is awarded costs. Otasco asserts that (1) the offer to confess judgment did not exceed the final award of damages to Otasco so SSC is not entitled to costs under Fed. R. Civ. Pro. 68, and (2) due to the appeal of the attorneys fees issues the Bankruptcy Court did not have jurisdiction to decide SSC's motion and due to the untimeliness of SSC's motion, SSC is now precluded from requesting costs.

### 1. Entitlement to Costs

In this case, SSC made a pre-trial offer to confess judgment to Otasco in the amount of \$450,000 on March 30, 1990. The parties disagree on whether or not the amount awarded to Otasco exceeds the pre-trial offer.<sup>10/</sup> The disagreement centers on whether or not prejudgment interest should be added to Otasco's judgment amount as of the date of the offer to confess judgment or as of the final date of judgment. If prejudgment interest is calculated only as of the date of the offer to confess judgment, SSC's offer exceeded the final award to Otasco and SSC should recover their costs. If prejudgment interest is awarded as of the date of the judgment, the judgment exceeds SSC's offer and SSC should not be awarded costs.

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<sup>10/</sup> The Bankruptcy Court's initial judgment in favor of Otasco was for \$617,977.81. SSC filed a post-trial request to reduce the judgment due to mathematical error. The request was granted and the Bankruptcy Court reduced Otasco's judgment to \$251,970.82 (including principal and interest). Of the judgment amount of \$251,970.82, \$17,192.17 constitutes prejudgment interest on SSC's pretrial tender of \$229,677.50. The amount of actual damages under the sales agreement is \$159,220.23, with \$75,558.42 in prejudgment interest on that award. SSC asserts that as of March 30, 1990, the date of their offer to confess judgment, Otasco was entitled to \$229,677.50 (the amount tendered by SSC to Otasco), plus interest on that amount, totaling \$17,192.17, plus actual damages awarded Otasco of \$159,220.23, plus interest as of that date totaling \$3,644.09. SSC asserts this totals \$409,733.99. SSC notes that even if attorneys fees and costs as of March 30, 1990 are added (\$15,499), Otasco's total judgment is less than SSC's offer of judgment.

Otasco refers the Court to Mock v. T.G. & Y. Stores Co., 971 F.2d 522 (10th Cir. 1992). The Tenth Circuit Court of Appeals, in the context of a consent judgment entered into as a result of an offer to confess judgment, affirmed the district court's refusal to add prejudgment interest to the amount in the consent judgment. The Tenth Circuit held that "a Rule 68 consent judgment for a sum certain must, absent indication otherwise, be deemed to include pre-judgment interest." Id. at 527. Otasco quotes this language from the decision of the Court.

The Magistrate Judge concludes that Mock is not dispositive of the issue before this Court. In Mock, the parties entered into a consent judgment shortly after the offer to confess judgment was made. No issues involving whether or not the offer to confess involved prejudgment interest as of the date of the offer to confess judgment or as of the date of the final entry of judgment were presented to or decided by the Court.

The language of the statute provides that costs are counted as of the date of the offer. Fed. R. Civ. Pro. 68 (" . . . for the money or property or to the effect specified in the offer, with costs then accrued."). Courts, in interpreting whether and how to include attorneys fees and costs have concluded that such items should be included as of the date of the offer. See, e.g., Marek v. Chesny, 473 U.S. 1, 7 (1985).

The Magistrate Judge concludes that prejudgment interest should be included only as of the date of the offer. The current case before the Court serves as an excellent example supporting the adoption of such a rule. In this case, the offer to

confess judgment was made in March of 1990. The original judgment was not entered by the Bankruptcy Court until May 22, 1997 – over seven years later. Certainly a party making an offer to confess judgment cannot be expected to anticipate that a court would take over seven years to decide the action and enter judgment, and therefore be expected to include prejudgment interest to cover that time frame within the initial offer to confess. The more reasonable conclusion is that the offer to confess should include prejudgment interest as of the date of the offer to confess.

Under the facts of this case, the offer to confess exceeded the amount recovered by Otasco and SSC is entitled to costs pursuant to Fed. R. Civ. Pro. 68.

## 2. Jurisdictional Issue

The Bankruptcy Court filed its Memorandum Opinion and Order on May 22, 1997. Based on the Order, the Bankruptcy Court entered Judgment in favor of Otasco for \$617,977.81 with interest thereon at the rate of 6.06 percent, and "each party bearing its own costs and attorney fees." Otasco filed a motion to amend the findings of fact and to enter a new judgment on May 28, 1997. Otasco asserted that the Bankruptcy Court had failed to determine whether expenses related to the General Electric goods were properly included in the sale agreement as allowed expenses. On May 29, 1997, SSC filed a Motion for relief from judgment asserting that the judgment contained a clerical or mathematical mistake. SSC filed an amended motion on June 2, 1997 with regard to the clerical or mathematical mistake, and a motion to alter or

amend the judgment in regard to prejudgment interest. The Bankruptcy Court<sup>11/</sup> entered an Order on July 15, 1997 granting in part and denying in part the Plaintiff's motion to alter or amend. The Bankruptcy Court additionally granted SSC's motion to alter or amend due to a mathematical error on July 15, 1997. The Court entered an Amended Judgment in favor of Otasco on July 15, 1997 in the amount of \$251,960.82 with interest at the rate of 6.06 percent. The Bankruptcy Court entered a separate order denying SSC's motion that Otasco should be denied prejudgment interest.

On July 24, 1997, SSC filed a notice of appeal from the decision of the Bankruptcy Court. On July 25, 1997, Otasco filed a notice of cross-appeal.

On July 28, 1997, Otasco filed an application for attorneys fees as the prevailing party in the adversary action. On July 29, 1997, SSC filed a Motion for Costs in the Bankruptcy Court based on Fed. R. Civ. Pro. 68. Otasco's and SSC's applications were denied by the Bankruptcy Court in one order filed on August 1, 1997. The Bankruptcy Court noted that the previous Bankruptcy Court Order had stated that each side should "bear its own costs and attorney fees." The Bankruptcy Court concluded that there was no prevailing party. The Bankruptcy Court additionally noted that the original judgment of the Bankruptcy Court concluded that each side should bear its own attorneys fees and costs and that neither party had filed a Fed. R. Civ. Pro. 59 motion (Bankruptcy Rule 9023) and that, at best, the parties' motions

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<sup>11/</sup> Bankruptcy Judge Mickey D. Wilson heard the case in 1990, took it under advisement, and entered the May 22, 1997 opinion order. He retired, and his successor, Judge Terrence L. Michael entered the July 15, 1997 order and all orders entered after that date.

could be considered as motions for relief from judgment under Fed. R. Civ. Pro. 60(b). On August 8, 1997, Otasco filed a Notice of Appeal of the decision of the Bankruptcy Court with regard to the denial of attorneys fees to Otasco as a prevailing party.

On August 11, 1997, SSC filed a second Motion to Alter or Amend the Order of the Bankruptcy Court. SSC requested that the Bankruptcy Court amend the judgment to include costs for SSC pursuant to Fed. R. Civ. Pro. 68. SSC noted that it was not entitled to file an application for costs until after the entry by the Bankruptcy Court of the amended judgment on July 15, 1997. SSC then filed its application on July 29, 1997. On August 14, 1997 the Bankruptcy Court issued an order requesting that the parties brief the issue of whether or not the Bankruptcy Court had jurisdiction to consider SSC's August 11, 1997 motion.

The Bankruptcy Court, by order dated September 26, 1997, concluded that it did not have jurisdiction to determine SSC's motion for costs pursuant to Fed. R. Civ. Pro. 68. The Bankruptcy Court noted that it had previously determined that neither party was a prevailing party, that determination of Fed. R. Civ. Pro. 68 costs depended, in part, on the substantive attorneys fees statutes of the applicable state law, that the applicable state statute was the Oklahoma prevailing party statute (12 O.S. § 936), that the Bankruptcy Court had determined that neither party qualified as a prevailing party, and that that determination had been appealed by Otasco. Consequently the Bankruptcy Court concluded that it no longer had jurisdiction to determine SSC's motion for costs. SSC appeals the decision of the Bankruptcy Court asserting that (1) the Bankruptcy Court erred in denying costs to SSC under Fed. R.

Civ. Pro. 68, and (2) that the Bankruptcy Court erred in concluding that it did not have jurisdiction to decide the Fed. R. Civ. Pro. 68 motion.

Otasco has two main arguments. First, Otasco asserts that the amended judgment filed by the Bankruptcy Court on July 15, 1997 was a final appealable order, that that judgment concluded that each side should bear its own costs and attorneys fees, and that both parties were required to appeal that decision to preserve any issue(s) related to fees or costs. Otasco claims that by failing to file an appeal within ten days of that order (and/or by failing to file a motion to amend the judgment or a motion pursuant to Fed. R. Civ. Pro. 60b) SSC waived its rights with regard to the denial by the Bankruptcy Court of costs. Otasco asserts that SSC was required to file their motion, if at all, by July 24, 1997, and that SSC was therefore out of time when SSC filed a motion on July 29, 1997.<sup>12/</sup> Second, Otasco asserts that the Bankruptcy Court lacked jurisdiction to consider SSC's motion because the attorneys fees issues had already been appealed to the District Court.

Otasco's argument is premised on the language in the Bankruptcy Court's Judgment which provides "each party bearing its own costs and attorneys fees." The May 22, 1997 Order and the May 22, 1997 Judgment contained this language. The May 22, 1997 Order and Judgment was for \$617,977.81. This amount far exceeded SSC's offer to confess. The Bankruptcy Court could not have intended to rule on a

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<sup>12/</sup> The Court notes that if the time limits for filing the motions had been based on the Federal Rules of Civil Procedure rather than the Bankruptcy Rules, SSC's Motion could have timely been considered a motion to reconsider. Compare Fed. R. Civ. Pro. 6, providing that weekends should not be counted for time limits of less than 11 days to Bankruptcy Rule 9006 which changes the time period to eight days.

Fed. R. Civ. Pro. 68 motion, since SSC had no claim for Fed. R. Civ. Pro. 68 costs, in the May 22, 1997 Order or Judgment. The language "each party bearing its own costs and attorneys fees" could not, therefore, have been applicable to a Fed. R. Civ. Pro. 68 motion.

SSC filed a motion requesting that the Bankruptcy Court reconsider the amount awarded to Otasco due to an asserted clerical or mathematical error. The Bankruptcy Court Judge who entered the May 22, 1997 Order retired, and SSC's motion was heard by that Judge's successor. SSC's motion was granted, and by Judgment entered July 15, 1997, the amount awarded to Otasco was changed to \$251,960.82 with interest at the rate of 6.06 percent. The issue considered by the Bankruptcy Court prior to the entry of the amended judgment was whether or not the prior order and judgment contained a mathematical error. The Bankruptcy Court Judge's successor concluded that the original order did contain a mathematical error and entered a second judgment. The second judgment is identical to the May 22, 1997 Judgment except for the amount of the judgment. The May 22, 1997 Judgment could not be interpreted as having ruled on any potential Fed. R. Civ. Pro. 68 motion because SSC was not entitled to costs at that time. The Amended Judgment, filed July 15, 1997 addressed solely whether or not a mathematical error had been committed by the Bankruptcy Court. No other issues were addressed and no additional language was included. The logical conclusion is that neither the May 22, 1997 Judgment nor the July 15, 1997 Judgment address whether or not SSC was entitled to costs and attorneys fees pursuant to Fed. R. Civ. Pro. 68.

If neither the May 22, 1997 Judgment nor the July 15, 1997 Judgment addressed whether or not SSC was entitled to costs pursuant to Fed. R. Civ. Pro. 68, the appropriate method for SSC to request costs was to file a motion for costs pursuant to Fed. R. Civ. Pro. 68. This is exactly what SSC did.

Otasco asserts that when SSC filed the motion the issue of attorneys fees was already on appeal and the Bankruptcy Court therefore lacked jurisdiction to address this issue. The Bankruptcy Court, on August 1, 1997, entered an order denying both Otasco's and SSC's motions for attorneys fees. The Bankruptcy Court concluded that the trial court had not abused its discretion in concluding that neither party had prevailed and that therefore neither party was entitled to fees. Otasco appealed the Bankruptcy Court's denial of attorneys fees on August 8, 1997. SSC filed a motion to alter or amend the judgment on August 11, 1997. SSC argued that the Bankruptcy Court had improperly denied SSC's motion for Fed. R. Civ. Pro. 68 costs based on a prevailing party theory although the motion for costs was not predicated on SSC being a prevailing party. By Order dated September 26, 1997 the Bankruptcy Court concluded that it did not have jurisdiction to decide the issue of whether or not SSC was entitled to attorneys fees due to Otasco's appeal of the attorneys fees ruling.

