

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

MIKE FIDLER,

Plaintiff,

vs.

MAYES COUNTY JAIL,

Defendant.

)
)
)
)
)
)
)
)
)
)
)

No. 96-CV-298-K ✓

FILED IN DOCKET
DATE MAR 19 1999

F I L E D

MAR 18 1999

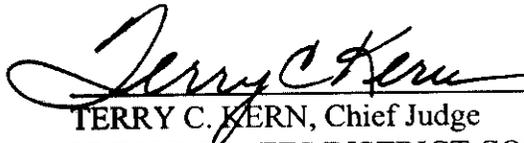
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court upon Defendant's motion for summary judgment. On March 31, 1998, the Court duly considered the issues and rendered a decision herein.

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

SO ORDERED THIS 18 day of March, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

DARRELL B. CURBOW,

Plaintiff,

vs.

UNITED WISCONSIN LIFE INSURANCE
COMPANY and AMERICAN MEDICAL
SECURITY TRUST d/b/a AMERICAN
MEDICAL SECURITY

Defendants.

ENTERED ON DOCKET

DATE MAR 19 1999

No. 97-CV-844-K ✓

FILED

MAR 18 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This action came on for non-jury trial, the Honorable Terry C. Kern, Chief District Judge, presiding. Having reviewed the pleadings, testimony, and evidence in this case, the Court finds in favor of the Plaintiff, Darrell B. Curbow, and against the Defendants, American Medical Security ("AMS") and United Wisconsin Life Insurance Company ("UWLIC") on this claim which arose out of ERISA violations.

IT IS THEREFORE ORDERED, ADJUDGED, DECREED that the Plaintiff, Darrell Curbow, is entitled to \$15,943.29 for past unpaid medical bills, as well as prejudgment interest at the rate allowable by law. The Defendants are ordered to pay this money directly to the Plaintiff, who is then responsible for paying the balance on the remaining medical bills. The Defendants are hereby enjoined and permanently restrained from violating ERISA as to the benefits to which the Plaintiff is entitled. Furthermore, the Court finds that the Defendant, AMS, acted with bad faith in denying benefits to the Plaintiff. However, any damages arising from the Defendant's bad faith are preempted by ERISA, and none will be awarded. The Defendants are further ordered to pay all of the Plaintiff's reasonable attorney's fees and costs, pursuant to the applicable statute. Defendants are also ordered to pay Plaintiff's expert fees in accordance with the applicable statute, not to exceed the fee of \$40 a day. Defendants are jointly and severally liable for Plaintiff's damages.

ORDERED this 18th day of MARCH, 1999.



TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

IN RE:)
)
)
MID-CONTINENT POWER COMPANY,)
INC., an Oklahoma corporation)
)
)
)

ENTERED ON DOCKET
DATE MAR 19 1999
No. 97-C-942-K ✓
F I L E D
MAR 18 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised that the underlying bankruptcy proceeding which gave rise to the commencement of this federal case has been resolved, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to *N.D. LR 41.0*.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within thirty (30) days that settlement has not been completed and further litigation is necessary.

ORDERED this 18th day of March, 1999.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on this 18th day of March, 1999, I mailed a true and correct copy of the within and foregoing, by regular U.S. Mail, with sufficient postage prepaid thereon, to the following:

State of Oklahoma ex rel., Office of Juvenile Affairs
and Lloyd E. Rader Center
c/o Wayne Johnson
Assistant Attorney General
P.O. Box 268812
Oklahoma City, OK 73126-8812

Richard Resetaritz
DHS Legal Department
P.O. Box 53025
Oklahoma City, OK 73152-3025

A handwritten signature in cursive script, appearing to read "Brandt Johnson".

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

FILED
MAR 19 1999
Philip Lombardi, Clerk
U.S. DISTRICT COURT

AUGUSTUS HENDERSON)
)
Plaintiff,)
)
vs.)
)
CITY OF TULSA, et. al.,)
)
Defendants.)

No. 98-CV-0120-B(M)

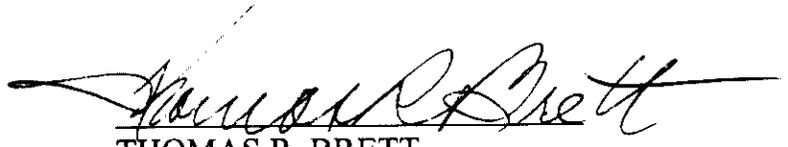
ENTERED ON DOCKET
DATE MAR 19 1999

J U D G M E N T

This action came on for hearing before the Court on Defendant City of Tulsa's Motion for Summary Judgment, Honorable Thomas R. Brett, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that Plaintiff, Augustus Henderson, take nothing from the Defendant, City of Tulsa, that the action be dismissed on the merits, and that the Defendant, City of Tulsa, recover of Plaintiff its costs of action upon timely application pursuant to N.D. LR 54.1. Each party shall pay its own attorney fees.

Dated at Tulsa, Oklahoma this 19th day of March, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

MAR 18 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AUGUSTUS HENDERSON)
)
Plaintiff,)
)
vs.)
)
)
CITY OF TULSA, et. al.,)
)
Defendants.)

No. 98-CV-0120-B(M) ✓

ENTERED ON DOCKET
DATE MAR 19 1999

ORDER

Comes on for consideration Defendant City of Tulsa's ("City") Motion for Summary Judgment (Docket #33) and the Court, being fully advised finds the same shall be granted.

Plaintiff brought this action against his former employer following termination of his employment, alleging violation of the American with Disabilities Act, 42 U.S.C. § 12111, *et seq.*, ("ADA") and Title VII of the Civil Rights Act of 1964 ("Title VII"), negligence and breach of contract. City filed its motion for summary judgment on February 1, 1999. Response brief was due no later than February 19, 1999. To date no response has been filed and Plaintiff has not filed any motion for extension of time to respond. Plaintiff is therefore deemed to have confessed the motion pursuant to N.D. LR

7.1.C.

Additionally, City asserts Plaintiff has failed to comply with the scheduling order entered by this Court, entitling it to a Rule 16(f) dismissal by this Court. City states it has never received any witness list or expert notification. City also represents that statements have been made by Plaintiff to City's counsel indicating he had no intent to pursue this action if it were not settled by a certain date. Plaintiff's failure to respond to these allegations renders them to also be deemed confessed and constitutes an additional ground for awarding judgment to City.

Nevertheless, the Court reviews the motion to determine if the facts and authority presented entitle City to judgment on the merits and concludes they do.

Summary Judgment Standard

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

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

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Conaway v. Smith*, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. *Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

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

* * *

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

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

Statement of Undisputed Material Facts

The undisputed material facts are:

1. Between 1987 and 1995, Plaintiff was employed by City as a refuse collector.
2. During this time, Plaintiff experienced problems with a shoulder injury as well as "bi-lateral carpal tunnel syndrome."
3. As a result, Plaintiff's physicians placed restrictions on his work activities and on several occasions ordered him to stop working for limited periods of time.
4. During those times when Plaintiff was able to work, City assigned him to various "light duty" jobs within the waste management section that required less lifting or physical exertion.
5. Additionally, City tried to accommodate Plaintiff's disabilities by placing him in other jobs outside the waste management section where he was employed.
6. Plaintiff was "disability separated" from his employment with the City on May 4, 1995, because he could not perform the essential functions of his job.
7. Plaintiff filed long term disability claims with Defendants UNUM and Cigna after he was disability separated from his employment with City.

Legal Analysis

Applying the required standard to the undisputed material facts, the Court finds summary judgment is appropriate on the following grounds. First, Plaintiff is not a "qualified individual with a disability" as that term is defined in the "ADA." Second,

Plaintiff is estopped from claiming he is a qualified person with a disability under the ADA because he sought disability benefits from insurers. Third, Plaintiff has presented no evidence that race or color was a factor in any decision affecting his employment, entitling City to summary judgment on his Title VII claims. Finally, Plaintiff has failed to present any evidence to support his claims based on negligence and breach of contract.

ADA CLAIMS

The ADA prohibits employers from discriminating against qualified individuals with disabilities based upon their disabilities in regard to hiring, advancement, discharge, or other terms, conditions, or privileges of employment. 42 U.S.C. §12112 (a).

In order to establish a claim for discriminatory discharge under the ADA, Plaintiff must establish that he is a disabled person as defined by the ADA, that he is qualified, i.e., with or without reasonable accommodation, to perform the essential functions of his job, and that he was terminated because of his disability. *Smith v. Midland Brake, Inc., a Div. Of Echlin, Inc.*, 138 F.3d 1304 (10th Cir. 1998).

Plaintiff's claim fails because he is unable to perform, even with reasonable accommodation, the essential functions of his job. The relevant inquiry is found at 42 U.S.C. §§12111(8), 12112 (a), and is twofold. First, the Court must determine if he could perform the essential functions of the job, i.e., functions that bear more than a marginal relationship to the job at issue. If the answer to this is negative, the Court must next determine whether any reasonable accommodation by City would enable him to perform

those functions.

The deposition testimony of Plaintiff establishes that he is not alleging he can perform the essential functions of the job. Instead, he asserts that because of his carpal tunnel and shoulder injury, his physicians consider him to be "permanently disabled" and unfit to work in the waste management department. Further, Plaintiff has not alleged that there are any reasonable accommodations which would allow him to perform the essential functions of his job. Based upon this, Plaintiff there remain no disputed material facts that Plaintiff could establish that he is a "qualified individual with a disability" under the ADA and summary judgment is appropriate as to that claim.

Additionally, the record before the Court establishes that Plaintiff has sought and collected long term disability insurance benefits, claiming total disability and is therefore estopped from claiming to be a qualified individual with a disability under the ADA.

Hindman v. Greenville Hospital Systems, 947 F. Supp. 215 (D.S.C. 1996), affirmed 133 F. 3d. 915 (4th Cir. 1997).

Title VII Claim

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against any individual with respect to compensation, terms, conditions, or privileges of employment based upon race, color or national origin. 42 U.S.C. §2000e-2(a)(1).

Plaintiff admitted in his deposition testimony that he had no evidence that his race or color was a factor in his termination. Accordingly, no issue of material fact remains as to

Plaintiff's Title VII claims.