Generally, a trial court retains jurisdiction to hear issues regarding costs even when the action has been appealed. See Cox v. Flood, 683 F.2d 330 (10th Cir. 1982). In this case, Otasco asserts that the issue of attorneys fees was on appeal and therefore the trial court lacked jurisdiction to decide SSC's motion for costs (including attorneys fees). SSC's motion was for costs pursuant to Fed. R. Civ. Pro. 68. This

does not involve a determination of who was the prevailing party. SSC asserts that because the Oklahoma prevailing party statute defines costs as including attorneys fees, costs under Fed. R. Civ. Pro. 68 are defined as including attorneys fees.<sup>13/</sup> This "interpretation" of the Oklahoma statute, however, does not require a finding that SSC was a prevailing party in order to award SSC costs. A construction of the costs statute that would require a party, in order to recoup costs, to both meet the requirements of the costs statute and qualify as a prevailing party simply makes no sense. The appeal of the prevailing party attorneys fees issue did not divest the Bankruptcy Court of jurisdiction to determine whether or not SSC was entitled to costs pursuant to Fed. R. Civ. Pro. 68. Fed. R. Civ. Pro. 68 requires an award of costs if the prerequisites of the Rule are met. Under the circumstances of this case, SSC met the requirements of Fed. R. Civ. Pro. 68 and SSC is entitled to costs.<sup>14/</sup>

The Magistrate Judge recommends that the District Court find that SSC is entitled to costs including attorneys fees pursuant to Fed. R. Civ. Pro. 68, and order the Bankruptcy Court on remand, to determine the amount of attorneys fees and costs.

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<sup>13/</sup> Otasco does not challenge this portion of SSC's argument.

<sup>14/</sup> The costs include only those incurred after the making of the offer. Fed. R. Civ. Pro. 68.

## **D. OTASCO'S REQUEST FOR SANCTIONS**

### **1. Standard of Review**

Otasco asserts that the issue of SSC's status as a fiduciary is reviewed *de novo*. Otasco concedes that the issue of whether to award sanctions is reviewed under the abuse of discretion standard.

### **2. Award of Sanctions**

Otasco asserts that the Bankruptcy Court erred in declining to award sanctions against SSC. Otasco notes that in the Tenth Circuit case which Otasco cites in its brief the Tenth Circuit "did ultimately hold that sanctions could not be imposed on purely prelitigation conduct, [but] the allegations and request for sanction in this case involve a Court-appointed party that subjected itself to the supervision, jurisdiction and process of the Bankruptcy Court in a bankruptcy case where the Bankruptcy Court expressly reserved the power to police, supervise and govern the parties before." See Opening Brief of Cross-Appellant, filed September 11, 1998 at 13. Otasco notes that such sanctions are discretionary.

The Bankruptcy Court was able to observe first-hand the conduct about which Otasco complains. The Bankruptcy Court declined to impose sanctions on SSC. Upon review of the record and the arguments of the parties, the Magistrate Judge recommends that the District Court affirm the decision of the Bankruptcy Court.

Otasco's argument additionally notes that SSC was a fiduciary of Otasco, and that the Bankruptcy Court erred in failing to recognize SSC as a fiduciary. Otasco

argues that the Bankruptcy Court failed to address the "central premise supporting Otasco's claim for sanctions against SSC." Id. at 15.

SSC asserts that the Bankruptcy Court properly determined that SSC was not a fiduciary. However, even if this Court were to accept Otasco's premise that SSC was a fiduciary, the Magistrate Judge is not convinced, based on Otasco's arguments, that the status of fiduciary results in a higher standard of care with regard to whether or not sanctions ultimately should be awarded. Regardless, the Court has reviewed the record and the arguments of the parties and concludes that the Bankruptcy Court did not abuse its discretion in declining to impose sanctions against SSC even if SSC is presumed to be in a fiduciary relationship with Otasco.

### 3. Long Delay

The Bankruptcy Court took the case under advisement in 1990, but did not issue a decision until 1997. Otasco claims that Otasco did all that Otasco could to "force" the Bankruptcy Court to reach a decision. Otasco claims that it suffered prejudice as a result of the delay and that Otasco's sanctions argument lost momentum due to the delay.

Otasco is correct that the record indicates a long delay with no apparent explanation. However, the Magistrate Judge is unable to agree with Otasco's premise that this must have impacted the Bankruptcy Court's decision on sanctions. Otasco could have availed itself of other remedies to attempt to enlist the assistance of the District Court in Otasco's campaign to obtain a decision of the Bankruptcy Court. Otasco did not undertake any prior effort in this Court. Certainly such delays should

not be encouraged, however, the Magistrate Judge does not accept Otasco's premise that this delay changed the result of the sanctions issue.<sup>15/</sup>

## **E. OTASCO'S REQUEST FOR ATTORNEYS FEES AS THE PREVAILING PARTY**

### **1. Standard of Review**

The applicable standard of review was clearly identified by the Tenth Circuit Court of Appeals in Arkla Energy Resources, a division of Arkla, Inc. v. Roye Realty and Developing, Inc., 9 F.3d 855 (10th Cir. 1993).

We review the meaning of "prevailing party" under Oklahoma law *de novo*. Although an award to a prevailing party is mandatory, "the determination of which party prevails in cases of this sort is, like the award of attorney's fees, within the discretion of the trial judge." We may reverse the court's decision that Roye did not prevail only if the court abused its discretion.

Id. at 865 (citations omitted).

### **2. Prevailing Party**

Otasco asserts that the Bankruptcy Court erred in concluding that the original Bankruptcy Court Judgment which provided that each side should bear its own costs and attorneys fees constituted a finding that neither party was a prevailing party.

The Bankruptcy Court, in the Order denying attorneys fees dated August 1, 1997, concluded that the original order of the Bankruptcy Court found that neither party was a prevailing party. The Bankruptcy Court noted that the determination of

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<sup>15/</sup> SSC also suffered due to the long delay because the award of damages to Otasco included prejudgment and post judgment interest.

which party is a prevailing party is for the sound discretion of the trial court, and that in appropriate circumstances a conclusion that neither party prevailed is proper. The Bankruptcy Court observed that Otasco received much less than it sought, that Otasco received much less than what was offered in settlement, that the defense by SSC could be characterized as "largely or mostly successful," and that the amount recovered by Otasco was less than the offer to confess. The Bankruptcy Court concluded that neither party was a prevailing party pursuant to 12 O.S. § 936.

The situation presented by the parties is similar to that considered by the Oklahoma Supreme Court in Hicks v. Lloyd's General Ins. Agency, Inc., 763 P.2d 85, 86 (Okla. 1988). In Hicks, the Defendant made an offer to confess judgment which was rejected by the Plaintiff. The Plaintiff ultimately received an affirmative judgment but the judgment was less than the amount offered by the Defendant. The Oklahoma Supreme Court concluded that Plaintiff should recover his attorneys fees<sup>16/</sup> but only to the date of the offer to confess judgment, and that Defendant should recover his attorneys fees from the date of the offer to confess judgment forward.

In construing § 936 where defendant has made an offer to allow judgment to be taken and it is rejected and plaintiff subsequently recovers less than the stated offer, we hold that plaintiff is not the prevailing party for 936 purposes. In the present case, Lloyd's made two offers to allow judgment to be taken and both were greater than what plaintiff ultimately recovered at trial. Hicks decided to reject both offers and subjected Lloyd's and the courts to the

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<sup>16/</sup> The Oklahoma Court concluded that the Plaintiff was not a "prevailing party" pursuant to § 936 status but awarded attorneys fees to Plaintiff for the period of time prior to the offer to confess judgment. The Oklahoma Court provides no explanation for the award of fees other than 12 O.S. § 936. This Court concludes that the Hicks decision is the most clearly analogous to the situation presented by the parties.

added burden of defending the case and, as a result, a considerable amount of time and money has been expended. Therefore, we would affirm the order of the trial court and find that Hicks should recover his attorney's fees but only for the period until the first offer was made, and we would allow attorney's fees to be assessed for Lloyd's for the period after the first offer until judgment was rendered at trial. This result clearly is supported by the judicial policies previously stated in interpreting § 936 and other attorney fees shifting provisions. The policies of encouraging settlement and dissuading the bringing of frivolous claims are served.

Id. at 86.

Based on the decision in Hicks, Otasco should be awarded attorneys fees but only until the time of the offer to confess filed by SSC. The Magistrate Judge recommends that the District Court reverse the decision of the Bankruptcy Court, and on remand the Bankruptcy Court should determine the amount of fees incurred by Otasco prior to the filing by SSC of the offer to confess.

### RECOMMENDATION

The Magistrate Judge recommends that the District Court affirm in part and reverse in part the decision of the Bankruptcy Court. With regard to allowable expenses pursuant to the agreement, the Magistrate Judge recommends that the Bankruptcy Court's decision that \$89,300 in bonuses to SSC employees were not covered by the agreement be affirmed, and the Bankruptcy Court's decision to reduce the permissible travel costs be affirmed. The Magistrate Judge recommends that the Bankruptcy Court's decision that expenses for the salaries of Roberts and Shays were

not covered by the agreement should be reversed. On remand, the Bankruptcy Court should determine the amount to attribute to Roberts and Shays.

The Magistrate Judge recommends that the District Court reverse the decision of the Bankruptcy Court to award prejudgment interest under federal law and remand the action to the Bankruptcy Court for a determination, under Oklahoma law, as to which portions of Otasco's claims, if any, prejudgment interest should be awarded.

The Magistrate Judge recommends that the District Court reverse the decision of the Bankruptcy Court that it lacked jurisdiction to decide the Fed. R. Civ. Pro. 68 motion for attorneys fees and costs and remand the action to the Bankruptcy Court for a determination of the amount of attorneys fees and costs to be awarded to SSC.

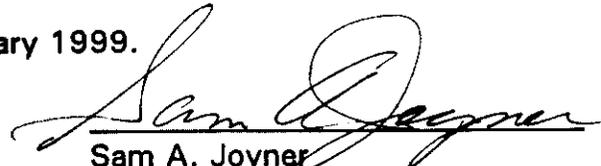
The Magistrate Judge recommends that the District Court affirm the Bankruptcy Court's decision not to sanction SSC. The Magistrate Judge recommends that the decision that Otasco not be awarded attorneys fees be reversed and that the action be remanded to the Bankruptcy Court for an award to Otasco of attorneys fees until the date of SSC's offer to confess judgment.

### **OBJECTIONS**

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and

Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 16th day of February 1999.

  
Sam A. Joyner  
United States Magistrate Judge

**CERTIFICATE OF SERVICE**

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 16th day of February, 1999.  
J. Law

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

IN RE: )

RONALD K. SUDDARTH )  
SS# 443-44-3287 )

Debtor. )

PATRICK J. MALLOY III, TRUSTEE, )

Appellant, )

v. )

ARCADIA FINANCIAL LTD., )

Appellee. )

DATE ~~FEB 13 1999~~

Bankruptcy No. 97-04791-R  
Chapter 7

**FILED**

FEB 16 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

District Court

Appeal No. 98-CV-539-H(J)

**ORDER**

This matter comes before the Court on the Report and Recommendation of the United States Magistrate Judge (Docket # 6) with respect to the Trustee's appeal of the Bankruptcy Court's decision that Arcadia substantially complied with the Oklahoma motor vehicle perfection statute. Appellant has filed an objection to the Report and Recommendation.

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

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

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

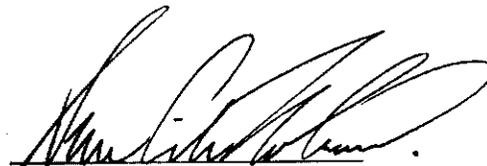
The Magistrate Judge recommended that the decision of the Bankruptcy Court should be affirmed on the basis that Okla. Stat. Ann. tit. 47 § 1110 incorporates the substantial

compliance provisions of the UCC, and that Arcadia substantially complied with the requirements of section 1110. Appellant objected, arguing that the complete omission of the date of the security agreement in Arcadia's lien entry form is insufficient either pursuant to the express terms of section 1110 or under the substantial compliance standard enunciated in In re Cook, 637 P.2d 588 (Okla. 1981).

Based upon a careful review of the Report and Recommendation of the Magistrate Judge and Appellant's objections, the Court finds that the Report and Recommendation affirming the Bankruptcy Court's decision should be adopted. Accordingly, the Court hereby adopts the Report and Recommendation of the United States Magistrate Judge (Docket # 6).

IT IS SO ORDERED.

This 5<sup>TH</sup> 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 16 1999

CLERK

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

**FILED**

FEB 16 1999

FRANKIE GENE CHAMBERS, )  
)  
Plaintiff, )  
)  
vs. )  
)  
JOHN AKIN and PATRICK ABITBOL, )  
)  
Defendants. )

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
Case No. 98-CV-879-BU (M)

ENTERED ON DOCKET

DATE FEB 16 1999

**ORDER**

On November 18, 1998, Plaintiff, a prisoner appearing *pro se*, filed the instant civil rights complaint and a motion for leave to proceed *in forma pauperis* ("ifp"). By Order dated December 2, 1998 (#3), the Court directed Plaintiff to supplement his "ifp" motion by providing the required certification and certified copy of the trust fund account statement pursuant to 28 U.S.C. §1915(a)(2). The Court directed the Clerk to mail to Plaintiff the forms necessary for compliance with the Court's order. Thereafter, Plaintiff requested an extension of time, until January 15, 1999, to submit the required "ifp" information. The Court subsequently issued its order on January 5, 1999 (#5), granting Plaintiff's motion for extension and directing him to file the requested financial information by January 15, 1999. As of the date of this order, Plaintiff has not paid the \$150.00 filing fee nor submitted a properly completed motion for leave to proceed *in forma pauperis* as directed by the Court. Therefore, the Court finds that Plaintiff's civil rights complaint should be dismissed without prejudice for failure to prosecute.

**ACCORDINGLY, IT IS HEREBY ORDERED** that Plaintiff's civil rights complaint is dismissed without prejudice for failure to prosecute.

SO ORDERED this 16<sup>th</sup> day of February, 1999.

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

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

**FILED**

FEB 16 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DALE JEAN TERWILLIGER, )  
on behalf of herself and all other )  
employees of HOME OF HOPE, INC. )  
similarly situated, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
HOME OF HOPE, INC., )  
 )  
Defendant. )

Case No. 96-CV-1042-H (E) /

ENTERED ON DOCKET  
FEB 16 1999

DATE \_\_\_\_\_

**REPORT AND RECOMMENDATION OF SPECIAL MASTER  
WITH PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

On November 12, 1996, plaintiffs brought this action under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., for alleged failure to pay overtime wages. Plaintiffs are employees, or former employees, of the defendant, Home of Hope, Inc. ("Home of Hope"). Home of Hope is a non-profit corporation which provides services to developmentally disabled individuals. Home of Hope did not pay plaintiffs time and a half for overtime hours for a two-year period between July 1, 1994 and June 30, 1996 when plaintiffs worked in Home of Hope's Supported Living Program as Habilitation Training Specialists ("HTS"), House Managers, or both. During that period of time, Home of Hope claimed to be exempt from paying overtime wages to plaintiffs because of the "companionship services" exemption found in 29 U.S.C. § 213(a)(15), which exempts payment of overtime wages to employees who provide "companionship services" for individuals who are unable to care for themselves.

Plaintiffs rely on an exception to the exemption which requires payment to employees who provide companionship services if those employees are found to have spent more than 20% of total

weekly hours worked performing general household work unrelated or incidental to the care of the individuals whom they served. The exception is found in the pertinent regulations at 29 C.F.R. § 552.6. Home of Hope maintains that plaintiffs did not spend more than 20% of their time performing general household work unrelated or incidental to the care of the individuals and thus, they do not fall within the “20% exception,” or, as it is sometimes referenced, the “general household work exception.”

The Court has previously adjudicated numerous issues. By Order dated January 7, 1998, the Court granted partial summary judgment to Home of Hope and held that certain plaintiffs were not entitled to “on-call” compensation. By Order dated May 21, 1998, the Court ruled on cross-motions for summary judgment, holding that (1) Home of Hope employees provided services to individuals in “private homes” as required by the companionship services exemption; (2) each plaintiff provided “companionship services” as required by the exemption; and (3) plaintiffs were not “trained personnel” for purposes of the 20% exception to the companionship exemption. After a hearing on two of the three remaining issues, the Court held that plaintiffs failed to meet their burden of proof to establish that Home of Hope committed a willful violation of the FLSA when Home of Hope applied the companionship services exemption and did not pay overtime wages to plaintiffs. Thus, a two-year statute of limitations applied to plaintiff’s claims instead of the three-year statute of limitations applicable for willful violations. (Order dated July 24, 1998).

In its Order of May 21, 1998, the Court declined to resolve by summary judgment the issue of whether the plaintiffs spent more than 20% of the total hours they worked each week performing “general household work” unrelated to the care of the individuals they served. Preferring to await a fully developed factual record, the Court appointed the undersigned as Special Master, pursuant

to 28 U.S.C. § 636(b)(2). The Court and the Special Master separately toured two of the group homes in which four of Home of Hope's developmentally disabled clients live. The Court toured the homes on April 24, 1998, and the Special Master toured the homes on August 28, 1998, before the "20% issue" was tried to the Special Master on September 28, 29, 30, October 13, 14, 19, 21, and 26, 1998.

Thirty-six of the original fifty plaintiffs were dismissed prior to the conclusion of the hearings before the Special Master. The remaining fourteen plaintiffs appeared at the evidentiary hearings: Martina Alexander, Tony Hooten, Dale Jean Terwilliger, Jody Terwilliger, Rachel George, Carver West, Mary Weins, Linda Hadley, Francis Kerns, Carol Smallwood, Carol Lacey, Dixie Sparks, Pat Turner, and Tambra Suter. In response, Home of Hope called its Program Manager/Director of Residential Homes Cindy Collins; its Lead Program Coordinator/Program Manager Rebecca Collins; Program Coordinator Judy Baker; former Program Coordinator Terry Wise; and former House Managers Robin Standley, Stacie Cloud, and Gene Jones. In addition, Home of Hope called as witnesses John Rowe, former supervisor with the State of Oklahoma Department of Human Services (the agency which oversees the Supported Living Program), and Cynthia Reynolds, Ph.D., a psychologist who evaluated some of the Home of Hope clients served by plaintiffs.

Plaintiffs each submitted their time cards as well as calculations, performed by Jo Rice, of the time each plaintiff claims as overtime for which he or she was not paid. Home of Hope submitted time cards, calendars, personnel files, discovery responses, and training information for each plaintiff. Home of Hope also submitted the Individual Habilitation Plan ("IHP") and other data regarding each client whom plaintiffs served. Finally, Home of Hope submitted a document indicating the square

footage for each group home in which plaintiffs worked, and the 1995-96 "Contract" that each plaintiff signed when he or she was employed by Home of Hope.

The parties submitted proposed findings of fact and conclusions of law after the evidentiary hearings, all of which the Special Master has carefully considered. Based upon the testimony and exhibits presented to the Special Master at the evidentiary hearings, the Special Master recommends that the Court adopt the following findings of fact and conclusions of law.

### **FINDINGS OF FACT**

#### **Stipulations and Admissions**

1. Home of Hope is a not-for-profit corporation whose mission is to serve developmentally disabled individuals.
2. Each plaintiff was an employee of Home of Hope during some period of time between July 1, 1994 and June 30, 1996.

#### **In General**

3. The applicable limitations periods are: Dale Jean Terwilliger, November 12, 1994 through June 30, 1996; Pat Turner and Linda Hadley, March 28, 1995 through June 30, 1996; all other plaintiffs, June 18, 1995 through June 30, 1996.
4. The plaintiffs in this action were employed in Home of Hope's Supported Living Program as either HTS or House Managers. HTS work in clients' homes to supervise clients' daily routines and activities, as outlined in the IHP for each client. The IHP is the plan of care for each individual client created by the client's treatment team, and includes goals and training objectives for that client. HTS provide specific training to clients based upon program plans involving skills in household chores and responsibilities such as cooking, cleaning, washing

clothes, and money management, **among others**. House Managers perform essentially the same functions as HTS, but have **added responsibility** in the area of paperwork and money management.

5. House Managers expected staff to **teach clients** to live in their own homes; most of the clients in the Supported Living program **came directly** from Hisson Memorial Center, a state institution for developmentally **disabled persons**.<sup>1</sup> Job descriptions for HTS and House Managers coincide with one of the **goals** of the Supported Living Program, which is to involve the clients in the **activities of the community** to the fullest extent possible, given the clients' needs and limitations. A **related goal** of Supported Living is normalization. Normalization means equipping **clients to reside** in an environment which approximates that of other people in the community.
6. Prior to beginning work in Home of Hope's Supported Living Program, each of the plaintiffs received extensive training **designed to meet** the needs of clients. Training for Supported Living staff emphasizes **integration of the client** into the community and teaching the client independent living skills. The **training received** by the staff in Supported Living did not include training in how to clean.
7. Client houses were not spotless, **nor were they** expected to be; they were expected to be clean enough that Home of Hope **employees would not be embarrassed**. In other words, Home of Hope employees were to use the **same standard** of cleanliness as in their own homes. Client houses were generally not any **dirtier than ordinary houses**. The sizes of Supported Living

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<sup>1</sup> Hisson was closed by court order **beginning** in 1987. See Homeward Bound, Inc. v. Hisson Memorial Center, Case No. 85-C-437-E 1987 WL 27104 (N.D. Okla. July 24, 1987).

Program clients' houses ranged from 938 square feet to 2,500 square feet, with most houses averaging approximately 1,100 square feet. Each client home was staffed by multiple employees of Home of Hope, and **all staff** members were responsible for keeping clean the homes in which they worked; no **plaintiff** did all the cleaning in any particular home.

8. Home of Hope's "chore lists" **posted in some clients'** homes were not lists of mandatory cleaning requirements. Home of **Hope** intended them to be used as prompts or reminders for HTS and House Managers to **check from** time to time. If an area was not dirty, it should not have been cleaned simply **because a task** was on the list. Houses were not inspected by the House Manager or Program Coordinator for cleanliness. However, House Managers or Program Coordinators would have **noticed** if clients' homes were not presentable when they visited the homes for other purposes relating to the client.
9. While Home of Hope expected **the clients'** homes to be clean, the goal for HTS and House Managers was to involve the **individual client** in doing household tasks to the extent that the client was capable. Staff members **were not** supposed to do tasks for clients that clients could do for themselves, albeit imperfectly or slowly. To the extent that the plaintiffs performed tasks for which clients were able, **such work** would have a deleterious effect on clients' functioning and would impede **the goal of normalization**. A sterile or spotless home would not achieve the goal of normalization; such an environment would resemble a hospital or institution -- a result contrary to **the intent** of the Supported Living Program. A spotless or sterile house is different and **segregated**. Thus, in the overall plan of the Supported Living Program, house cleaning was **significant to the extent** that it involved the clients' habilitation

or incidental teaching goals or was **necessary** for safety and sanitation. The expectation of Home of Hope management was that **each** client would clean his or her own house, if able; staff would not clean house for a **capable** client.

10. Similarly, the State of Oklahoma **Department of Human Services** ("DHS") wanted client houses to be safe and secure, and **the DHS** wanted providers to integrate clients into the community. The cleanliness of clients' private residences was not a high priority to the DHS unless it became an issue of **safety or sanitation**. The DHS did not expect the houses to be spotless or sterile. The expectation of **the DHS** was the same as the expectation of Home of Hope management: the client, not **staff**, would clean house if the client were capable.
11. Some Home of Hope clients were **incapable** of cleaning; these were considered "total care" clients. Those that had some **capability** were considered "higher-functioning," depending primarily upon their **adaptive ages**. A client's **adaptive age** is the age level at which a client is able to function. The **adaptive ages** of clients in Home of Hope's Supported Living Program with whom the plaintiffs worked ranged from 4.5 months to eleven years. In deriving the client's **adaptive age**, **an examiner** determines whether the individual can and does perform certain activities. **The adaptive age** is used to set goals and objectives, including incidental teaching for **clients** served by Home of Hope's Supported Living Program.
12. Home of Hope utilized the **companionship services** exemption from July 1, 1994 through June 30, 1996. During the **relevant time**, **each** of the plaintiffs was advised that the Home of Hope was not paying overtime wages. **Employees** were not required to work in excess of 40 hours

during the relevant time, but some **staff members** volunteered to work in excess of 40 hours. No plaintiff filed a grievance with **the State** or Federal Departments of Labor for overtime wages during the relevant time.

13. If the HTS were spending a **substantial** amount of time cleaning, Home of Hope expected staff to bring this to the attention of a **House Manager** or Program Coordinator. From July 1, 1994 through June 30, 1996, **none** of the plaintiffs reported to the Program Coordinators or House Managers that they spent in excess of 20% of their weekly hours worked engaged in house cleaning activities or **activities unrelated** to the care of the client. Home of Hope was not aware during the relevant time **that any** plaintiff was engaged in extraordinary cleaning activities, and Home of Hope was not aware during the relevant time of any plaintiff spending in excess of 20% of his or her weekly work hours on general household work.
14. Former House Manager Gene Jones testified that he spent no more than four hours per week on cleaning. Former House Manager Stacie Cloud testified that she spent at most two hours per week cleaning when she was an HTS.
15. No one created contemporaneous records establishing the amount of time spent by HTS or House Managers in general household work unrelated to the individual. Plaintiffs' answers to Interrogatory No. 25 represent the plaintiffs' attempts to estimate their time spent performing various tasks. The **categories** of activities contained in those answers were formulated by the plaintiffs' attorney and, in several instances, were completed in the attorney's handwriting. The **time estimates** contained in those answers are not specific to any one client, do not take into account the clients' varying needs and limitations, and were based on plaintiffs' memories some years after the events. The time estimates do not include

time spent training, filling out paperwork, sleeping, attending to clients' medical needs resulting from seizures, falls, tantrums or behaviors, or otherwise monitoring clients.