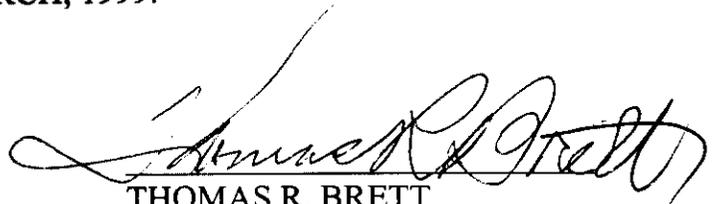
Negligence and Breach of Contract

Plaintiff urged City was liable to him in damages under several nonspecific allegations of negligence, including failure to keep accurate and truthful records and failing to assist Plaintiff in dealing with insurance carriers to overcome their frivolous reasons for denying his insurance claims. Plaintiff has failed to come forward with any proof that he would be entitled to relief under these claims nor has any authority been presented to establish Plaintiff's entitlement to proceed under these claims. These being unsupported by the facts and law, summary judgment is appropriate as to these claims as well.

Plaintiff's breach of contract claims stem from Plaintiff's assertion that City was a disability insurer owing him a contractual duty to pay disability benefits. There is no evidence that there was ever a contractual relationship in which City was an insurer. Plaintiff's breach of contract claims also must fail.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that City be awarded summary judgment against Plaintiff on all claims as set forth herein. Defendant is awarded its costs upon timely application pursuant to N.D.LR 54.1. Each party is to bear its own attorney's fees.

DONE THIS ^{18th}~~15~~ DAY OF MARCH, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

ENTERED ON DOCKET

WILLIAM WICKHAM)

Plaintiff,)

v.)

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

Defendant.)

DATE **MAR 19 1999**

Case No. 97-CV-527-H(E)

FILED

MAR 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on the Report and Recommendation of the United States Magistrate Judge (Docket # 12) recommending that this Court affirm the decision of the Commissioner denying disability benefits to claimant William Wickham. Plaintiff has filed an objection to the Report and Recommendation (Docket # 13).

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).

Based upon a careful review of the Report and Recommendation of the Magistrate Judge and Plaintiff's objections, the Court finds that the Report and Recommendation affirming the decision of the Commissioner (Docket # 12) should be adopted.

IT IS SO ORDERED.

This 16TH day of March, 1999.


Sven Erik Holmes
United States District Judge

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

FILED

MAR 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES A. CHRISTOPHER,)

Plaintiff,)

v.)

UNIT RIG, INC., ET AL.)

Defendants.)

Case No. 96-CV-905-H

ENTERED ON DOCKET

DATE MAR 19 1999

ADMINISTRATIVE CLOSING ORDER

These proceedings being stayed due to proceedings pending in the Bankruptcy Court, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

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

IT IS SO ORDERED.

This 16TH day of March, 1999.



Sven Erik Holmes
United States District Judge

16

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLES L. DENNIS,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
Commissioner, Social)
Security Administration,)
)
Defendant.)

Case No. 97-CV-909-J

ENTERED ON DOCKET
DATE MAR 19 1999

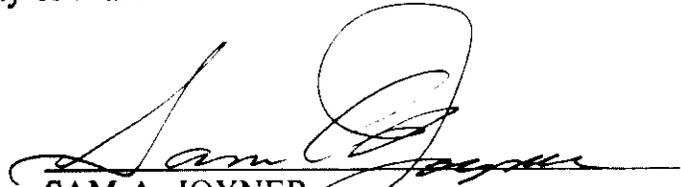
ORDER

On January 20, 1999, this Court reversed the Commissioner's decision and remanded the case for further proceedings. 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 \$2,321.75 for attorney fees and no 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 \$2,321.75 and no costs 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.

It is so ORDERED THIS 17 day of March 1999.


SAM A. JOYNER
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney



PHIL PINNELL, OBA #7169\
Assistant United States Attorney
333 West 4th Street., Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

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

ENTERED ON DOCKET

DATE MAR 19 1999

TERRELL L. SMITH,)
)
Plaintiff,)
vs.)
)
WEXFORD HEALTH SERVICES; and)
NURSE SHIRLEY,)
)
Defendants.)

Case No. 98-CV-769-K (J)

FILED

MAR 17 1999

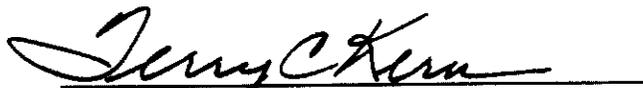
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On October 7, 1998, Plaintiff, a prisoner appearing *pro se*, filed the instant civil rights complaint along with a motion for leave to proceed without prepayment of the filing fee. Pursuant to 28 U.S.C. §1915(b)(1), the Court granted Plaintiff's motion and directed him to pay an initial partial filing fee of \$11.00 by February 8, 1999 (#5). The Clerk of the Court mailed a copy of the Court's order to Plaintiff at the address he had provided to the Court. However, on January 25, 1999, mail addressed to Plaintiff was returned and marked "NOT IN CUSTODY." As of the date of this order, Plaintiff has neither paid the \$11.00 initial partial filing fee or shown cause for his failure to do so, nor has he provided the Court with his current address. Therefore, the Court finds that the 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 17 day of March, 1999.



TERRY C. KERN, Chief Judge
United States District Court

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

F I L E D

MAR 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DARRELL B. CURBOW,)
)
 Plaintiff,)
)
 vs.)
)
 UNITED WISCONSIN LIFE INSURANCE)
 COMPANY and AMERICAN MEDICAL)
 SECURITY TRUST d/b/a AMERICAN)
 MEDICAL SECURITY)
)
 Defendant.)

No. 97-CV-844-K /

ENCLD ON DOCKET

DATE MAR 19 1999

ORDER

FINDINGS OF FACT

1. At all times relevant to this action, Plaintiff was an employee of All American Fitness.
2. All American Fitness offered group health policy insurance to its employees through United Wisconsin Life Insurance Company ("UWLIC") which was administered by American Medical Security ("AMS").
3. Plaintiff did not originally sign up for the insurance under the group policy when he first became employed by All American, because he did not learn that his employer offered health insurance until 1996, some two years after he started working for All American.
4. Plaintiff made application for such insurance on April 22, 1996, and was considered a late enrollee. The insurance became effective May 22, 1996.
5. Plaintiff only signed up for single coverage through the plan because his wife and children were already covered by Indian health cards.
6. The policy All American Fitness had in effect was policy number 1700-6082-25.

74

7. The application for insurance included a section for the Plaintiff to reflect his medical history. Defendants' Exhibit 12.
8. The application did not include any booklet of explanation, instructions, or definitions.
9. The application attempts to get an accurate account of the applicant's medical history with six questions. Defendants' Exhibit 12.
10. The application asks, under the "Medical History" section, for the "Name, Address, and Phone Number of Physician(s)." Defendants' Exhibit 12.
11. The application does not ask for the names of every doctor the applicant has seen or a listing of every illness the applicant has suffered for any set period of time. Defendants' Exhibit 12.
12. The application was purportedly drafted so that the average person could interpret the questions asked, without any reference to directions or definitions. Tr. at 102-106.
13. Question number 3 under the medical history section of the application stated: "Are you or any dependent receiving treatment, taking medication, or been advised of a condition that will require attention in the next twelve months?" To that question the Plaintiff answered, "No." Defendants' Exhibit 12.
14. Darrell Curbow answered "no" to Question number 3 because he was not receiving treatment at the time, was not taking medication, and had not been advised of a condition that would require treatment within the next twelve months. Tr. at 34.
15. Question number 6 under the medical history section of the application stated: "Within the past two years, have you or any dependent ever had any indication, diagnosis, consultation, treatment, or taken any medication or received counseling for...H. digestive disorder?" To that question, Plaintiff answered, "No." Defendants' Exhibit 12.

16. The Plaintiff's explanation for this answer was that he interpreted a "digestive disorder" as a disorder that affected his stomach, not his rectal area. Tr. at 34.
17. Plaintiff listed only one doctor on his application as a physician he had seen, that being Dr. Richardson. Defendants' Exhibit 12.
18. Plaintiff explained that he listed Dr. Richardson, because he had custody of all of Plaintiff's previous medical records, and because he intended to keep Dr. Richardson as his primary physician. Tr. at 62.
19. Question number 6 under the medical history section of the application stated: "Within the past two years, have you or any dependent ever had any indication, diagnosis, consultation, treatment, or taken any medication or received counseling for...R. AIDS or AIDS Related Complex?" Plaintiff answered, "No." Defendants' Exhibit 12.
20. At the time of the application, Plaintiff had not been diagnosed with HIV. Tr. at 15.
21. Darrell Curbow was approved and issued an insurance card by AMS although AMS never made a verification telephone call to Mr. Curbow or his doctor(s) as required by the underwriting guidelines used by AMS, despite AMS's claim that it must know an applicant's complete medical background. Tr. at 85-86.
22. Approximately one month after filling out the application, Darrell B. Curbow was diagnosed with HIV at which time he began consulting with Drs. Peake and Beal exclusively. Tr. 15-21.
23. After receipt of certain claims, AMS investigated Darrell Curbow's medical history in August, 1996, including treatment and/or observations by Dr. Richardson and Dr. Lee in Tulsa prior to the time Plaintiff applied for coverage through his employer.

24. AMS, which began its investigation in August 1996, did not make payments on hospital bills due from as early as June 1996, and continued to collect premiums from Mr. Curbow and his employer through February 1997. Tr. at 111.
25. Darrell Curbow had seen Dr. Lee for constipation, an anal fissure, and rectal bleeding in January 1996, for which Dr. Lee recommended surgery, a sphincterotomy, for February 1996. Mr. Curbow did not trust Dr. Lee and did not have surgery in February 1996. The surgery was scheduled for the anal fissure on at least two occasions, but Darrell Curbow went instead to see Dr Richardson for a second opinion. Tr. at 61-62.
26. Dr. Richardson recommended against surgery and instead recommended that Mr. Curbow take Metamucil as an over-the-counter laxative and discontinue the use of any pain medication, since pain medication exacerbates constipation. Tr. at 23-24. Mr. Curbow had previously been instructed to take Metamucil, but he had not been taking it regularly. Tr. at 59.
27. Within several weeks the condition resolved and Mr. Curbow has not suffered from an anal fissure or needed surgery since February 1996. Tr. at 43.
28. Upon receipt of medical records, including the information relating to Dr. Lee and Dr. Richardson, AMS notified Mr. Curbow on February 10, 1997, that it had rescinded Mr. Curbow's group health insurance benefits, effective May 1, 1996, or the day before his coverage became effective. Plaintiff's Exhibit 5.
29. AMS's explanation for its decision to rescind coverage was based on Plaintiff's failure to disclose certain medical information. Defendants' Exhibits 11, 12, 15, 19, 20, 22, and 23.
30. On February 25, 1997, AMS sent a letter to All American informing them that Mr. Curbow

owed them \$9,690.81. Plaintiff's Exhibit 8.