16. From July 1, 1994 through June 30, 1996, no staff member ever reported to a Program Coordinator or House Manager that he or she was not sleeping during a night shift, or that any staff member was cleaning all night. If a staff member was not sleeping and the house was not an "awake" house, Home of Hope expected this situation to be brought to the attention of a House Manager or Program Coordinator.
17. Since part of the job of the HTS is to encourage the client to participate in daily living skills, if a client chose not to participate in daily living skills on a consistent basis, the situation should have been brought to the attention of the treatment team by the HTS so that the client's goals could have been adjusted. If the client refused to participate in daily living skills on a consistent basis, the staff should have written this information in the client's daily activity log.
18. Objective, contemporaneous records such as IHPs and daily activity logs support the conclusion that the plaintiffs did not spend in excess of 20% of their weekly work hours engaged in activities unrelated to the care of clients in the Supported Living Program. Services performed by the plaintiffs on behalf of clients who could not perform such tasks independently constitute services related to the care of the client. The time spent by the plaintiffs in training clients on incidental teaching and habilitation goals and time spent training clients in daily living skills also constitute services related to the care of the client.

## Individual Plaintiffs<sup>2</sup>

### Martina Alexander

19. Plaintiff Martina Alexander began employment in Home of Hope's Supported Living Program on April 21, 1994. She was advised that Home of Hope was not paying the premium portion for overtime. Typically, Ms. Alexander had a 40 to 42 hour shift, from 3:00 p.m. on Friday afternoon until Sunday morning at 7:00 or 9:00 a.m.
20. Upon examination at the hearing, Ms. Alexander agreed that an HTS provides fellowship, care, and protection to persons who cannot care for their own needs due to physical or mental infirmity. An HTS does not administer injections of medications or decide which kinds of therapy or treatment a client will receive. She also agreed that the HTS job summary requires the HTS to provide specific training to individual clients involving skills in household chores and responsibilities such as cooking, cleaning, washing clothes, and money management, as outlined in the program plans.
21. Ms. Alexander testified that the duties and responsibilities of an HTS include implementing any training in the IHP, teaching, preparing meals, helping clients with meals and cleaning up after meals, bathing clients, and charting daily activities. She also testified that meal preparation, dishes, laundry, bed making, cleaning up spills, and picking up toys or personal items of the client constitute housework related to the care of the client, not "general household work."

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<sup>2</sup> Although Kassey Samples is included in plaintiff's Proposed Findings of Fact, the Special Master notes that Ms. Samples was dismissed from the litigation. (See Stipulation of Dismissal Without Prejudice, Docket # 103.)

22. From April 1994 until October 1995, Ms. Alexander worked in the home of Geno (Bert) Marlow and Roger Needham. Geno Marlow's physical limitations included mental retardation, seizure disorder, mild spastic quadriplegia, and reflux. He had limited verbal skills and needed consistent staff. During the relevant time, Geno Marlow's adaptive age was two years, ten months. His psychological assessment indicates that he was eager to help with tasks around the home, but was limited in his ability and required supervision. His incidental teaching goals included household chores, but he required physical and verbal assistance to accomplish most household chores. With regard to personal hygiene, Geno Marlow required hand-over-hand assistance.
23. Roger Needham's physical limitations included severe mental retardation, and he had difficulties with effective expressions. He required assistance with his self-care needs. He had limited verbal skills and did not like strangers. During the relevant time period, his adaptive age was four years, eleven months. The daily activity logs for the Marlow/Needham home indicate that the clients assisted in the household chores. They also went on several outings, during which time Ms. Alexander could not have been cleaning the house.
24. From October 1995 until August 1997, Ms. Alexander worked in the home of Tom Horn and Lonnie Birdtail. Lonnie Birdtail's physical limitations included seizure disorders and mental retardation. During the relevant time in 1995, his adaptive age was four years, seven months. His goals, as set forth in the IHP, were to independently complete basic home maintenance and independent living skills, and to independently pick up, sort and do his laundry. One of Lonnie Birdtail's incidental teaching skills was to clean and maintain his

home. His psychological evaluation indicates that frequent repetition and redirection to task were required to aid him in task focus.

25. Tom Horn's physical limitations included mental retardation, autism and seizures. During the relevant time, his adaptive age was seven years, two months. His IHP indicates that one of his needs related to functional daily living, and that his incidental teaching goals included meal preparation and household chores. In August 1995, he was becoming more independent with laundry and self-care skills, but still needed assistance with such tasks as laundry and cleaning his room. Although autistic, he was capable of doing work around the house, but it would take him a long time if he repeated a task, like washing the table, numerous times.
26. The Horn/Birdtail house was double-staffed during waking hours. Weekly calendars and daily activity logs of the Horn/Birdtail house indicate that the clients assisted in household chores. They also went on numerous outings and trips to Tulsa, during which time Ms. Alexander could not have been cleaning the house.
27. Ms. Alexander's estimate of her time performing general household work in answer to Interrogatory No. 25 does not include required duties such as paperwork, sleep time or training time.
28. In February 1995, Jeanette McCleary warned Ms. Alexander about Ms. Alexander's poor housekeeping skills. Ms. Alexander denied any other reprimands or warnings about her housecleaning skills, although documents indicate she was counseled regarding her lack of housekeeping. The evidence also showed that Ms. Alexander's supervisor deemed her lacking in housecleaning skills.

29. Ms. Alexander testified that deep cleaning duties were rotated among the four to five staff in each house in which she worked. If all of the four HTS staff in the Horn/Birdtail house in which Ms. Alexander worked during the relevant time spent in excess of 20% of their weekly hours worked performing general household work (or 10 hours, as claimed by the Ms. Alexander in her discovery responses), the staff would have spent 40 hours cleaning a house which had a maximum square footage of 1,250 feet. The Director of Residential Homes for Home of Hope's Supported Living Program, Cindy Collins, testified that it would not have taken each staff member 10 hours per week to maintain the Horn/Birdtail or Marlow/Needham residences.

**Tony Hooten**

30. Plaintiff Tony Hooten was employed in Home of Hope's Supported Living Program from May 28, 1995 through June 30, 1996. When he was hired, Mr. Hooten knew that Home of Hope was not paying the premium portion of overtime. No one discussed cleaning duties with him at that time. Mr. Hooten testified that housework related to the care of a client includes health care, keeping the toilet sanitary, and cleaning the dishes and food surfaces. He also testified that persons other than himself performed cleaning chores in the clients' houses where he worked.

31. During the time he worked in Supported Living, Mr. Hooten primarily worked in the home of Tim Bogle. During the relevant time period, Tim Bogle's adaptive age was eleven months. Staff members at the Bogle house required special training, and Tim Bogle needed consistent staff because he was non-verbal and required total care. Even his food had to be pureed. He crawled on the floor, so the mopping and dusting were related to his care.

Obviously, he could do no household work. His physical limitations included profound mental retardation, seizure disorder, spastic paraplegia, and other assorted health problems such as congestive heart failure, food aspiration, tremors and seizures. After he became medically fragile, his residence was double-staffed twenty-four hours per day.

32. Rebecca Collins was the Program Coordinator for the Bogle house during the relevant time period and was familiar with the activities of the house because Tim Bogle's medical condition required her to make frequent visits. She testified that, while there was some household work to be done, no HTS was supposed to be doing all the work by himself or herself. Those responsibilities were to be divided by the eight staff members who worked in the house. If staff members each spent 10 hours (or a total of 80 hours) cleaning Tim Bogle's 1,000 square foot home, Ms. Collins was not aware of it. In the Bogle house, most of the household work was related to the care of the client.
33. After he worked in Tim Bogle's home, Mr. Hooten worked in the residences of Matthew Ledbetter, Heath Elliott, Shawn Allison and Gary Pritchard. Matthew Ledbetter could perform some household work, including wiping the sink and vacuuming. Mr. Hooten testified that, other than Matthew Ledbetter, no other clients could perform housework.
34. During his tenure at Home of Hope, Mr. Hooten was reprimanded for failing to arrive at work on time. Mr. Hooten is not seeking overtime compensation for time he spent sleeping, or for time when his clients were in the hospital, in respite care, or were not in their homes.

It is not plausible that Mr. Hooten spent in excess of 20% of his weekly hours worked engaged in general household work unrelated to the care of the clients he served.

**Dale Jean Terwilliger**

35. Plaintiff Dale Jean Terwilliger was employed by the Home of Hope from February 24, 1992 through July 8, 1996. From February 15, 1994 through March 29, 1995, Ms. Terwilliger worked as an HTS; from March 30, 1995 through July 8, 1996, Ms. Terwilliger worked as a House Manager. As a House Manager, Ms. Terwilliger was required to undertake additional responsibilities such as paperwork, keeping track of clients' funds, and transporting clients to doctor appointments. Ms. Terwilliger is not seeking overtime compensation for time spent sleeping or for "task time."
36. Ms. Terwilliger worked at the home of Johnny Dobbins, Kenny Allen and Ronnie Potter (the "DAP" house) for approximately fourteen months. Ms. Terwilliger worked for Shawn Allison and Tim Bogle<sup>3</sup> when they lived together, and then for Shawn Allison when he moved to his own house. The last house in which she worked was the home of Norman Gehring. Ms. Terwilliger is not claiming overtime for time spent in the Bogle or Allison house. She is making a claim for overtime wages for time spent working in the DAP and Gehring houses.
37. The DAP house was double-staffed from 9:00 a.m. to 10:00 p.m.; there were three HTS and one House Manager. At the DAP house, the clients were capable of doing most of the chores Ms. Terwilliger characterized as "general household work."

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<sup>3</sup> However, Ms. Terwilliger testified that the male staff at the Bogle house were supposed to take care of the client and the female staff were to cook and clean.

38. During the relevant time period, Johnny Dobbins' adaptive age was seven years, four months. He could vacuum, dust, do laundry, load a dishwasher, and wash and dry dishes. He was independent in his self-care skills, could make his bed and fix simple meals.
39. During the relevant time period, Kenny Allen's adaptive age was five years, seven months. His self-assessment reflected that he could clean his room, do his laundry, put dishes in the dishwasher and take them out, and hang up his clothes. His Residential Provider Monthly Report indicates that he always participated in household activities.
40. During the relevant time period, Ronnie Potter functioned on the same level as Kenny Allen; however, Ronnie Potter had a seizure disorder.
41. Norman Gehring was also a higher-functioning client; he did his own laundry. Rebecca Collins testified that Norman Gehring's house was a typical "bachelor pad"; it was not spotless.
42. Rebecca Collins has seen Ms. Terwilliger's clients performing duties characterized by Ms. Terwilliger as "general household work." Kenny Allen and Ronnie Potter liked to mop. Ms. Collins has seen Ronnie Potter dust and sweep, and she has seen Kenny Allen dust. Ronnie Potter liked to vacuum. Further, Kenny Allen, Ronnie Potter, Johnny Dobbins and Norman Gehring have all been employed in jobs requiring housekeeping skills.
43. Ms. Terwilliger admitted that the clients in the DAP house and Norman Gehring could do laundry, sweep, vacuum, dust and take out the trash. But she stated that it was faster for her to do tasks without the clients, even if the clients were capable of performing these duties. While Ms. Terwilliger testified that Kenny Allen, Ronnie Potter, Johnny Dobbins and

Norman Gehring would not participate in household chores, the daily activity logs relating to these clients indicate otherwise.

44. Ms. Terwilliger testified that, if the client lost control of bladder or bowels, the cleanup could be the same as cleaning up a spill or making the client's bed, i.e., household work related to the individual.
45. Ms. Terwilliger did not understand that if she worked sixty hours, she would have had to spend twelve hours herself doing tasks unrelated to client care in order to qualify for the 20% exception. Ms. Terwilliger admitted that her answer to Interrogatory No. 25 accurately summarized the time she spent performing general household work. Ms. Terwilliger's answer to Interrogatory No. 25 does not reflect that she spent more than 20% of her weekly hours worked performing general household work.

**Rachel George**

46. Plaintiff Rachel George was employed by the Home of Hope from May 26, 1995 through September 30, 1996. At the time Ms. George began her employment, she was advised that Home of Hope was not paying the premium portion for overtime. Ms. George testified that she worked from 9:00 a.m. to 10:00 p.m. on weekdays and 8:00 a.m. to 10:00 p.m. on Sundays.
47. Before she started as an HTS, Ms. George participated in extensive training, including Foundations, Basic Health Management, Medication Administration, Effective Teaching Therapy and Advanced Meal Time Challenges. The emphasis of her training was on teaching and caring for the client.