31. AMS sent a letter to Darrell Curbow demanding payment of the \$9,690.81, and threatened to turn the bills over to a collection agency if he did not send the money. Plaintiff's Exhibit 12.
32. AMS was authorized by its agreement with UWLIC to act on behalf of UWLIC in issuing and extending coverage, paying claims, reviewing claims, adjusting claims, and handling all aspects of the policies issued by UWLIC. Plaintiff's Exhibit 25; Defendants' Exhibit 2.
33. The group insurance policy referenced contained a clause stating: "RETURN OF PREMIUM FOR RESCISSION OF INSURANCE: Subject to the Incontestability provision in the certificate, we reserve the right to rescind insurance on any Insured person because of the Person's material misrepresentation or fraud. If no medical claims have been paid by Us on the date We rescind, We will return all premiums paid for the rescinded insurance. If claims have been paid, We reserve the right to subtract the amount of claims paid from the returned premiums." "MISREPRESENTATION OR FRAUD: Claims will be denied in whole or part in the event of misrepresentation or fraud by your or your representatives." Defendants' Exhibit 2.
34. The application for insurance filled out by the Plaintiff was approved by the Oklahoma Insurance Commissioner. Tr. 132.
35. In discovering a material misrepresentation, AMS could have deferred coverage on a pre-existing condition. AMS chose to defer coverage totally for a period of 18 months. Tr. 133, 134.
36. After receiving his rescission letter, Darrell B. Curbow appealed the decision by AMS in

compliance with the administrative remedies portion of the plan. Mr. Curbow was denied all coverage and not just coverage for the “pre-existing condition” by AMS, for eighteen months until November, 1997.

37. Subsequent to the start of the investigation in August 1996, Mr. Curbow sought coverage for his necessary and expensive prescriptions through the State of Oklahoma and a compassionate care program, which agreed to and has covered Mr. Curbow’s prescriptions since August, 1996. AMS will not be required to repay the State of Oklahoma. Tr. at 42.
38. Darrell Curbow received extensive medical care prior to his coverage being rescinded and Mr. Curbow’s medical providers have not had their bills paid in the amount of \$17,983.29,¹ none of which was due to chronic anal fissure, recommended sphincterotomy, rectal bleeding, or diarrhea. Tr. at 137.

Conclusions of Law

1. Darrell Curbow seeks payment of benefits withheld under a health insurance benefits plan underwritten by United Wisconsin Life Insurance Company and administered by American Medical Security (collectively “AMS”). Pursuant to the Employment Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §1132(e), the United States District Court for the Northern District of Oklahoma has jurisdiction over this matter as alleged.
2. Under the civil enforcement provisions of §502(a), a plan participant or beneficiary may sue to recover benefits due under the plan, to enforce the participant’s rights under the plan, or

¹Several figures have been presented as the total cost of Mr. Curbow’s unpaid medical bills. In the Parties’ final supplement to the Court, both cite this figure as the total amount.

- to clarify rights to future benefits. Relief may take the form of accrued benefits due, a declaratory judgment to entitlement to benefits, or an injunction against a plan administrator's improper refusal to pay benefits. Pilot Life Ins. Co. v Dedeaux, 481 U.S. 41 (1987).
3. In addition to suing for benefits, Darrell Curbow seeks prejudgment interest to compensate him for the delay in obtaining benefits pursuant to his suit under ERISA. It is within the discretion of the district court to award prejudgment interest in an ERISA case. Lutheran Medical Center v. Contractors, Laborers, Teamsters, & Engineers Health & Welfare Plan, 25 F.3d 616 (8th Cir. 1994).
 4. If an employee benefits plan gives the administrator or fiduciary officer discretionary authority to determine plan eligibility or to construe the terms of the plan, the court must review that decision under an arbitrary and capricious standard of review. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989). Absent such discretionary authority, the court reviews the plan administrator's decision *de novo*. Id.
 5. The Plan does not allow discretion on the part of the administrator AMS, and states that: "Only Our President, Vice-President, or Secretary has the power to change the Policy. No other person has the authority to bind Us in any manner. No agent may accept risks, extend the time for payment of premiums, alter or change coverage or waive any provisions of the Policy. Any change in the Policy will be made by amendment approved by the Policy holder, signed by Us, and attached to the Policy. A change may be made to the Policy at any time by the Policyholder or by Us, without consent of the Employer, or any Insured Person or beneficiary." Certificate of Group Insurance.

6. The proper standard for review in the instant case is *de novo*. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989).
7. Under Oklahoma law a “misrepresentation” in an insurance application is “a statement as a fact of something which is untrue and which the insured states with the knowledge that it is untrue and with an intent to deceive, or which he states positively as true without knowing it to be true and which has a tendency to mislead, where such fact in either case is material to the risk.” Claborn v Washington Nat’l Ins. Co., 910 P.2d 1046, 1049 (Okla. 1996).
8. The existence of a single misrepresentation in an application for insurance is sufficient to support rescission of the policy. Burgess v. Farmers New World Life Ins. Co., 12 F.3d 992, 993 (10th Cir. 1993).
9. The misrepresentation is grounds for voidance of a policy if the insured had the intent to deceive. Hays v. Jackson Nat’l Life Ins. Co., 105 F.3d 583, 588 (10th Cir. 1997).
10. The application involved in this matter was approved by the Oklahoma Insurance Commissioner. 36 O.S. §3610, 3611.
11. Question number 3 under the medical history section of the application asks of a condition that *will require attention* in the next 12 months. It is not refuted that Mr. Curbow did not require treatment for an anal fissure in the twelve-month period following the date of the application. His answer to Question 3 did not constitute a “misrepresentation” under Oklahoma law. Claborn at 1059. See Lips v. American Comm. Mut. Ins. Co., No. 97-1139, filed October 23, 1998 (10th Cir. 1998).
12. Question number 6 under the medical history section of the application stated: “Within the past two years, have you or any **dependent** ever had any indication, diagnosis, consultation,

- treatment, or taken any medication or received counseling for...H. digestive disorder?" To that question, Plaintiff answered, "No." Defendants' Exhibit 12.
13. Mr. Curbow answered "no" to this question, because he did not think the anus was part of the digestive system. Tr. at 20, 34, 35, 116-118. Mr. Curbow was supplied with no definitions which would have clarified this question.
 14. "The language of a contract should be interpreted most strongly against the party who drafted the contract." Dismuke v. Cseh, 830 P.2d 188, 190 (Okla. 1992).
 15. Having found absolutely no evidence of, or even an inference of intent to deceive, Mr. Curbow's answer to Question 6H does not constitute a "misrepresentation" under Oklahoma law. See Hays v. Jackson Nat'l Life Ins. Co., 105 F. 3d 583 (10th Cir. 1997).
 16. Finally, the application asks, under the "Medical History" section, for the "Name, Address, and Phone Number of Physician(s)." Defendants' Exhibit 12.
 17. Plaintiff listed only one doctor on his application as a physician he had seen, that being Dr. Richardson. Defendants' Exhibit 12. Plaintiff explained that he listed Dr. Richardson, because he had custody of all of Plaintiff's previous medical records, and because the Plaintiff intended to keep Dr. Richardson as his primary physician. Tr. at 62.
 18. The Defendant argues that the omission of Dr. Lee on the application constituted a material misrepresentation, for which they could either defer the effective date of coverage or extend the "pre-x" period. Tr. at 113.
 19. Though the Defendants chose to defer the effective date of coverage, this was based primarily on the discovery that surgery, a sphincterotomy, had been recommended for the Plaintiff. Tr. at 115.

20. The Plaintiff was not called and given an opportunity to explain that the condition had resolved and that he did not have the surgery, and did not anticipate ever having to have the surgery for the anal fissure. Tr. at 115.
21. Even assuming, *arguendo*, that the omission of Dr. Lee from the application could be construed as a "misrepresentation," it was immaterial. The record shows that the Plaintiff has not received any medical treatment whatsoever for an anal fissure, rectal bleeding, or constipation since filling out his application in April, 1996. Tr. at 43.
22. The Court finds, reviewing AMS' decision *de novo*, that the Plaintiff's application did not contain a material misrepresentation under Oklahoma law.² The questions answered by Plaintiff were answered with no intent to deceive. The questions were, in fact, rather ambiguous, and, this Court believes, answered as a reasonable consumer would have answered them. Furthermore, to the extent that the pre-existing condition would have altered the coverage extended to the Plaintiff by AMS, this Court finds that the appropriate action for AMS to have taken would be to deny coverage as to the pre-existing condition of an anal fissure. AMS' own guidelines do not indicate that a complete denial would have been the normal course of action for a resolved anal fissure. Plaintiff's Exhibit 26. The complete rescission of coverage was inappropriate under the circumstances, where there was absolutely no evidence of an intent to deceive on the part of the Plaintiff. The Plaintiff is, therefore, entitled to damages for back medical payments from AMS for any expenses

²Although the Court's analysis does not include a discussion of review pursuant to the "arbitrary and capricious" standard, the Court finds that the application of that standard would not have changed the outcome in this case. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989).

incurred for any condition other than an anal fissure. Since the Plaintiff has not suffered from an anal fissure since before his coverage with AMS began, AMS is liable for all of the unpaid bills.

23. The amount of the unpaid medical bills comes to a total of \$17,983.29. After the applicable co-payments, the Court finds that the Plaintiff is entitled to \$15,943.29 for unpaid medical bills to be paid by the Defendants.³
24. The Plaintiff has also made a claim for prejudgment interest. An award of prejudgment interest is within the district court's discretion. Resolution Trust v. Federal Savings & Loan Insurance Corp., 25 F.3d 1493, 1506 (10th Cir.1994). An award of prejudgment interest will be upheld absent an abuse of discretion. Eastman Kodak Co. v. Westway Motor Freight, Inc., 949 F.2d 317, 321 (10th Cir.1991). "Generally, a court should award prejudgment interest unless 'exceptional or unusual circumstances exist making the award of interest inequitable.'" The award of prejudgment interest is considered proper in ERISA cases. See Lutheran Medical Center v. Contractors Health Plan, 25 F.3d 616, 623 (8th Cir.1994) (an award of prejudgment interest is necessary to allow an ERISA beneficiary to obtain appropriate equitable relief). "Awards of prejudgment interest are compensatory, not punitive, and a finding of wrongdoing by the defendant is not a prerequisite to such an award." Drennan v. General Motors Corp. 977 F.2d 246, 253 (6th Cir. 1992).