48. During her employment with Home of Hope, Ms. George worked at the Guinto/Whomble house, the Cluck/Thompson house, the Moad/McMullin and Morris house, and the Conwell/Green house. She was an HTS at all of these houses, and a House Manager in the Conwell/Green house. Ms. George is asserting a claim for overtime pay only as to the Conwell/Green house; her household work in the other houses was either not in excess of 20% of her total work week or it was all for the clients' benefit. Even though Ms. George testified that the Conwell/Green home was "very large," it was, in fact, only 1,000 square feet; the Moad/McMullin and Morris home, in which Ms. George had previously worked, was substantially larger.
49. Cheryl Conwell was blind and non-verbal; she could not participate in general household work. At the relevant time, her adaptive age was one year, eleven months. She had significant behavioral issues that required immediate staff attention: she was self-injurious, engaged in screaming, dropping to the ground and dragging herself, and stripping off her clothes or becoming physically aggressive. Some of these behaviors would last up to two hours. Ms. George testified that Cheryl Conwell could do no work for herself; therefore, work performed in Cheryl Conwell's house related to her health and safety.
50. Melva Green was verbal, but mentally retarded. During the relevant time, her adaptive age was three years, ten months. While Ms. George testified that Melva Green would not participate in the general household work, the daily activity logs relating to Melva Green indicate otherwise. Melva Green was employed by the training center at Claremore where she vacuumed, cleaned bathrooms, wiped off tables, swept, mopped, and cleaned the windows. While she was at work, there was only one staff member on duty in her home.

Melva Green's Long Term Care Assessment indicates that she maintained cleanliness and order. Her Residential Assessment recites that she "does home maintenance with very little prompting." Her vocational profile states "I like to clean." Her IHP indicates that "she has personal household duties that she completes independently"; "she has improved the quality of her cleaning skills in the home"; and "she likes to keep her room neat."

51. One of the essential job functions contained in the House Manager's job description signed by Ms. George is "assuring that individuals have the opportunity to participate in the community." While Ms. George testified that Home of Hope would expect her to perform essential job duties, she also stated that she delegated some of her House Manager duties, such as paperwork, to HTS staff. Home of Hope did not approve of House Managers delegating essential functions to HTS staff.
52. Ms. George's claim as to the amount of time she spent doing tasks unrelated to the care of the clients is not plausible because one client required total care (Cheryl Conwell), and the other was capable of performing general household work (Melva Green). Ms. George shared equal responsibility with other staff members for keeping the home clean; if all of them cleaned as Ms. George claims she cleaned, the result would have been 45.9 total housework hours in a 1,000 square foot house. This is inconsistent with caring for total care clients.

**Jody Terwilliger**

53. Plaintiff Jody Terwilliger was employed by the Home of Hope as an HTS in the Supported Living Program from August 4, 1995 through August 11, 1997. Ms. Terwilliger is not making any claim for overtime compensation for the time she spent training.

54. While Ms. Terwilliger worked in Home of Hope's Supported Living Program she was a "floater": she was not assigned to any specific house. However, her claim for overtime pay is apparently based on the time she spent in the home of Bobby Hartley and Paula Cupp.
55. During the relevant time, Bobby Hartley's adaptive age was eight years, three months. He worked at Vinita Flag and Apron, and, at the time of the hearing, he worked for the Home of Hope cleaning crew doing janitorial work at Home of Hope. Rebecca Collins has seen him clean her office (mopping the floor, cleaning the toilet, vacuuming, dusting, cleaning bathrooms, wiping baseboards and doors) as a part of his duties with the cleaning crew.
56. During the relevant time, Paula Cupp had an adaptive age of eleven years. She worked at Wendy's where she wiped tables; at the time of the hearing, she was also employed by the Home of Hope cleaning crew. Obviously, Bobby Hartley and Paula Cupp were higher-functioning clients who could have performed cleaning tasks in their own home.
57. Ms. Terwilliger denied ever having been disciplined for not properly cleaning; however, the documents contained in her personnel file establish otherwise. In fact, she was verbally counseled for not participating in household activities such as cleaning. Ms. Terwilliger was also reprimanded by DHS Case Manager Charlotte Cooper for watching television instead of caring for Tim Bogle, who was medically fragile.
58. Ms. Terwilliger failed to offer any testimony regarding the time in which she spent engaged in various tasks she considers to be "general household work." Further, Ms. Terwilliger's estimate of general household work, as reflected in answer to Interrogatory No. 25, fails to demonstrate that she spent more than 20% of her weekly hours worked performing general household work.

### Carver West

59. Plaintiff Carver West was employed in the Home of Hope's Supported Living Program as an HTS from 1991 until February 1995, and from September 1995 until March 1997. When Mr. West returned to Home of Hope in September 1995, he knew that he would not be receiving overtime.
60. Mr. West considered direct time with the client to be companion service. West understood that tasks performed for the benefit of the client such as bed making, washing clothes and cleaning spills do not count as general household work.
61. The only residence at which Mr. West worked during the relevant time was the Tim Bogle residence. The square footage of Tim Bogle's house was 1,197 square feet. Mr. West frequently stayed at the Bogle home for twenty-four hours straight. When he was asleep, Mr. West was obviously not cleaning the client's residence.
62. During the relevant time period, Tim Bogle's adaptive age was eleven months. His behaviors included physical aggression, seeking attention and impulsivity. He also had eating and sleeping disturbance and a poor attention span, and he required the administration of breathing treatments. A psychological assessment performed by Dr. Cynthia Reynolds for Tim Bogle describes his many physical problems and behaviors. Tim Bogle could do nothing for himself.
63. Consequently, Tim Bogle was not able to assist or perform any household cleaning. His self-assessment indicates that he could not sweep, mop, wash dishes, make beds, do laundry or prepare his own meals. Mr. West agreed that making the bed was for Tim Bogle's benefit; washing the dishes was for Tim Bogle's benefit because he ate from the dishes; mopping,

vacuuming and sweeping the floor were for Tim Bogle's benefit because he crawled around on the floor and put things in his mouth; laundry and meal preparation were tasks for the benefit of Tim Bogle; and dusting was related to Tim Bogle's care and safety because he had allergies.

64. Tim Bogle's Residential Assessment indicates that he needed total assistance with dressing, undressing, toileting, bathing, shampooing and hair combing, tooth brushing, and food preparation. Due to his health, he needed total assistance with home maintenance such as vacuuming, dusting, sweeping, washing dishes and making his bed. The Residential Provider Monthly Report for Tim Bogle, dated June 5, 1996, indicates that he could not work toward any goals. During the relevant period of time, Tim Bogle was incontinent; therefore, it would not have been necessary for Mr. West to clean Tim Bogle's toilet daily or weekly. For the same reason, it is reasonable to assume that it would have taken more than the one hour indicated by Mr. West to do laundry for Tim Bogle.
65. From June 1995 through June 1996, Tim Bogle's health was deteriorating. He had daily seizures and tremors, congestive heart failure, and he was confined to a wheelchair. He was also on a diet of applesauce consistency due to his aspiration problems. Medication administration was important in Tim Bogle's life due to the many medications he was taking. Mr. West received verbal counseling for failure to follow the medical protocol. The evidence establishes that Mr. West was also reprimanded in March 1996 because he failed to chart, he left all the lights on in the house, and the house was dirty. Mr. West could not recall being reprimanded.

66. Due to Tim Bogle's poor health, it is implausible that each of the eight persons who worked in his home spent ten hours per week performing tasks unrelated to him. Further, the evidence showed that staff members were authorized to watch cable television in the Bogle home during their down time. Other plaintiffs who worked in the Bogle house from September 1995 included Tony Hooten, Jody Terwilliger, Dixie Sparks, and Dale Jean Terwilliger. Mr. West did not agree with the testimony of Dale Jean Terwilliger that the men took care of Tim Bogle and the women did all the housework.
67. From June 1995 through June 1996, Rebecca Collins was the Lead Program Coordinator/Program Manager for the Supported Living Program at Home of Hope; part of her duties entailed supervision of the Bogle house. Ms. Collins visited the Bogle home weekly and sometimes daily. The purpose of her visit to the home was usually related to Tim Bogle's health, not to inspect for cleanliness. Ms. Collins did not expect Tim Bogle's house to be spotless, because he required too much personal care.
68. During a seventy-five hour work week, Mr. West would have had to spend in excess of fifteen hours himself doing tasks unrelated to Tim Bogle's care in order to be entitled to overtime pay. During the week of February 4, 1996 through February 10, 1996, Tim Bogle was in the hospital; thus, Mr. West's claim that he spent fifteen of this 75 hours cleaning the Bogle house is not credible. During the June 1995 to June 1996 time period, Tim Bogle was hospitalized or in respite care for a total of ninety days. When Tim Bogle was in the hospital for extended periods of time, Mr. West admitted that he was not cleaning the client's residence.

Mary Weins

69. Plaintiff Mary Weins was employed in Home of Hope's Supported Living Program from December 15, 1995 through December 30, 1996 as an HTS. At the time she began working for Home of Hope, she was aware that she would not be paid time-and-a-half for hours worked in excess of forty. She is not making a claim for overtime pay for any week in which she worked less than 40 hours, and she is not making a claim for overtime pay for time while she was in training.
70. Her training was tailored to the needs of individual clients and homes, and it was designed to help her better serve the needs of her clients. None of her training focused on cleaning or housework. The time she spent training was time she could not have spent cleaning the house; therefore, if she did not work over 40 hours providing care to the client, that week would not qualify for the 20% exception. Ms. Weins testified that training and charting, among other tasks she performed, were not contained in the estimated time categories of her answer to Interrogatory No. 25.
71. Ms. Weins claims to have spent ten hours of a 40-hour work week performing general household cleaning, twice as much time as she listed for any other activity (the same estimates apply to each house). However, on her performance evaluation for the relevant time, "house cleaning" is not listed among the four major tasks required by Home of Hope for her job as HTS. She knew that the job description for an HTS focuses on training the individual client to live independently. It does not mention household chores to be performed by the HTS, nor does it specify that the HTS will provide a maid service for the

client. She understood that it was her duty to help the individual clients learn independent living skills, and that part of her job as an HTS was to encourage clients to maintain their homes. Home of Hope requires that HTS workers know how to clean a house so they can teach this skill to clients.

72. Ms. Weins spent the majority of her time in Supported Living working in the homes of Joey Guinto, Joel Whomble, Cheryl Conwell, and Melva Green.
73. Ms. Weins did not commence work at the Guinto/Whomble house until the week of January 21, 1996. Her shift at the Guinto/Whomble house was 3:00 p.m. to 9:00 a.m., a shift of approximately seventeen hours. She worked Monday through Friday. Ms. Weins believed that every staff member at the Guinto/Whomble house was cleaning ten hours in a 40-hour work week. Both clients in the Guinto/Whomble house were employed. When the clients were not at the house during the day, the staff was not at the house.
74. Joey Guinto could vacuum, dust, take out the trash and fold his clothes; he had no physical limitations. Program Coordinator Judy Baker saw Joey Guinto sweep, carry out trash, clean, wipe and set the table, and put dishes in the sink. She testified that he was always eager to please when he was asked to help. Most of the time, Joey Guinto would do what staff members asked him to do.
75. Joel Whomble could vacuum and dust, sweep, wash windows, and fold his laundry. He worked at the Claremore Hospital in the laundry. He was capable of doing many different tasks, if asked. The incidental teaching on his documentation indicates that the staff were

supposed to be training him to vacuum, sweep, wash and cook meals. He participated in these activities and, in fact, Ms. Baker witnessed him assisting with meals.

76. An HTS would not have had an opportunity to spend greater than 20% of his or her time cleaning in the Guinto/Whomble house due to the activity level of the clients who lived there. Further, Joey Guinto and Joel Whomble were willing and helpful in taking care of household chores. Ms. Weins admitted that because the clients at the Guinto/Whomble house would help, she could not have spent in excess of 20% of her weekly work hours performing general household work. Ms. Baker testified that it was not reasonable for Ms. Weins to estimate that she spent three hours in a 40-hour work week teaching living skills; teaching occurred on a constant basis with clients such as Joey Guinto and Joel Whomble.
77. Ms. Weins' shift at the Conwell/Green house was 3:00 p.m. to 9:00 a.m.; she worked the shift after Rachel George's shift. Another staff member was present at the house with Ms. Weins because Home of Hope required double-staffing in the Conwell/Green house.
78. Cheryl Conwell was blind and unable to participate in necessary home cleaning.
79. Melva Green was capable of cleaning; she made her bed, cleaned her room, dusted and laundered her clothes. Her IHP indicates that she also liked to clean; this would be consistent with Ms. Baker's experience in the Conwell/Green home. Further, Melva Green cleaned in the vocational center in Claremore by vacuuming, mopping, wiping tables and cleaning bathrooms. Ms. Baker has witnessed Melva Green sweep and mop, wipe tables, serve coffee, and dust.