³After requesting supplemental briefs on the issue of damages, the Court finds that the Plaintiff has met his burden of proving the total amount of damages owed to him under the Policy. While the Defendant has consistently contended that the amount should not exceed \$10,023.72, the Court is not persuaded by that calculation. Further, Defendants' trial witness, Mr. Lee-Wasson, stated a variety of deductions, co-payments, and exclusions that reduce the amount of the payment to the Plaintiff, but his statements were conclusory, and altogether failed to tie his calculations to the Policy.

25. ERISA allows prejudgment interest on a judgment where the Court deems it to be necessary for the beneficiary to obtain appropriate relief. Having found that AMS is liable for Plaintiff's damages for back medical bills, the Court has determined that prejudgment interest should be awarded to the Plaintiff in this case, at the applicable legal rate under the laws of Oklahoma.
26. As to the Plaintiff's claim of bad faith, numerous decisions have established governing principles under Oklahoma law regarding "bad faith" claims. "The mere allegation that an insurer breached the duty of good faith and fair dealing does not automatically entitle a litigant to submit the issue to a jury for determination." Oulds v. Principal Mut. Life Ins. Co., 6 F.3d 1431, 1436 (10th Cir.1993). "The insurer does not breach the duty of good faith by refusing to pay a claim or by litigating a dispute with its insured, if there is a 'legitimate dispute' as to coverage or amount of the claim, and the insurer's position is 'reasonable and legitimate.'" Thompson v. Shelter Mut. Ins., 875 F.2d 1460, 1462 (10th Cir.1989) (quoting Manis v. Hartford Fire Ins. Co., 681 P.2d 760, 762 (Okla.1984)).
27. The insurer will not be liable for the tort of bad faith if it "had a good faith belief, at the time its performance was requested, that it had a justifiable reason for withholding payment under the policy." McCoy v. Oklahoma Farm Bureau Mut. Ins. Co., 841 P.2d 568, 572 (Okla.1992). "To determine the validity of the claim, the insurer must conduct an investigation reasonably appropriate under the circumstances." If the insurer fails to conduct an adequate investigation of a claim, its belief that the claim is insufficient may not be reasonable. Willis v. Midland Risk Ins. Co., 42 F.3d 607, 612 (10th Cir.1994) (quoting Buzzard v. McDanel, 736 P.2d 157, 159 (Okla.1987)).

28. A legitimate dispute as to coverage will not act as an impenetrable shield against a valid claim of bad faith. An insured may pursue a claim of bad faith even where the insurer has a legitimate defense to coverage. However, in order to pursue such a claim, the insured must present sufficient "evidence reasonably tending to show bad faith." Timberlake Const. Co. v. U.S. Fidelity and Guar. Co., 71 F.3d 335, 343 (10th Cir.1995) (footnote omitted)(quoting Oulds, 6 F.3d at 1440)).
29. The evidence shows that the investigation of Mr. Curbow's coverage was triggered by Mr. Curbow's HIV diagnosis. The investigation concluded that the HIV was not a preexisting condition and was not the basis for the retroactive rescission. Tr. at 95.
30. AMS relied on an undisclosed preexisting condition, an anal fissure, as its basis to rescind coverage. AMS underwriting guidelines do not even reference anal fissure as a basis for administrative denial. Plaintiff's Exhibit 26. AMS denied coverage for not disclosing a condition, that, had such condition been previously disclosed, should not have rendered the Plaintiff subject to denial.
31. Prior to extending coverage to the Plaintiff as a late enrollee, the underwriting guidelines require that "A verification phone call should be done on all late enrollees." Plaintiff's Exhibit 26, Tr. at 109-110. AMS did not make the required verification phone call. Tr. at 109.
32. The medical benefits which AMS withheld from the Plaintiff were to be used to purchase medicine to treat the Plaintiff's terminal illness and hopefully sustain his life. It is quite possible that, but for Oklahoma's Compassionate Care program, the Plaintiff would have died prior to trial. Tr. at 15-16.

33. The Court finds that there is evidence of bad faith on the part of AMS. The evidence supports the inference that AMS only sought a reason to remove Mr. Curbow from his coverage once it was discovered that he had HIV. No proper, thorough, or appropriate investigation had been initiated before Mr. Curbow was extended coverage. If AMS had complied with the underwriting requirements, AMS would have discovered the previous anal fissure, and would most likely have extended coverage to Mr. Curbow anyway, according to AMS' guidelines. Plaintiff's Exhibit 26.
34. The Court finds that the Defendant **has committed** the tort of bad faith in denying benefits to the Plaintiff. However, punitive damages are not available in an ERISA action. Sage v. Automation, Inc. Pension Plan & Trust, 845 F.2d 885, 888 n. 2 (10th Cir.1988). Nothing in ERISA's §502(a)(1)(B) supports damages beyond that section's language authorizing recovery of "benefits due ... under the terms of the plan." See Alexander v. Anheuser-Busch Companies, Inc., 990 F.2d 536, 539 (10th Cir.1993); see also Harsch v. Eisenberg, 956 F.2d 651, 654-55 (7th Cir.) ("Any other conclusion would appear to be at odds with the plain meaning of the Supreme Court's statements in Russell ... [and] would also seem to do some violence to the language of section 502(a)(1)(B)...."), *cert. denied*, 506 U.S. 818, 113 S.Ct. 61 (1992). Although "allowing extra-contractual relief may be supportable on grounds of policy and justice,...the plain language of the statute, the legislative history, and the majority's ruling in Russell counsel otherwise." 502(a)(3)(B). Lafoy v. HMO Colorado, 988 F.2d 97, 101 (10th Cir.1993); Zimmerman v Sloss Equipment, Inc., 72 F.3d 822 (10th Cir. 1995).
35. The Plaintiff has further requested an award for attorneys fees and costs pursuant to 29 U.S.C. §1132(g)(1). Pursuant to 29 U.S.C. § 1132(g)(1), attorneys' fees are awarded in the

sound discretion of the district court, though they should not be granted as a matter of course. In deciding to award attorneys' fees in an ERISA case, the district court must consider several factors: (1) [T]he degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to personally satisfy an award of attorney's fees; (3) whether an award of attorney's fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions. McGee v. Equicor-Equitable HCA Corp., 953 F.2d 1192, 1209 n. 17 (10th Cir.1992) (quoting Gordon v. United States Steel Corp., 724 F.2d 106, 109 (10th Cir.1983)).

36. As discussed *supra*, the Court has already concluded that AMS acted in bad faith in its denial of all benefits to the Plaintiff, Darrell Curbow. Secondly, the Court is convinced that the Defendants have the financial resources to satisfy the award of attorney's fees. The Court finds that, as the liable party, the attorney's fees and costs may appropriately be shifted to the Defendants, who have far greater financial resources than the Plaintiff. As to the third prong, the Court finds that an award of attorney's fees against the Defendants would serve as an appropriate deterrent, particularly considering ERISA's preemption of any non-contractual damages. Additionally, the Court finds that awarding the Plaintiff attorney's fees and costs satisfies the fourth prong of the inquiry. The Plaintiff was denied benefits to buy medicine which was literally essential to sustain his life. An award of attorney's fees in this case would be beneficial to all recipients of ERISA, helping to ensure that insurance companies will be cautious to hastily and unfairly rescind an insured's coverage, particularly where the

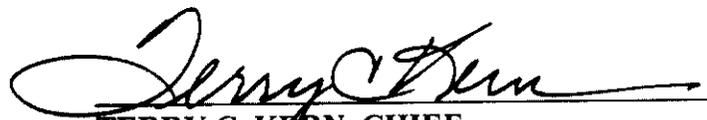
insured is terminally ill. Finally, the Court has ruled for the Plaintiff on the denial of benefits claim pursuant to ERISA; therefore, the Court has no doubt that the Plaintiff's claim is meritorious. Reasonable attorney's fees and costs should therefore be paid to the Plaintiff by the Defendants.

37. Finally, the Plaintiff requests an award of expert witness fees. The fee shifting provision of ERISA, 29 U.S.C. §1132(g), authorizes that the district court, in its discretion, "may allow a reasonable attorney's fee and costs of action to either party." But, absent a specific statutory provision, an award of expert fees must be based on 28 U.S.C. §§ 1821 and 1920; Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445, 107 S.Ct. 2494, 2499 (1987), limiting the amount to \$40 a day. See also Hull by Hull v. United States, 978 F.2d 570, 573 (10th Cir.1992) (fee shifting provision of Federal Torts Claims Act, 28 U.S.C. § 2412, does not authorize award of expert witness fees in excess of those allowed under 28 U.S.C. § 1821); Gray v. Phillips Petroleum Co., 971 F.2d 591, 595 (10th Cir.1992) (fee shifting provision of ADEA, 29 U.S.C. § 626, does not authorize award of expert witness fees greater than those allowed under 28 U.S.C. § 1821). ERISA's fee shifting provision accords the decision to the district court's discretion. In addition, expert fees are not part of "reasonable attorney's fees." West Virginia Univ. Hosps., Inc., 499 U.S. at 97-101, 111 S.Ct. at 1146-48. Nor does 42 U.S.C. § 1988 authorize or mandate an award of expert fees in this case. Section 1988 is limited to suits brought under specific civil rights statutes; ERISA is not included. Accordingly, §1988 is inapposite. See Watkins v. Fordice, 807 F.Supp. 406, 418 n. 24 (S.D.Miss.1992), appeal dismissed, --- U.S. ----, 113 S.Ct. 1573 (1993). Therefore, Plaintiff is allowed expert witness fees pursuant to 28 U.S.C. §§ 1821 and 1920, by which the amount

is limited to \$40 a day. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445, 107 S.Ct. 2494, 2499 (1987).

38. In closing, the Court finds that the Plaintiff, Darrell Curbow, is entitled to \$15,943.29 for past unpaid medical bills, as well as prejudgment interest at the rate allowable by law. The Defendants are ordered to pay this money directly to the Plaintiff, who is then responsible for paying the balance on the remaining medical bills. The Defendants are hereby enjoined and permanently restrained from violating ERISA as to the benefits to which the Plaintiff is entitled. Furthermore, the Court finds that the Defendant, AMS, acted with bad faith in denying benefits to the Plaintiff. However, any damages arising from the Defendant's bad faith are preempted by ERISA, and none will be awarded. The Defendants are further ordered to pay all of the Plaintiff's reasonable attorney's fees and costs, pursuant to the applicable statute. Defendants are also ordered to pay Plaintiff's expert fees in accordance with the applicable statute, not to exceed the fee of \$40 a day. Defendants are jointly and severally liable for Plaintiff's damages.

SO ORDERED THIS 17 DAY OF MARCH, 1999.



TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

F I L E D

MAR 17 1999

JANET MICHELLE KETCHER)
BARZELLONE, et al.,)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Plaintiffs,)

vs.)

No. 97-CV-717-K

CITY OF TULSA, et al.,)

ENTERED ON DOCKET

Defendants.)

DATE MAR 19 1999

JUDGMENT

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

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendants City of Tulsa, Ronald Palmer and Kelly Young and against the Plaintiffs.

ORDERED THIS 17 DAY OF MARCH, 1999.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

25

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

FILED

MAR 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JANET MICHELLE KETCHER)
BARZELLONE, et al.,)
)
Plaintiffs,)
)
vs.)
)
CITY OF TULSA, et al.,)
)
)
Defendants.)

No. 97-CV-717-K

ENTERED ON DOCKET

DATE MAR 19 1999

ORDER

Before the Court is the motion for summary judgment of the defendants City of Tulsa, Ronald Palmer and Kelly Young. Plaintiff has brought numerous claims against these defendants as well as Darryl Randolph and Debbie Leaver. The action was originally filed in state court, in which forum apparently summary judgment was granted in Randolph's favor and default judgment was entered against Leaver. Accordingly, only the present movants remain as party defendants. The action was removed to this Court upon plaintiff's assertion of federal claims under Title VII and the Americans with Disabilities Act ("ADA").

Statement of Facts

Plaintiff was employed by the City of Tulsa as a police officer. On June 3, 1994 and July 15, 1994, plaintiff saw Dr. Carl Ingram. Plaintiff stated she was having trouble driving at night. The problem was resolved when she obtained new glasses. On December 8, 1994, a Mutual Protective Order was issued by the Tulsa County District Court. Plaintiff and her boyfriend Darryl Randolph were directed not to abuse, harass or threaten one another. On February 18, 1995, Randolph filed

34

a police report alleging plaintiff had pursued his vehicle at speeds in excess of 100 miles per hour. At one point, plaintiff's vehicle allegedly bumped Randolph's vehicle. Tulsa Police Detective (and defendant herein) Kelly Young was assigned to investigate the incident. Young interviewed the plaintiff, Randolph and other witnesses. Young filed an affidavit in Tulsa County District Court summarizing his investigation. The affidavit was presented to Judge Haas, who found probable cause to issue a warrant for plaintiff's arrest.

On March 1, 1995, plaintiff sent a memo to Chief of Police Palmer. She stated that she was unable to safely perform her duties as a police officer because she had diagnosed with Multiple Sclerosis in July, 1994 and had also been diagnosed with having a malignant brain tumor. She requested a transfer to civilian employment or medical retirement. On March 8, 1995, plaintiff sent Palmer another memo, again requesting disability retirement and/or a civilian position. Plaintiff attached a letter from Dr. Faith Holmes, stating that plaintiff could no longer carry out her duties as a police officer because of Multiple Sclerosis.

Plaintiff was placed in the City's alternate job placement program. In April, 1995, plaintiff was offered a security position at the City Zoo, which she declined. The City continued its efforts to find plaintiff another position.

On March 16, 1995, defendant Palmer, Chief of the Tulsa Police Department, suspended plaintiff with pay pending the outcome of her court case for violating the protective order. On May 30, 1995 plaintiff entered a plea of guilty to a charge of violating the Protective Order. On January 2, 1996, plaintiff filed an application to modify her plea and sentence. The District Court did amend her sentence but did not allow her to amend her plea to nolo contendere.

After plaintiff pled guilty and was convicted of the charge, Palmer gave plaintiff notice of

a pretermination hearing. On June 14, 1995, Palmer terminated plaintiff's employment with the City as a result of her conviction. Plaintiff appealed her termination to the Tulsa Civil Service Commission. A hearing was held on August 30, 1995. The Commission upheld the City's termination of plaintiff. On July 1, 1996, plaintiff filed a Charge of Discrimination with the EEOC. She received her "right to sue" letter from the EEOC on December 31, 1996. She first asserted an ADA claim in this action on July 16, 1997 and first asserted a Title VII claim on October 7, 1997.

Summary Judgment Standard

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P.* 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. *Mares v. ConAgra Poultry Co., Inc.*, 971 F.2d 492, 494 (10th Cir. 1992)¹. Plaintiff's second amended "petition", filed in this Court October 7, 1997, alleges eleven counts against the defendants, which will be addressed in turn.

¹In its order filed August 31, 1998, the Court granted the defendants' motion to strike plaintiff's motion for summary judgment because it was untimely filed. The Court did not order plaintiff's brief and supporting exhibits removed from the file, and the Court has reviewed those materials to assure that the Court has a complete understanding of plaintiff's arguments.

Discussion

Plaintiff's first claim, brought against the City, is that the hearing before the Commission violated her right to due process in violation of 42 U.S.C. §1983. The City argues that the issue is controlled by Loudermill v. Cleveland Bd. Of Educ., 470 U.S. 532 (1985), in which the Supreme Court established the minimal protections afforded to a public employee in a pretermination proceeding. The Court held that the essential requirements of due process "are notice and opportunity to respond." Id. at 546. Plaintiff has not argued that such procedural due process was not afforded, but instead argues that her constitutional rights were violated "if she was terminated because of her sex or her disability, regardless of whether or not she was afforded notice and opportunity for a hearing appropriate to the case." (Plaintiff's brief at 6).

In other words, plaintiff argues for the incorporation of her Title VII and ADA claims, to be addressed by this Court later, into her due process claim. While the Court has found no authority directly on point, courts in published decisions appear to address the claims separately. See e.g., Van Richardson v. Burrows, 885 F.Supp.1017 (N.D.Ohio1995). Such a distinction is to plaintiff's benefit, as there is no point in rendering the claims redundant or duplicative. The Court will follow this practice. As there is no dispute that procedural due process was afforded, this aspect of the first claim will be dismissed.

However, although the phrase "due process" connotes a right to a fair hearing, the clause contains a substantive component as well. Hennigh v. City of Shawnee, 155 F.3d 1249, 1256 (10th Cir.1998). These protections only apply if plaintiff had a fundamental property interest in her employment. It has not been clearly delineated what specific property interests in employment are fundamental. Assuming arguendo that plaintiff had such a fundamental property interest, substantive

due process prohibits termination which is arbitrary or without a rational basis. Id. at 1257. In light of plaintiff's guilty plea as a basis for termination, the Court concludes plaintiff has not satisfied this standard. Judgment is appropriate as to count one.

In count two, plaintiff asserts that the Tulsa Police Department violated her civil rights when she was falsely arrested and charged with crimes she did not commit. She seeks redress under 42 U.S.C. §1983. As defendants argue, plaintiff is attempting to relitigate her guilty plea in state court. That forum is the only appropriate one for an attempt to withdraw her guilty plea or collaterally attack the plea based upon fraud or whatever arguments might be available. Plaintiff has failed to demonstrate that count two is viable, and it will be dismissed.

Plaintiff's third claim alleges defamation against Detective Young for his filing of the affidavit upon which the state judge found probable cause for plaintiff's arrest. Plaintiff asserts that the affidavit was false and made in bad faith. Defendant Young correctly notes that, pursuant to 12 O.S. §1443.1, a communication made in a judicial proceeding is absolutely privileged from libel. The statutory procedure required an officer to prepare a probable cause affidavit, which was done. There is no exception to the privilege for bad faith or malice, which plaintiff has not demonstrated in any event. Again, the truth of the Young affidavit should have been contested in state court. Plaintiff elected to enter a guilty plea, and may not litigate the issue in this forum. Count three is dismissed.

Plaintiff's fourth claim is titled "wrongful termination" and appears to assert a state law claim of disability discrimination. Defendant initially argued that the claim was barred for failure to comply with the notice provisions of the Governmental Tort Claims Act, 51 O.S. §151 et seq. (GTCA). In its reply brief, defendant appears to concede that under Duncan v. City of Nichols Hills,

913 P.2d 1303 (Okla.1996), the notice provisions of the GTCA are preempted by claims brought under the Oklahoma anti-discrimination statutes. Accordingly, the claim will not be dismissed for failure of compliance with notice provisions. The merits of the claim will be addressed later in this Order when discussing the merits of the federal ADA claim.

Count five is claim pursuant to Title VII; count six is a claim under the ADA. Before reaching the merits, the Court must address defendants' assertion of a statute of limitation defense. Before filing a lawsuit under the ADA, a claimant must follow the procedural requirements of Title VII of the Civil Rights Act of 1964. 42 U.S.C. §12117(a). Of course, a Title VII claim must also meet the same requirements. Under Title VII, a charge of discrimination must be filed with the EEOC within 180 days after the unlawful practice occurred. 42 U.S.C. §2000e-5(e)(1). However, in a state with a fair employment practice agency, such as Oklahoma, a claimant who has instituted proceedings with the state agency has 300 days for the claim to be filed with the EEOC. *Id.* Under Oklahoma law, a complaint charging that a discriminatory practice has been committed must be filed within 180 days after the alleged discriminatory practice occurred. 25 O.S. §1502(A).

Here, the latest possible discriminatory event, plaintiff's termination, took place on June 14, 1995. It is undisputed that plaintiff filed her charge with the Oklahoma Human Rights Commission and EEOC on July 1, 1996. Thus, even assuming arguendo the more liberal 300 day time period, plaintiff's charge was not timely filed. Further, it is undisputed that plaintiff received her "right to sue" letter from the EEOC on December 31, 1996. She then has ninety days from that date to assert her Title VII or ADA claims. 42 U.S.C. §2000e-(f)(1). Plaintiff's ADA and Title VII claims were asserted on July 16, 1997 and October 7, 1997, respectively. These claims were asserted outside the ninety-day limitation period.