80. Ms. Baker acknowledged that it is difficult to identify whether certain household tasks were done specifically for one client or the other. If one client requires total care, then the tasks performed for that client are not general household work, but related to the care of that client. Ms. Weins testified that she performed basically the same general household work in each of the houses; she did not tailor the chore list to the specific client served. Further, she said that she cleaned even if the room, area or object she cleaned was not dirty or did not need to be cleaned.
81. Ms. Weins' Program Coordinator for both houses was Judy Baker. As a Program Coordinator for the Supported Living Program, Judy Baker oversaw the care of the client, participated in the formulation of the client's IHP, and made sure the home was properly staffed. If Ms. Baker went to a client's home and it was presentable, she was satisfied with the staff's cleaning. A house would not be presentable if it had odors, if there were clothes lying around, or if the trash needed to be taken out. Ms. Baker tried to visit each home once or twice a week; sometimes she would visit more frequently. She inspected houses for cleanliness if staff members complained. As the Program Coordinator responsible for hiring staff, Ms. Baker explained in hiring interviews that the staff would not be paid overtime. Staff members were not required work overtime; it was optional.
82. If staff members felt that they were doing an inordinate amount of house cleaning, a procedure existed to report these complaints. Ms. Weins did not discuss with her House Manager or Program Coordinator the amount of time she spent cleaning. Ms. Weins never complained to Judy Baker about having to do an inordinate amount of cleaning unrelated to

the care of the client. In fact, she does not recall what conversations, if any, she had with Judy Baker about cleaning duties and responsibilities in the homes.

83. Ms. Baker testified that two hours per week for transportation, as Ms. Weins estimated, would not be a reasonable estimate; transporting clients back and forth to work, shopping, and activities required much more than two hours. Further, she did not believe that any HTS could spend more than 20% of his or her time doing household chores unrelated to the care of the client in either the Guinto/Whomble or Conwell/Green homes. Ms. Weins understood that vacuuming the floor, if the clients spent time sitting or laying on the floor, is a household task "related to the individual" similar to making a client's bed. She admitted that she performed no household work or service unrelated to the care of the individuals whom she served.

**Linda Hadley**

84. Plaintiff Linda Hadley was employed in Home of Hope's Supported Living Program from 1988 to March 1996, and again from August 1996 through the present.
85. In March 1995, plaintiff worked in the home of Betsy Gibson, Regina Reed and Roberta Taylor. At the Gibson/Reed/Taylor home, Ms. Hadley did the deep-cleaning and the cooking; the clients could and did participate in housework that pertained to their care. Four to five staff people worked at the home, and Ms. Hadley generally worked twenty-four hours at a time.
86. During the relevant time period, Betsy Gibson's adaptive age was seven years, eight months. She could independently clean and make her bed. She has been employed in a variety of

jobs, such as housekeeper and dishwasher, which required general house cleaning skills. Her biographical sketch indicates that she "shows initiative regarding house cleaning."

87. During the relevant time period, Regina Reed's adaptive age was seven years, eight months. One of her incidental training needs was to improve her home maintenance skills. One of her habilitation goals was to be independent in domestic household duties. She performed general household work in connection with her employment at Thomas Restaurant at Shangri-La Resort and Care Nursing Center.
88. During the relevant time period, Roberta Taylor's adaptive age was five years, seven months. In her psychological assessment, she was reported to be "neat," demonstrating good domestic skills including laundry and housekeeping. She was employed by Shangri-La where she washed and put away dishes, did general cleaning and took out the trash. She also worked at Pizza Hut. Her self-assessment during the relevant time establishes that she could vacuum, sweep, mop, wash dishes, make beds and prepare meals independently; she could do laundry with some assistance. Other documents in her IHP indicate that she enjoyed cooking and laundry. Ms. Hadley signed this document, and there is no accompanying statement of disagreement.
89. From August 1995 until March 1996, Ms. Hadley was the House Manager for Carol Frazier. Three employees worked at the Frazier home. As House Manager, Ms. Hadley had additional job duties, including paperwork. There is no listing for paperwork in her time estimate in answer to Interrogatory No. 25, although this activity occupied some of her time.
90. During the relevant time period, Carol Frazier's adaptive age was one year, two months. She could participate in general household cleaning only with hand-over-hand assistance.

Her behaviors included aggressive screaming and physical aggression, including self-injurious behaviors (rocking, striking her head against the wall) and aggressive acts toward others (striking, slapping resulting in mild abrasions, choking, scratching, and hair pulling resulting in hair loss by others). Consistency in staffing was important for clients such as Carol Frazier who became agitated when new people were in the house. Three employees worked at the Frazier home.

91. In January 1996, Ms. Hadley also started working in the Marsh/Robinson home. Five staff members worked at the Marsh/Robinson house. Blaine Marsh and Sherry Robinson did most of the cleaning in their home themselves.
92. Blaine Marsh washed dishes, dusted and vacuumed. During the relevant time period, his adaptive age was five years, eleven months. He was employed by Shangri-La Resort, where he washed and put away dishes, sorted silverware and did general cleaning such as sweeping, mopping and taking out the trash.
93. During the relevant time, Sherry Robinson's adaptive age was five years. Ms. Hadley testified that Sherry Robinson refused to participate in household work. However, daily activity logs and other contemporaneous documents regarding Sherry Robinson establish that she did assist in general household work. Entries in those documents show that she cleaned house; made her bed; helped staff dust the furniture; did laundry; helped staff clean both bathrooms; helped prepare her lunch; set the table for supper; washed, rinsed and otherwise "helped with" dishes; swept the kitchen, wiped off the kitchen table, and otherwise "helped staff clean the kitchen." Sherry Robinson's staff noted that "she is very helpful in the kitchen and only needs verbal prompts sorting the laundry." Her July 1995 performance

review indicated that she washed dishes, cleaned floors and took out the trash. If she had refused to perform household work, it is reasonable to assume that the HTS would have documented her refusal in the daily activity logs. Further, she was employed at Shangri-La during the relevant time period, where her duties included unloading dishes, putting away dishes and general cleaning.

94. Ms. Hadley claimed that she deep-cleaned everything in the clients' home once per month, but she agreed that it is very important for clients to be given the opportunity to do tasks for themselves, if the clients were capable. Her performance evaluation indicates criticism of her for doing too much for the client. Notably, the performance evaluation lists four major job tasks required by Home of Hope, none of which includes cleaning. One of Ms. Hadley's performance evaluations indicated that she was always willing to work overtime. However, Ms. Hadley was not required to work overtime during the relevant time period.
95. Cindy Collins testified that the individual clients in the Supported Living Program were trained for many years to perform household tasks, and it would not have taken 20% of every work week to clean the houses at which Ms. Hadley worked. When Ms. Hadley estimated her time she did not take into account the individual needs of her clients. Her answer to Interrogatory No. 25 fails to demonstrate that she spent in excess of 20% of the weekly hours she worked performing general household work.

**Francis Darlene Kerns**

96. Plaintiff Francis Darlene Kerns was employed as an HTS in Home of Hope's Supported Living Program from October 1994 through July 1996 and from April 1997 through August 1997. Her responsibilities as an HTS included charting, giving medications, housekeeping

and assisting in the implementation of goals contained in the clients' IHPs. She testified that Home of Hope could rely on her to utilize her training and apply this training to the client. She also testified that Home of Hope would have discussed the cleaning list with staff if management discovered that one person was doing too much of the cleaning.

97. At the time Home of Hope started using the companionship exemption, Ms. Kerns was advised that she would not receive time-and-a-half for hours worked in excess of forty. Program Coordinator Judy Baker testified that Ms. Kerns worked overtime hours on a voluntary basis during the relevant time period, although Ms. Kerns claimed that she was coerced into working overtime. Ms. Kerns' performance evaluations also indicate that she volunteered for extra work.
98. In June 1995, she worked in the home of Roberta Cluck and Donna Thompson in Claremore. Subsequently, she was transferred to the Conwell/Green home. At the Cluck/Thompson house, Ms. Kerns worked four days on, four days off, in twelve hour shifts from 6:00 p.m. to 6:00 a.m. She testified that, because she could not sleep in the Cluck/Thompson house, she performed cleaning duties during the early morning hours of her shift. At the Conwell/Green home, she had no set schedule. Ms. Kerns did not differentiate between her time estimates applicable to the Cluck/Thompson house and those applicable to the Conwell/Green house.
99. During the relevant time period, the adaptive age of Roberta Cluck was 4.5 months. Ms. Kerns described Roberta Cluck as a total care client. Roberta Cluck was non-verbal and bedfast. Her psychological evaluation establishes that she had limited adaptive skills, and she communicated by smiling or turning her eyes toward an object. She did not understand

the concept of "yes" or "no." During the relevant time period, Donna Thompson's adaptive age was five months. Her limitations were essentially the same as those of Roberta Cluck.

100. Ms. Kerns' estimate of her overtime hours is incorrect in several aspects as it relates to the Cluck/Thompson house. Because Donna Thompson and Roberta Cluck did not have the capacity to learn living skills, Ms. Kerns could not have engaged in five hours per week of teaching living skills to them. Since the clients rarely left their residence, it is improbable that Ms. Kerns engaged in three hours per week of outside activities. For the same reason, it is improbable that Ms. Kerns engaged in three hours per week of transportation for the clients. The house in which Donna Thompson and Roberta Cluck resided was 991 square feet. It is implausible that Ms. Kerns spent ten hours in a 40-hour work week on general house cleaning, given the size of the Cluck/Thompson home and the many needs of the clients who lived there.

**Carol Smallwood**

101. Plaintiff Carol Smallwood was employed as an HTS and a House Manager in Home of Hope's Supported Living Program from September 1994 through May 1995 and again from August 1995 through March 1997. Ms. Smallwood makes no claim for overtime compensation between June 18, 1995 and August 1995; likewise, she makes no claim for the time period of December 31, 1995 through February 10, 1996. During the brief time that she was a House Manager, she had additional duties and responsibilities, especially with paperwork. Ms. Smallwood's performance evaluation for November 1995 contains a listing of four major job tasks required by Home of Hope, none of which is cleaning.

102. Ms. Smallwood worked in the Conwell/Green home from September 1, 1995 through October 21, 1995. Cheryl Conwell was a total care client; Melva Green performed some household cleaning. In October 1995, she began working in the home of Shawn Allison. Shawn Allison was a total care client who could do no general household work for himself.
103. She worked in the home of Tracy Goforth and Johnny Dobbins from January 1996 through June 30, 1996. At the Goforth/Dobbins house, Ms. Smallwood was an HTS. Terry Wise was the Program Coordinator for the Goforth/Dobbins house at the time Ms. Smallwood worked at the residence. When Mr. Wise came to the Goforth/Dobbins house, Ms. Smallwood was often at the residence. Mr. Wise did not witness Ms. Smallwood engaged in any cleaning.
104. During the relevant time, Tracy Goforth's adaptive age was one year, eight months. He could walk and feed himself, but he had seizures and wore briefs. He needed assistance in dressing and undressing himself. One of his habilitation goals was house cleaning, although he required assistance with all home maintenance tasks. Ms. Smallwood signed his IHP. During the relevant time period, Johnny Dobbins' adaptive age was seven years, four months, and he could perform some household work.
105. Ms. Smallwood does not make a claim for entitlement to overtime compensation for time she spent sleeping or doing paperwork. Ms. Smallwood's answer to Interrogatory No. 25 lists several categories of tasks; missing from this list are sleeping and paperwork. Ms. Smallwood testified that her estimates in answer to Interrogatory No. 25 apply equally to clients, regardless of the needs of the individual clients. She also testified that her estimates applied to the Goforth/Dobbins house, and were not accurate as to other clients. Since Tracy

Goforth and Shawn Allison both required considerable assistance with personal hygiene, Ms. Smallwood's estimate of two hours per week spent assisting the clients with personal hygiene appears to be too low. The evidence otherwise failed to demonstrate that she spent in excess of 20% of the weekly hours she worked performing general household work.

**Carolyn Lacey**

106. Plaintiff Carolyn Lacey began employment in Home of Hope's Supported Living Program on September 19, 1994. During the relevant time, Ms. Lacey was an HTS. She agreed that the tasks contained in the HTS job description focused on care of the client to enable the client to live independently. Ms. Lacey's performance evaluations for 1995 and 1996 do not list housecleaning as one of the four major job tasks required by Home of Hope.
107. From June 10, 1995 through October 1995, Ms. Lacey worked in the residence of Roberta Cluck and Donna Thompson, both of whom were total care clients.
108. From October 1995 through May 1996, Ms. Lacey worked in the home of Gary Pritchard and Melvin Smith. During the relevant time period, Gary Pritchard's adaptive age was approximately two years. He was mostly non-verbal and required assistance with all daily living skills. One of the Home of Hope goals for him was to reduce the bad behaviors he exhibited when he was in a crowd. He was employed in jobs requiring janitorial and maintenance skills, including sweeping.
109. During the relevant time period, the adaptive age of Melvin Smith was approximately two years. He was profoundly mentally retarded, and also suffered from a physical handicap. However, his abilities improved as a result of staff working with him.