Plaintiff asserts that the time for filing her charge was tolled while her appeal was pending, and that her termination did not become final until the appellate process was exhausted. This argument has been rejected. See Sharpe v. Philadelphia Housing Authority, 693 F.2d 24 (3rd Cir.1982). The Court concludes that plaintiff's ADA and Title VII claims are time-barred.

In the interest of thoroughness, the Court will nevertheless discuss these claims on the merits. The "burden shifting" scheme discussed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) is applicable to ADA claims. See White v. York Intern. Corp., 45 F.3d 357, 360-61 (10th Cir.1995). To state a prima facie case, a plaintiff must demonstrate: (1) that she is a disabled person within the meaning of the ADA, (2) that she is qualified, that is, she is able to perform the essential functions of the job, with or without reasonable accommodation, and (3) that the employer terminated her employment under circumstances which give rise to an inference that the termination was based on her disability. Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir.1997). The burden then shifts to the employer to offer a legitimate nondiscriminatory reason for the discharge. If the employer does so, the plaintiff must then establish a genuine dispute as to whether the employer's actions were pretextual. Id. at 1324.

The same scheme applies to Title VII claims, but the elements of a prima facie case are stated differently. Plaintiff must show (1) she is a member of the class protected by the statute; (2) she suffered an adverse employment action; (3) she was qualified for the position at issue; (4) she was treated less favorably than others not in the protected class. Sanchez v. Denver Public Schools, 164 F.3d 527, 531 (10th Cir.1998).

Defendants contend that plaintiff has failed to establish a prima facie showing under the ADA. The Court agrees. On March 1, 1995 both plaintiff and her doctor sent memorandums to the

City. Both stated that because of plaintiff's medical condition, she was unable to perform her duties as a police officer. Plaintiff requested a "lateral transfer" to a civilian position. (Defendants' Exhibits Nos. 18-19 at pgs. 185-187). Thus, by her own statements at the time, plaintiff conceded that she could not perform the essential functions of her job. The second element of her prima facie case fails. Plaintiff argues that a subsequent letter from a Dr. Webb, dated May 16, 1995, advised defendants that plaintiff was fully released to return to position with the Tulsa Police Department. The letter (Plaintiff's Exhibit L) does not so state. It refers to plaintiff's "tension-type headaches" and advises that this medical problem has been resolved. The letter does not reference plaintiff's Multiple Sclerosis and brain tumor. It is also undisputed that plaintiff was offered an alternative position with the City, but she declined the offer. (Second Amended Petition at ¶43).

Even assuming that plaintiff has established a prima facie case, defendant has articulated a legitimate nondiscriminatory reason for the discharge. Plaintiff pled guilty to a misdemeanor violation of a protective order and a misdemeanor reckless driving charge. She was terminated for violations of Oklahoma statutes and Rules and Regulations of the Tulsa Police Department. Specifically Rule and Regulation #3 (police officers have a duty to know, enforce and obey laws and regulations and #8 (conduct unbecoming an officer). See Plaintiff's Exhibit O. Plaintiff has attempted to demonstrate pretext by citing other misdemeanor violations by other male, non-disabled officers who were not discharged. The defendants distinguish these other incidents by demonstrating that none of them involved conduct which placed the lives of innocent citizens in jeopardy, as plaintiff's alleged reckless driving did. Plaintiff has made no showing that this distinction is unworthy of belief or raised any plausible inference that defendants were motivated by discriminatory animus.

A similar analysis applies to plaintiff's Title VII claim. She has not established a prima facie case because she has not shown that she was qualified for the position at the time of her discharge. Even if a prima facie case has been established, plaintiff has failed to raise a genuine issue of material fact as to pretext. Summary judgment is appropriate as to counts five and six.

Count seven is a claim for "misrepresentation" against defendant Randolph, who was granted summary judgment in state court prior to removal. Thus, the claim is no longer in existence.

Count eight is yet another count labeled "wrongful discharge". It asserts that the City violated Oklahoma law and the ADA by failing to reasonably accommodate plaintiff within the Tulsa Police Department. This appears to be simply a reiteration of the other discrimination claims already addressed. Those discussions of the merits of the state law claims, Title VII claim and ADA claim already made are incorporated herein.

Plaintiff's ninth claim is for malicious prosecution, contending that the criminal prosecution against plaintiff was done maliciously with the intent to harm plaintiff and her reputation. The elements of a malicious prosecution action are (1) the bringing of the original action by the defendant; (2) its successful termination in favor of the plaintiff; (3) want of probable cause to bring the action; (4) malice, and (5) damages. Parker v. City of Midwest City, 850 P.2d 1065, 1067 (Okla.1993). As defendants note, plaintiff pled guilty to the criminal charge brought against her. Therefore, she cannot prove the second element. Count nine is dismissed.

The tenth and eleventh count work in tandem. Count ten argues that plaintiff's discharge violates ERISA by denying her and her daughter medical coverage under the City of Tulsa medical plan. Count eleven asserts that the City is the fiduciary of the medical plan, and therefore breached its fiduciary duty by the discharge. Defendant City has demonstrated to the Court's satisfaction that

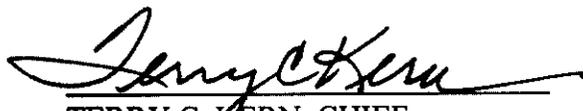
it is not subject to the provisions of ERISA. 29 U.S.C. §1003(b)(1) declares exempt from ERISA any employee benefit plan if “such plan is a governmental plan (as defined in section 1002(32) of this title)”. 29 U.S.C. §1002(32) defines a governmental plan as one maintained for its employees by “the government of any State or political subdivision thereof. . . .” Plaintiff has cited no authority supporting the contrary proposition. Counts ten and eleven are also dismissed.

As the foregoing discussion demonstrates, a linchpin of this lawsuit—particularly regarding plaintiff’s malicious prosecution claim—is her guilty plea to the misdemeanor charges. Plaintiff contends that she was not actually guilty of the charges, and she has sought to withdraw her guilty plea. The request has been denied in state court, and plaintiff has apparently appealed to the Oklahoma Court of Criminal Appeals. Plaintiff has asked this Court to delay its ruling pending a decision on her appeal. This Court stated in its order of November 13, 1998, that it would not do so. If plaintiff should prevail on her state court appeal, she may file a motion in this Court pursuant to Rule 60(b) F.R.Cv.P., and request the Court to take account of the changed circumstances.

Conclusion

For the foregoing reasons, the Motion for Summary Judgment (#16) of defendants City of Tulsa, Ronald Palmer and Kelly Young is hereby GRANTED.

ORDERED this 17 day of March, 1999.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

COREY VANCLEAVE,)
)
Plaintiff,)
)
v.)
)
CHEVRON U.S.A., INC.,)
ATLANTIC RICHFIELD COMPANY,)
HYPERION ENERGY, LP, and)
HYPERION RESOURCES, INC.,)
)
Defendants.)

ENTERED ON DOCKET

DATE MAR 19 1999

No. 98-CV-472-K

FILED

MAR 17 1999

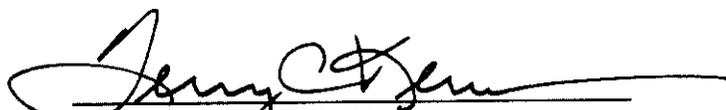
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court, having been advised per Notice filed February 22, 1999 that the parties to this action have reached an agreement in the above-captioned matter, finds that it is no longer necessary for this action to remain on the calendar of the Court. The Court hereby orders an administrative closing pursuant to *N.D. LR 41.0*.

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

ORDERED this 17 day of March, 1999.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

21

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

ORLANDO REED,)
)
Plaintiff,)
vs.)
)
STANLEY GLANZ, and)
HARRY WALKER,)
)
Defendants.)

ENTERED ON DOCKET
DATE MAR 19 1999

No. 98-CV-792-K (E) ✓

F I L E D

MAR 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On October 13, 1998, Plaintiff submitted for filing a civil rights complaint pursuant to 42 U.S.C. § 1983 and a motion for leave to proceed *in forma pauperis*. By order entered October 30, 1998, the Court granted Plaintiff's motion for leave to proceed *in forma pauperis* and directed Plaintiff to cure certain deficiencies in his papers. Plaintiff was advised that this action could not proceed unless he paid, pursuant to 28 U.S.C. § 1915(b), an initial partial filing fee of \$29.16 by November 30, 1998. He was also directed to submit properly completed service documents for each of the named Defendants.

On November 9, 1998, Plaintiff mailed to the Court the requested service documents. On November 24, 1998, Plaintiff submitted a motion, requesting an extension of the payment deadline. However, on December 3, 1998, prior to entry of the Court's order granting the motion for extension of time, Plaintiff paid the initial partial filing fee of \$29.16. Plaintiff then filed a motion, requesting that the initial partial filing fee of \$29.16 be transferred to another case filed by Plaintiff, Case No. 98-CV-768-B. According to Plaintiff, the fee was credited to the instant matter in error.

On December 29, 1998, the Court granted Plaintiff's motion and transferred the initial partial

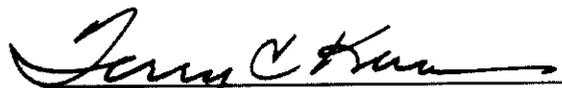
8

filing fee of \$29.16 to case no. 98-CV-768-B. The Court also directed Plaintiff to submit the initial partial filing fee of \$29.16 for the instant case "on or before January 15, 1999" or show cause in writing for failure to do so. However, on December 31, 1998, mail addressed to Plaintiff was returned and marked, "NOT IN CUSTODY." On January 29, 1999, the returned mail (Order dated December 29, 1998, doc. #7) was mailed again to Plaintiff at his current address.¹

As of the date of this Order, Plaintiff has neither paid the \$29.16 initial partial filing fee or shown cause for his failure to do so, nor has any mail addressed to Plaintiff at his Texarkana address been returned. Therefore, the Court finds that this 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 lack of prosecution.

SO ORDERED this 17 day of March, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

¹The Court takes notice that a change of address was received on January 29, 1999, in case no. 98-CV-768-B, giving Plaintiff's new address as FCI-Texarkana, P.O. Box 7000, Texarkana, TX 75501.