110. From May 1996 through June 1996, Ms. Lacey worked in the home of Allen Moad and Joel McMullin. During the relevant time period, the adaptive age of Allen Moad was one year, eight months. He was profoundly mentally retarded and non-verbal. He had involuntary muscle movement due to the psychotropic medication he took. However, Program Coordinator Judy Baker observed Allen Moad dust, take clothes to the laundry, and take plates to the sink. Further, his employment required him to perform janitorial functions. There is no reason Allen Moad could not do household tasks at home.
111. During the relevant time period, the adaptive age of Joel McMullin was one year, four months. He was also profoundly mentally retarded, and he had limited communication skills. Nonetheless, he had several jobs which involved housekeeping and janitorial skills.
112. Since the clients in the Moad/McMullin house were active and liked to do things, there would not have been enough time to spend 20% of it performing house cleaning or other tasks unrelated to the clients' care.
113. Ms. Lacey claims that her clients refused to engage in required household cleaning activities; yet, she never used the procedural mechanisms in place to bring this to the attention of Home of Hope management, nor did she ever speak to the House Manager or Program Coordinator about this situation.
114. Judy Baker was the Program Coordinator for the Moad/McMullin house and the Pritchard/Smith house during the relevant time. During the relevant period, Ms. Baker saw some improvement in the skills of Gary Pritchard and Melvin Smith, but less improvement in the skills of Allen Moad and Joel McMullin. She testified that teaching daily living skills should have been an ongoing task which was incorporated into all other household tasks.

She also testified that there is no reason to believe that clients could not perform household functions at home if those clients could perform the same functions at their jobs. She stated that client participation in household work sometimes requires prompting, but that is the reason Home of Hope hires an HTS.

115. As the Program Coordinator for the houses in which Ms. Lacey worked, Ms. Baker believes that staff members could not have spent more than 20% of their time doing household work unrelated to the care of the client.
116. Ms. Lacey admitted that she volunteered for extra hours during the relevant time period so that she could make more money. Her answer to Interrogatory No. 25 (the estimate of her overtime hours for which she is claiming monetary relief) establishes that she did not spend in excess of 20% of her weekly hours worked performing general household work.

#### **Dixie Sparks**

117. Plaintiff Dixie Sparks was employed in Home of Hope's Supported Living Program from March 1995 through March 1998. During the relevant time, Ms. Sparks worked in the home of Shawn Allison. In January 1996, she became the House Manager of the Allison house until September 1996, when she was demoted from the House Manager position for failing to report an allegation of abuse and neglect by another staff member.
118. Ms. Sparks signed Shawn Allison's IHP, dated November 29, 1995. The IHP establishes that he could provide limited assistance in the area of household work due to his mental and physical disabilities. He was extremely hyperactive and required one-on-one staffing. He could perform household duties only with hand-over-hand assistance, but not for long

periods of time. During the relevant period of time, Shawn Allison could do very little for himself, and he was totally dependent on the staff for all daily living skills.

119. At the time Ms. Sparks worked in the Allison house, plaintiffs Dale Jean Terwilliger and Tony Hooten also worked there, and Rebecca Collins was the Program Coordinator. Due to Shawn Allison's hyperactivity and many needs, and due to the number of staff in the house, it is implausible that each staff member spent ten hours of every 40-hour work week engaged in activities unrelated to his care. Most, if not all, of the work performed by Ms. Sparks in Shawn Allison's house was for the benefit of the client.

#### **Pat Turner**

120. Plaintiff Pat Turner was employed in Home of Hope's Supported Living Program from May 14, 1992 to her termination on February 28, 1997.
121. During the relevant time period, Ms. Turner primarily worked in the home of Paula Cupp and Bobby Hartley, and in the home of Teresa McMahon. Paula Cupp, Bobby Hartley and Teresa McMahon were all "higher-functioning" clients and were very capable of doing household duties for themselves.
122. During the relevant time period, Paula Cupp's adaptive age was eleven years. One of her goals was to balance her own checkbook. She was considered a self-starter who was observed by DHS personnel performing household duties. She could vacuum, clean her bedroom, empty her trash, dust, and mop the floor.
123. During the relevant time period, Bobby Hartley's adaptive age was eight years, three months. He had many of the same goals as Paula Cupp. The Social Service Summary

prepared by the DHS indicates that he "has the skills to independently complete all household duties."

124. During the relevant time period, Teresa McMahon's adaptive age was nine years, three months. Her goals were check writing, meal preparation and employment. Her Residential Assessments for the relevant time period demonstrate that she could independently clean her house. In addition, she was employed by Shangri-La Resort for two seasons, where her job tasks included loading dishes, putting away dishes, washing pots and pans, sweeping, mopping, taking out trash and general cleaning. Program Coordinator Rebecca Collins also witnessed Teresa McMahon mopping floors and doing general cleaning in connection with Teresa McMahon's job in Home of Hope's snack bar.
125. Several aspects of Ms. Turner's testimony were infirm. For example, Ms. Turner testified that gravel on a road near a home in which she worked created more dust in the home than most homes, but she failed to report this to anyone at Home of Hope. While Ms. Turner claims that cleaning was a major job function, cleaning is not listed as one of the four major job tasks required by Home of Hope in the performance evaluation she signed on May 14, 1996. Ms. Turner agreed that her job required her to help the clients learn living skills; nevertheless, she remade the clients' beds after they attempted to do so. Ms. Collins testified that it would not have been proper for Ms. Turner to remake clients' beds, as this engenders low self-esteem and teaches clients that there is no reason to attempt to do things for themselves.
126. Ms. Turner also testified that she could not sleep at night in the clients' homes because she was worried about the possibility of fire; thus, she cleaned to pass the time. Ms. Collins was

not aware of any employee who had ever stayed awake all night to clean a client's house. Ms. Collins testified that it would not have been necessary for Ms. Turner to stay up all night to protect the clients in case of a fire, as all houses in the Supported Living Program were equipped with smoke detectors. Further, Ms. Turner's testimony that she cleaned the fireplace once a week is not credible because, according to Rebecca Collins, fireplaces in the clients' homes were never used.

127. The documents contained in Ms. Turner's personnel file establish that she was terminated by Home of Hope after an employee of the bingo hall in Grove, Oklahoma reported that Ms. Turner took the clients with her to play bingo and did not leave the bingo hall until 3:00 a.m. Both Bobby Hartley and Paula Cupp wanted to leave earlier because they were tired, and they were required to be at work by 7:00 a.m. the next day.
128. Ms. Turner agreed that certain tasks she performed, such as sleeping, paperwork, and charting, are not reflected in her answer to Interrogatory No. 25. She also testified that her answer to Interrogatory No. 25 does not represent any one week. During the time period for which she seeks overtime, Ms. Turner vacationed with the clients; they took a trip to St. Louis for three days, a camping trip, and a trip to the Special Olympics. She could not have been cleaning while away on trips.
129. Due to the activity level in the houses where Ms. Turner worked and the abilities of the clients in those homes, it is implausible that Ms. Turner spent in excess of 20% of her work week doing general household work unrelated to the clients.

**Tambra Suter**

130. Plaintiff Tambra Suter was employed as an HTS in Home of Hope's Supported Living Program from October 1995 through January 20, 1997. She is not claiming entitlement to overtime for the time she spent training. Ms. Suter finished her training on November 16, 1995 and began working in the home of Donald Morris and Corky Johnson. The Johnson/Morris house is 1,068 square feet.
131. During the relevant time period, Corky Johnson's adaptive age was approximately five years, five months. He was confined to a wheelchair. He had no use of one hand and limited use of the other hand. He was employed for a time at a hospital. During the relevant time period, Donald Morris' adaptive age was five years, five months. He had poor eyesight.
132. During the relevant time period, Judy Baker was the Program Coordinator for the Johnson/Morris house. She testified that Donald Morris and Corky Johnson were active clients. The clients went to appointments with doctors, took frequent rides, and attended Home of Hope dances and other activities. These activities required client transportation. This evidence does not support the testimony of Ms. Suter that she spent only one hour per week on client transportation.
133. Ms. Suter worked in the Morris/Johnson house until she quit in January 1997. Ms. Suter claims that her House Manager, Robin Standley, instructed her to keep the house "spotless." She worked from 3:00 p.m. to 9:00 a.m. during the week and from 3:00 p.m. Friday to 9:00 p.m. Saturday; she also worked from 9:00 a.m. to 9:00 p.m. Sunday.

134. Ms. Suter testified that she did not sleep during her overnight shift, so that none of her total weekly hours were spent sleeping. However, House Manager Robin Standley testified that she observed Ms. Suter carrying a blanket and pillow when she came into the house to work her shift. If staff members were not sleeping in the house as Home of Hope management expected, they should have made Home of Hope management aware of the situation. It is not reasonable to believe that Ms. Suter did not sleep during her overnight shift. Nor would it be reasonable for Ms. Suter to spend ten hours of forty (more than 20% of her total weekly hours) doing general household work unrelated to the care of the clients she served.

### **Summary Findings**

135. At the evidentiary hearings in this matter, each plaintiff testified in detail as to the amount of time he or she spent on each household cleaning task (allegedly unrelated to the individual) daily or per shift, weekly and monthly. Plaintiffs testified room-by-room as to the specific tasks they performed, although not every plaintiff testified that he or she performed the same tasks that other plaintiffs performed. The Special Master found that much of this testimony lacked credibility. It is unreasonable to assume, for example, that anyone would clean out the refrigerator or wash curtains and mini-blinds in these homes on a weekly basis, or that anyone would wash the windows and clean the mirrors on a daily basis in his or her own home. Some plaintiffs even testified that they routinely moved appliances to clean behind them, and they routinely washed the light fixtures, walls and baseboards throughout the house.

136. The Special Master found more helpful the testimony regarding the needs, goals and abilities of the particular clients served. For example, in this matter Tim Bogle crawled and played on the floor for exercise. He also drooled on carpet and furniture. Vacuuming and cleaning

the carpet would be directly related to his care. Shawn Allison had a condition which caused him to crave non-food items, and he was allergic to dust and mold. Dusting, sweeping, mopping and wiping countertops would be related to his care. By contrast, clients such as Bobby Hartley, Melva Green, Roberta Taylor, Sherry Robinson, Joel McMullen, Allen Moad, Gary Pritchard, Melvin Smith, and Paula Cupp had outside jobs in which they performed numerous cleaning tasks. There is no reason to suggest that they could not clean at home with some prompting and assistance from plaintiffs.

137. Home of Hope established by a preponderance of the evidence that no plaintiff spent in excess of 20% of his or her time performing general household work unrelated to the care of the client during the relevant time, given the sizes of the houses, the number of staff members assigned to each house, and the needs of the clients served.

### CONCLUSIONS OF LAW

#### Overtime Compensation

1. The payment of overtime wages is governed by the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*
2. Under the FLSA, hourly workers must be compensated at a rate of one and one-half times their regular hourly wage for all hours worked in excess of 40 hours per work week. 29 U.S.C. § 207(a)(1).
3. Home of Hope is an employer covered by the overtime provisions of the FLSA.
4. Exemptions for the FLSA must be narrowly construed. A.H. Phillips, Inc., v. Walling, 324 U.S. 490, 493 (1945); Schoenhals v. Cockrum, 647 F.2d 1080, 1081 (10th Cir. 1981).

## Companionship Exemption

5. The “companionship exemption” of 29 U.S.C. § 213(a)(15) provides that the overtime provisions of § 207 do not apply to:

any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).
6. The exemption also authorizes the Secretary of Labor to promulgate regulations interpreting the terms contained in the “companionship services” exemption.
7. Title 12, part 552 of the Code of Federal Regulations governs the administration of the companionship services exemption.
8. The term “companionship services” is defined in 29 C.F.R. § 552.6 to mean:

those services which provide fellowship, care and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include housework related to the care of the aged or infirm person such as bed making, washing of clothes, and other similar services. They may also include the performance of general household work: Provided, however, that such work is incidental i.e., does not exceed over 20 percent of the total weekly hours worked. . . .
9. When construing an exception to the overtime provisions of the FLSA, the burden rests upon the employer to show that its employees are exempt from the Act. Hayes v. City of Pauls Valley, 74 F.3d 1002, 1005 (10th Cir. 1996).
11. Home of Hope has met its burden to establish that the services provided by the plaintiffs to developmentally-disabled clients in Home of Hope’s Supported Living Program during the applicable limitations periods constituted companionship services.