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

ENTERED ON DOCKET

DATE MAR 19 1999

TERRELL L. SMITH,)
Plaintiff,)

vs.)

Case No. 98-CV-658-K (E)✓

TULSA COUNTY SHERIFF'S OFFICE,)
and TULSA COUNTY JAIL,)

Defendants.)

F I L E D

MAR 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On August 28, 1998, Plaintiff, a prisoner appearing *pro se*, filed the instant civil rights complaint along with a motion for leave to proceed *in forma pauperis*. Pursuant to 28 U.S.C. §1915(b)(1), the Court granted Plaintiff's motion and directed him to pay an initial partial filing fee of \$11.00 by November 5, 1998 (#6). Plaintiff filed a response to the Court's order on October 13, 1998, (#7), seeking an extension of time in which to make the required payment. By Order, dated January 6, 1999, the Court granted Plaintiff's request for an extension and directed him to pay the initial partial filing fee of \$11.00 by January 26, 1999 (#8). The Clerk of the Court mailed a copy of the Court's order to Plaintiff at his last known address. However, on January 26, 1999, mail addressed to Plaintiff was returned and marked "NOT IN CUSTODY." As of the date of the instant order, Plaintiff has neither paid the \$11.00 initial partial filing fee or shown cause for his failure to do so, nor has he notified the Court of his change of address. Therefore, the Court finds that the 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 17 day of March, 1999.

A handwritten signature in black ink, appearing to read "Terry C. Kern", written over a horizontal line.

TERRY C. KERN, Chief Judge
United States District Court

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

BP AMOCO CORPORATION)
f/k/a AMOCO CORPORATION,)
)
Plaintiff,)
)
v.)
)
LANDMARK GRAPHICS CORPORATION,)
)
Defendant.)

MAR 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-450-H(M) ✓
Before the Honorable
Sven Erik Holmes

ENTERED ON DOCKET

DATE MAR 19 1999

AGREED FINAL ORDER OF DISMISSAL

THIS MATTER COMING BEFORE THE COURT on Amoco's Motion for Leave to File Supplement to Complaint and Enter Final Order in Accordance with Settlement Agreement, the parties being in agreement as to the terms herein:

(i) Leave is granted pursuant to Federal Rule of Civil Procedure 15(d) for BP Amoco Corporation to file its Supplement to Complaint for Patent Infringement and for Declaratory Judgment, and such supplement is hereby deemed filed and served without further notice; and

(ii) The Complaint for Patent Infringement and for Declaratory Judgment (as supplemented) is hereby dismissed with prejudice, with each party to bear their own costs and fees.

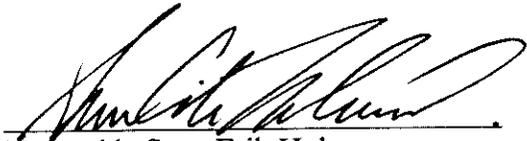
AGREED:

BP AMOCO CORPORATION
By: *Johnnie*
One of its Attorneys

LANDMARK GRAPHICS CORPORATION
By: *And Kahl*
One of its Attorneys

ENTERED:

Dated: MARCH 16, 1999


Honorable Sven Erik Holmes

IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IVANIA D. LAWRENCE,)
)
Plaintiff,)
)
vs.)
)
STATE FARM FIRE AND CASUALTY)
COMPANY,)
)
Defendant.)

No. 95-C-639-E

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

ENTERED ON D.C.

ORDER

DATE ~~MAR 18 1999~~

Now before the Court is the Motion for Attorney's Fees (Docket #35) of the Defendant State Farm Fire and Casualty Company (State Farm).

Defendant prevailed on a motion for summary judgment in an action for recovery on a policy of property casualty insurance and bad faith breach of that contract. Defendant now seeks attorney's pursuant to Okla.Stat.tit.36, §3629(B) which provides for an award of attorney's fees to the prevailing party in a contract dispute over coverage. That section provides:

It shall be the duty of the insurer, receiving a proof of loss, to submit a written offer of settlement or rejection of the claim to the insured within ninety (90) days of receipt of that proof of loss. Upon a judgment rendered to either party, costs and attorney fees shall be allowable to the prevailing party. For purposes of this section, the prevailing party is the insurer in those cases where judgment does not exceed written offer of settlement. In all other judgments the insured shall be the prevailing party.

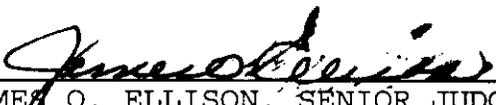
In opposing this motion, plaintiff simply argues that, under these facts, such an award would be unjust, and that State Farm's conduct amounts to a breach of the duty of good faith and fair dealing, and is extreme, unconscionable and outrageous. This Court

48

has determined that the conduct of State Farm was acceptable in light of the policy provision, and that the policy provision was not void and did not violate the duty of good faith and fair dealing. That determination has been affirmed on appeal.

Defendant's Motion for Attorney's Fees (Docket #35) is Granted. This matter is set for 11:30 AM, the 15th day of April 1999 For a hearing in which to determine the amount of attorney's fees to be awarded.

IT IS SO ORDERED THIS 17th DAY OF MARCH, 1999.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

DARRELL M. PATTERSON,)
)
Plaintiff,)
)
v.)
)
OKLAHOMA MILITARY DEPARTMENT,)
THUNDERBIRD YOUTH ACADEMY,)
MICHAEL D. BEDWELL, BARBARA ERWIN,)
individually and in their official capacities, and)
Does I through X, inclusive,)
)
Defendants.)

ENTERED ON DOCKET
DATE 3/17/99

Case No. CIV-97-1055-H ✓

FILED

MAR 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE
OF ALL CLAIMS ALLEGED AGAINST
DEFENDANTS MICHAEL D. BEDWELL AND BARBARA ERWIN

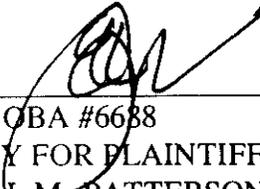
On the 16TH day of MARCH, 1999, the above-styled action comes on before the Court on the issues raised by the Joint Stipulation of Dismissal With Prejudice of All Claims Alleged Against Defendants Michael D. Bedwell and Barbara Erwin, and the Court finding good cause does hereby find that the stipulation should be made an order of this Court.

It is therefore ordered that all claims alleged in this action against Defendants Michael D. Bedwell and Barbara Erwin are dismissed with prejudice, and that they are dismissed as Defendants herein.

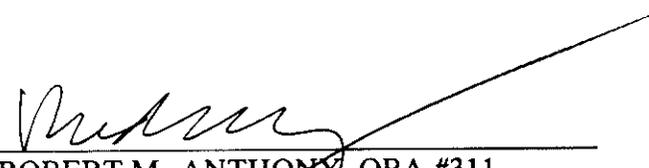
SVEN ERIK HOLMES
U. S. DISTRICT JUDGE

28

APPROVED:



JEFF NIX, OBA #6688
ATTORNEY FOR PLAINTIFF
DARRELL M. PATTERSON
NIX & SCROGGS
601 S. Boulder, Suite 610
Tulsa, OK 74119
(918) 587-3193 Fax (918) 587-3491



ROBERT M. ANTHONY, OBA #311
ATTORNEY FOR DEFENDANTS OKLAHOMA
MILITARY DEPARTMENT-THUNDERBIRD
YOUTH ACADEMY, MICHAEL D. BEDWELL
and BARBARA ERWIN
4545 N. Lincoln, Suite 260
Oklahoma City, OK 73105
(405) 521-4274 Fax (405) 528-1867

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

ENTERED ON DOCKET

DARRELL M. PATTERSON,)
)
Plaintiff,)

DATE 3/12/99

v.)

Case No. CIV-97-1055-H ✓

OKLAHOMA MILITARY DEPARTMENT,)
THUNDERBIRD YOUTH ACADEMY,)
MICHAEL D. BEDWELL, BARBARA ERWIN,)
individually and in their official capacities, and)
Does I through X, inclusive,)
)
Defendants.)

FILED

MAR 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

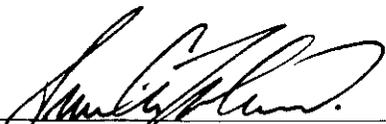
ORDER OF DISMISSAL WITH PREJUDICE
OF ALL CLAIMS ALLEGED AGAINST
DEFENDANT OKLAHOMA MILITARY DEPARTMENT-
THUNDERBIRD YOUTH ACADEMY

On the 16TH day of MARCH, 1999, the above-styled action comes on before the Court on the issues raised by the Joint Stipulation of Dismissal With Prejudice of All Claims Alleged Against Defendant Oklahoma Military Department-Thunderbird Youth Academy, and the Court finding good cause does hereby find that the stipulation should be made an order of this Court.

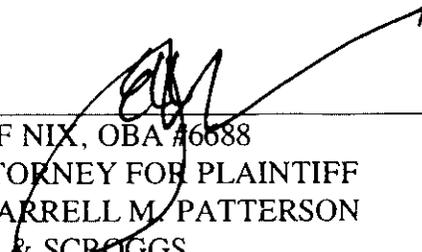
It is therefore ordered that all claims alleged in this action against Defendant Oklahoma Military Department-Thunderbird Youth Academy are dismissed with prejudice.

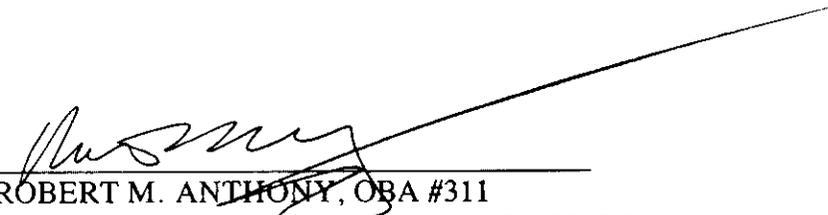
It is further ordered that, all claims alleged in this action against prior defendants, Michael D. Bedwell and Barbara Erwin, having previously been dismissed with prejudice, the above-styled action is dismissed with prejudice.