### Household Work Exception

10. The “general household work” exception to the companionship services exemption provides that the exemption does not apply where “general household work” exceeds 20% of the total weekly hours worked. 29 C.F.R. § 552.6.
11. The regulation distinguishes between “household work related to the care of the aged or infirm persons” and “general household work.” Id.
12. The term “general household work” is not defined within the regulations concerning the companionship exemption. Several courts, however, have attempted to define “general household work” and clarify the distinction between “household work related to the care of the aged or infirm persons” and “general household work” for purposes of the 20% exception. In Toth v. Green River Regional Mental Health/Mental Retardation Board, Inc., 753 F. Supp. 216, 217 (W.D. Ky. 1989), aff’d sub nom Hengesbeack v. Green River Regional Mental Health/Mental Retardation Bd., Inc., 985 F.2d 560 (6th Cir. 1993), the court held:

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

Id. at 217 (quoting McCune v. Oregon Senior Services Div., 643 F.Supp. 1444, 1450 (D. Or. 1986), aff’d 894 F.2d 1107 (9th Cir. 1990)). The McCune court also stated: “The regulation defines household work related to the care of the individual to include meal preparation, bed making, washing of clothes, and ‘other similar services.’ These similar services would

presumably include other types of personal care, such as bathing, feeding, or cleaning spills.”

Id. Similarly, other courts have focused on the particular task performed by plaintiffs.

The record shows that plaintiffs provided [clients] with some general maintenance services, including cleaning laundry areas, general household cleaning (through use of mop, duster, and vacuum), washing vehicles, cleaning the garage, and maintaining the yards and grounds. These services constitute general household services. Although they benefit the individual residents of [the residential facility for developmentally disabled individuals], they are ultimately provided to keep [the facility] generally clean for the benefit of all employees and the family members and friends who visit the residents.

Bowler v. Desert Village Assoc., Inc., 922 P.2d 8, 15 (Utah 1996).

13. The Special Master recommends that the Court conclude that the language “other similar services” signifies the Secretary’s intent not to limit the scope of services “related to the case of the . . . person” to those items specifically enumerated in 29 C.F.R. § 552.6.
14. In each instance, the test should be whether a particular task is necessary for the care or habilitation training of a particular client. If it is, then the task cannot be “general household work” unrelated to the individual client, and it does not count toward the 20% exception. Instead, the companionship exemption applies to the task, and the employer is not required to pay overtime wages to the plaintiff who performs it.
15. Although Toth v. Green River implies that the burden shifts to the plaintiff to prove the 20% or “general household work” exception to the companionship services exception,” 753 F. Supp. at 217, the Special Master recommends that this Court conclude that the burden remains with the employer to show that the 20% exception does not apply, since the employer is the party seeking to avoid payment of compensation for overtime hours.

16. Home of Hope has shown by a preponderance of the evidence that it is more likely than not that no plaintiff spent in excess of 20% of his or her total weekly work hours engaged in general household work.
17. Therefore, plaintiffs are not entitled to overtime compensation pursuant to the FLSA, 29 U.S.C. § 207.

**Policy Considerations**

18. The Sixth Circuit has stated the following policy reason for the companionship exemption:

These critical services reach more elderly or infirm individuals than they otherwise would precisely because the care-providers are exempt from the FLSA. We also note that many private individuals, who do not benefit from federal and state assistance, may also be forced to forego the option of receiving these services in their homes if the cost of the services increases. The only alternative for these individuals may be institutionalization.

Salyer v. Ohio Bureau of Workers' Compensation, 83 F.3d 784, 788 (6th Cir.), cert. denied, 117 S. Ct. 386 (1996) (quoting McCune, 894 F.2d at 1110).
19. The Special Master recognizes other, equally compelling policy concerns at issue in this matter. Home of Hope and similar agencies must be able to attract and retain capable and compassionate workers if they are to continue providing quality services that are essential and, in this jurisdiction, mandated for developmentally disabled individuals. They must also be continually concerned that the homes in which they provide services are safe and sanitary. Fair compensation for hours worked overtime would presumably assist in that endeavor.
20. However, the evidence showed that many of the plaintiffs in this matter knew, when they accepted employment with Home of Hope, that they would not be paid for overtime hours.

Further, the evidence did not show that Home of Hope required plaintiffs to spend more than 20% of their time doing general household work.

21. While the relief granted by this Court should provide incentives for employees to keep clients' homes clean, it should not reward employees for performing unnecessary general household work just to pass the time or stay awake, nor should it serve to encourage them to perform unnecessary general household work for the sole purpose of obtaining additional compensation for overtime hours. Most importantly, it should never encourage employees to neglect the clients they serve.

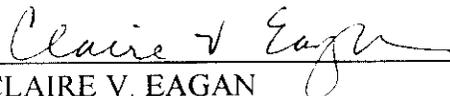
#### **SUMMARY**

The credible evidence presented at the evidentiary hearings did not show that any plaintiff spent more than 20% of his or her total weekly work hours performing general household work unrelated to the clients they served. For some clients, plaintiffs performed household work to teach the clients to perform household work on their own. For other clients, most of the work plaintiffs performed was "related to the individual" because those individuals were unable to do any household work on their own. The remainder of the household work that plaintiffs performed could not have exceeded 20% unless plaintiffs were spending time doing housework when they should have been spending time performing the work for which they were hired. Based upon the evidence presented at the hearings on the 20% issue, the Special Master recommends that the Court adopt the proposed findings of fact and conclusions of law set forth herein and enter judgment in favor of the defendant, Home of Hope.

**OBJECTIONS**

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review, the District Judge will consider the parties' written objections to the Report and Recommendation. A party wishing to file objections must do so within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(2) and Fed. R. Civ. P. 72(b). **The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court.** See Thomas v. Arn, 474 U.S. 140 (1985); Ayala v. United States, 980 F.2d 1342 (10th Cir. 1992).

Dated this 16<sup>th</sup> day of February, 1999.

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

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

**FILED**

**FEB 11 1999**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

FIRST NETWORK MANAGEMENT CORP., AN )  
OHIO CORPORATION, ET AL., )

PLAINTIFFS, )

VS. )

WILLIAM B. RICHMOND A/K/A BRIAN RICHMOND; )  
ET AL., )

CASE No. 99CV028 C (M) /

ENTERED ON DOCKET

DATE **FEB 12 1999**

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**DISMISSAL WITHOUT PREJUDICE**

COME NOW the Plaintiffs, First Network Management Corp., an Ohio corporation, and Network Trucking Corp., an Ohio corporation, by and through their attorney of record and hereby dismiss without prejudice, the Defendant, Tulsa Federal Credit Union.

Respectfully submitted,

RIGGS, ABNEY, NEAL, TURPEN,  
ORBISON & LEWIS

By *Kenneth M. Smith*

Kenneth M. Smith, OBA #8374  
Karen Langdon, OBA #11395  
502 West 6th Street  
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(918) 587-3161  
Attorneys for Plaintiffs

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C/S

**CERTIFICATE OF MAILING**

The undersigned hereby certifies that on the 11<sup>th</sup> day of February, 1999, a true and correct copy of the above and foregoing was mailed with proper postage prepaid thereon to entitle the same to due passage in the United States mail to:

James R. Gotwals  
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Collin M. Hinds  
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Attorney for Tulsa Federal Employees Credit Union



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Kenneth M. Smith

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**  
FEB 11 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

MARIE M. BONTEMPS, )  
)  
Plaintiff, )  
)  
v. )  
)  
KENNETH S. APFEL, )  
Commissioner, Social )  
Security Administration, )  
)  
Defendant. )

Case No. 98-CV-546-M ✓

ENTERED ON DOCKET

DATE FEB 11 1999

**ORDER**

On January 7, 1999, this Court remanded this case to the Commissioner's for further administrative action. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of \$1,852.50 for attorney fees and \$150.00 in costs for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees in the amount of \$1,852.50 and \$150.00 in costs for a total award of \$2,002.50 under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

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It is so ORDERED THIS 11<sup>th</sup> day of February 1999.

  
FRANK H. McCARTHY  
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS  
United States Attorney



PHIL PINNELL, OBA #7169  
Assistant United States Attorney  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

FEB 10 1999

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CARRIE JONES, )  
)  
Plaintiff, )  
)  
v. )  
)  
TULSA FEDERAL EMPLOYEES )  
CREDIT UNION, a Corporation )  
in the State of Oklahoma )  
)  
Defendant. )

Case No. 96-CV-930B

ENTERED ON DOCKET  
DATE FEB 11 1999

**JOINT STIPULATION OF DISMISSAL WITH PREJUDICE**

COME NOW the parties, Plaintiff Carrie Jones and Defendant Tulsa Federal Employees Credit Union, by and through their respective attorneys, and advise the Court that they have reached a mutually satisfactory settlement regarding Plaintiff's claims herein. Therefore, the parties stipulate that this action should be dismissed with prejudice with each of the parties to bear their own costs and attorneys' fees.

Dated this \_\_\_\_\_ day of February, 1999.

Respectfully submitted,

By: Katherine T. Waller  
Katherine T. Waller, OBA #15051  
Kurt K. Hoffman, OBA #14372  
403 South Cheyenne Ave., Suite 1100  
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(918) 582-9339

ATTORNEYS FOR PLAINTIFF  
CARRIE JONES

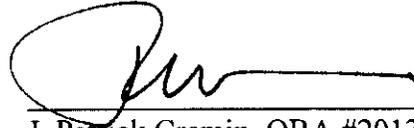
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- AND -

HALL, ESTILL, HARDWICK, GABLE,  
GOLDEN & NELSON, P.C.

By:



J. Patrick Cremin, OBA #2013  
Heather E. Pollock, OBA #17333  
320 South Boston Avenue, Suite 400  
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ATTORNEYS FOR DEFENDANT  
TULSA FEDERAL EMPLOYEES CREDIT UNION

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

ENTERED ON DOCKET  
DATE FEB 11 1999

DAVID BROWN, )  
)  
Plaintiff, )  
)  
vs. )  
)  
R.J. REYNOLDS TOBACCO CO., )  
BROWN & WILLIAMSON TOBACCO CO., )  
PHILLIP MORRIS TOBACCO CO., JOHN )  
DOE TOBACCO CO., TOM DOE TOBACCO )  
CO., JAMES DOE TOBACCO CO., STATE )  
OF OKLAHOMA, W. A. DREW EDMONDSON, )  
ATTORNEY GENERAL, STATE OF )  
OKLAHOMA, )  
)  
Defendants. )

Case No. 99-C-71-C /

**F I L E D**  
FEB 9 1999  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

Currently pending before the Court is plaintiff, David Brown's, motion to commence and maintain this action in forma pauperis, pursuant to 28 U.S.C. § 1915(a).

On January 25, 1999, Brown filed a pro se complaint against defendants invoking diversity jurisdiction. In his affidavit supporting his motion to proceed in forma pauperis, Brown represents that he is not presently employed and that he has no assets or funds from which he can pay the costs of this action. It would appear, from the face of the affidavit, that Brown is indigent and that he is unable to pay the costs of commencing this action. Because the economic eligibility requirement of 28 U.S.C. § 1915(a) has been met, the motion to proceed in forma pauperis is granted. McCone v. Holiday Inn Convention Center, 797 F.2d 853, 854 (10<sup>th</sup> Cir. 1986).

The granting of in forma pauperis status, however, does not necessarily end the Court's inquiry. As noted, this action is based on diversity jurisdiction, and, in order to invoke such

jurisdiction, Brown must demonstrate that the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different states. 28 U.S.C. § 1332(a). The Court concludes that defendant has failed to meet the requisite showing of complete diversity between the parties, and the present case must therefore be dismissed.

The Court notes that no motion to dismiss has been filed. However, the Court has the duty to raise and resolve matters regarding its subject matter jurisdiction. Laughlin v. K-Mart Corp., 50 F.3d 871, 873 (10th Cir. 1995). “[T]he rule . . . is inflexible and without exception, which requires [a] court, of its own motion, to deny its jurisdiction . . . in all cases where such jurisdiction does not affirmatively appear in the record.” Id. (quoting, Ins. Corp. v. Compagnie des Bauxites, 456 U.S. 694, 702 (1982)).

Brown alleges in his complaint that he is a “resident of the State of Oklahoma.” Although Brown alleges in his complaint that the present action is based on diversity, he states in the same paragraph that diversity exists with respect to him and all defendants, “with the exception of defendants State of Oklahoma and defendant Edmondson.” Based on these facts, the Court finds that complete diversity of citizenship between the parties is clearly lacking. See Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373 (1978) (diversity jurisdiction does not exist unless each defendant is a citizen of a different state from each plaintiff). Although nondiverse parties may be dismissed in order to preserve diversity jurisdiction, Tuck v. USAA, 859 F.2d 842, 845 (10<sup>th</sup> Cir. 1988), it appears from the complaint that the state defendants are indispensable parties, inasmuch as the complaint alleges a conspiracy between the state defendants and the diverse defendants.<sup>1</sup>

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<sup>1</sup> Eleventh Amendment immunity may also bar this action against the state defendants. However, since the Court is dismissing the action for want of jurisdiction, the Court need not examine this Eleventh Amendment issue.

Accordingly, Brown's motion to proceed in forma pauperis, pursuant to 28 U.S.C. § 1915(a), is hereby GRANTED and the Clerk is directed to file this matter without prepayment of fees and costs; it is further ordered that this action is hereby DISMISSED for lack of complete diversity between Brown and all defendants.

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



H. DALE COOK  
Senior United States District Judge