39


SVEN ERIK HOLMES
U. S. DISTRICT JUDGE

APPROVED:


JEFF NIX, OBA #6688
ATTORNEY FOR PLAINTIFF
DARRELL M. PATTERSON
NIX & SCROGGS
601 S. Boulder, Suite 610
Tulsa, OK 74119
(918) 587-3193 Fax (918) 587-3491


ROBERT M. ANTHONY, OBA #311
ATTORNEY FOR DEFENDANTS OKLAHOMA
MILITARY DEPARTMENT-THUNDERBIRD
YOUTH ACADEMY, MICHAEL D. BEDWELL
and BARBARA ERWIN
4545 N. Lincoln, Suite 260
Oklahoma City, OK 73105
(405) 521-4274 Fax (405) 528-1867

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

PAMELA P. JONES, individually,)
and as Personal Representative of the)
Estate of ZACHARY W. NOBILE, deceased,)
On Behalf of and for the Benefit of)
GREGORY M. NOBILE, JEFFREY M.)
NOBILE, AND JENNIFER E. NOBILE,)
As Claimants to the Estate,)

Plaintiff,)

v.)

CITY OF BROKEN ARROW; and RICK)
ROSS, JOHN WALLS, SCOTT BENNETT,)
ERIC HELVELSTON, E.A. FERGUSON,)
And JOHN DOES I-V in their Individual)
Capacities,)

Defendants.)

FILED

MAR 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil No. 98-CV-479-K(E) ✓

ENTERED ON DOCKET

DATE 3/18/99

ORDER DISMISSING DEFENDANT SCOTT BENNETT

This matter having come before this Court, upon Stipulation of Dismissal
With Prejudice and good cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant Scott
Bennett is hereby dismissed with prejudice in the above-captioned matter. IT IS
FURTHER ORDERED that each party to the case against Defendant Scott Bennett
will bear its own costs in this litigation.

Dated this 16 day of March, 1998.



U.S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

72

IN THE UNITED STATES COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT LOBATO,)
)
Plaintiff,)
)
vs.)
)
ROBERT ABRAHAM,)
)
Defendant.)

ENTERED ON DOCKET

DATE MAR 17 1999

Case No. 98-CV-014 (K(E))

FILED

MAR 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER FOR DISMISSAL WITH PREJUDICE

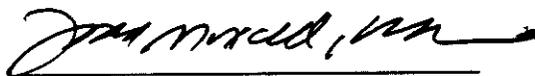
Now on this 16 day of March, 1999, the Court has for its consideration the parties' joint stipulation that the above captioned matter should be dismissed with prejudice to the refiling thereof. For good cause shown, the Court finds that the stipulation is in good order, is well taken, and that it should result in the entry of an order of dismissal with prejudice.

IT IS, THEREFORE, THE ORDER AND JUDGMENT OF THIS COURT that this case should be, and is hereby, dismissed with prejudice to the refiling hereof and that each of the parties should bear his own costs and attorney's fees.

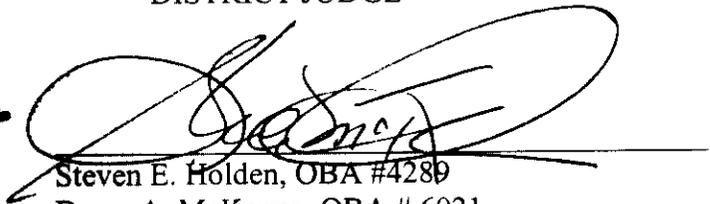


TERRY C. KEEN, UNITED STATES
DISTRICT JUDGE

Approved:



Todd Maxwell Henshaw, OBA No.
320 S. Boston, Suite 1130
Tulsa, OK 74103
(918) 583-7500



Steven E. Holden, OBA #4289
Bruce A. McKenna, OBA # 6021
200 Reunion Center
Nine East Fourth Street
Tulsa, Oklahoma 74103
(918) 295-8888
(918) 295-8889 (facsimile)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
IN OPEN COURT

MAR 17 1999

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

UNITED STATES OF AMERICA,
on behalf of Farm Service Agency,
formerly Farmers Home Administration,

Plaintiff,

v.

THOMAS B. KRAUSER
aka Thomas Brian Krauser;
BARBARA A. KRAUSER
aka Barbara Alice Krauser;
FARM CREDIT BANK OF WICHITA;
AMERICAN EXCHANGE BANK,
Collinsville, Oklahoma;
COUNTY TREASURER, Mayes County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Mayes County, Oklahoma,

Defendants.

ENTERED ON DOCKET

DATE ~~MAR 17 1999~~

CIVIL ACTION NO. 98-CV-0076-H (J)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 17th day of March, 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 February 2, 1999, pursuant to an Order of Sale dated September 4, 1998, of the following described property located in Mayes County, Oklahoma:

The South Half of Lot 4 and the Southwest Quarter of the Northwest Quarter and the West Half of the Southeast Quarter of the Northwest Quarter and the Northwest Quarter of the Southwest Quarter and the West Half of the Northeast Quarter of the Southwest Quarter and the Northeast Quarter of the Southwest Quarter of the Southwest Quarter of Section 1, Township 23 North, Range 20 East of Indian Base and Meridian, less the following described property, to-wit:

All those parts of the Northeast Quarter of the Southwest Quarter of the Southwest Quarter and the Northwest Quarter of the Southwest Quarter and the West Half of the Northeast Quarter of the Southwest Quarter and the West Half of the Southeast Quarter of the Northwest Quarter described as follows:

24

Beginning at a point in the West boundary of said Northeast Quarter Southwest Quarter Southwest Quarter 250 feet South of the Northwest corner thereof;
thence in a Northeasterly direction to a point in the East boundary of said Northwest Quarter of the Southwest Quarter 660 feet South of the Northeast corner thereof;
thence in a Northeasterly direction to a point in the North boundary of said West Half of the Northeast Quarter of the Southwest Quarter 330 feet East of the Northwest corner thereof;
thence in a Northeasterly direction to a point in said West Half of the Southeast Quarter of the Northwest Quarter 660 feet South and 165 feet West of the Northeast corner thereof;
thence in a Northwesterly direction to a point in the North boundary of said West Half of the Southeast Quarter of the Northwest Quarter 330 feet West of the Northeast corner thereof;
thence Easterly along said North boundary to said Northeast corner;
thence Southerly along the East boundary of said West Half of the Southeast Quarter of the Northwest Quarter to the Southeast corner thereof;
thence in a Southwesterly direction to a point in the West boundary of said West Half of the Northeast Quarter of the Southwest Quarter 165 feet North of the Southwest corner thereof;
thence in a Southwesterly direction to a point in the West boundary of said Northeast Quarter of the Southwest Quarter of the Southwest Quarter 100 feet North of the Southwest corner thereof;
thence Northerly along said West boundary to the point of beginning;
and all that part of the South 20 acres of Lot 4 lying North of the following described line:
Beginning at the Northwest corner of said South 20 acres of Lot 4;
thence in a Southeasterly direction to a point in the East boundary of said South 20 acres of Lot 4 330 feet South of the Northeast corner thereof, all in Section 1, Township 23 North, Range 20 East of Indian Base and Meridian,
and
The South Half of Lot 1 and the Southeast Quarter of the Northeast Quarter and the South Half of the South Half of the Southwest Quarter of the Northeast Quarter and the North Half of the Southeast Quarter and the Northeast Quarter of the Northeast Quarter of the Southwest Quarter of Section 2, Township 23 North, Range 20 East of Indian Base and Meridian.

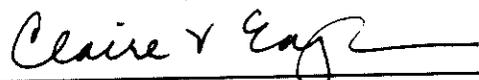
Appearing for the United States of America is Phil Pinnell, Assistant United States Attorney. Notice was given the Defendants, Thomas B. Krauser aka Thomas Brian Krauser; Barbara A. Krauser aka Barbara Alice Krauser; Farm Credit Bank of Wichita through John Lann, Assistant General Counsel; American Exchange Bank, Collinsville, Oklahoma now

known as RCB Bank, through its attorney Richard D. Mosier; and County Treasurer and Board of County Commissioners, Mayes County, Oklahoma, through Charles A. Ramsey, 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 Pryor Daily Times, a newspaper published and of general circulation in Mayes County, Oklahoma, and that on the day fixed in the notice the property was sold to Milo Dean, Route 1, Box 384, Big Cabin, Oklahoma 74332, he 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, Milo Dean, Route 1, Box 384, Big Cabin, Oklahoma 74332, 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



PHIL PINNELL, OBA #7169

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-0076-H (J) (Krauser)

PP:css

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

17th Day of March, 1999.

Christina M. Pinnell, Deputy Clerk

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

DWAYNE ANTHONY ALEXANDER,)
)
 Plaintiff,)
)
 vs.)
)
 STANLEY GLANZ; WEXFORD HEALTH)
 SERVICES and JOYCE MAN, sued as)
 Joyce Man #4767,)
)
 Defendants.)

ENTERED ON DOCKET

DATE MAR 17 1999

No. 98-CV-510-K (E) ✓

F I L E D

MAR 17 1999 *PL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On July 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 August 25, 1998, the Court informed Plaintiff of deficiencies in his papers. Specifically, Plaintiff was advised that this action could not proceed unless he provided a certified copy of the trust fund account statement or institutional equivalent and properly completed summonses and USM Marshal service forms. Plaintiff was cautioned that failure to comply could result in dismissal without prejudice and without further notice. On September 10, 1998, (Docket #4), Plaintiff filed an affidavit as to his dates of confinement along with a trust fund account statement and the requested service documents.

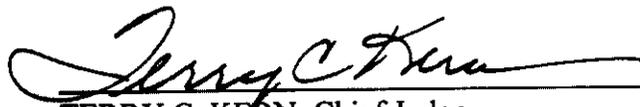
Based on these additional documents, the Court issued an Order dated December 23, 1998 (#5), granting Plaintiff leave to proceed without prepayment of the filing fee. Pursuant to 28 U.S.C. § 1915(b), the Court directed Plaintiff to pay an initial partial filing by of \$3.33, and thereafter, to continuing making monthly payments of 20% of the preceding month's income until the total filing fee of \$150.00 is paid. Plaintiff was advised that "unless by [January 22, 1999] he has either (1)

paid the initial partial filing fee (of \$3.33), or (2) shown cause in writing for the failure to pay, this action will be subject to dismissal without prejudice to refiling . . .” (#5). In addition, Plaintiff was ordered to submit three copies of the civil rights complaint for service upon the named Defendants. On January 8, 1999, Plaintiff submitted the three copies of the complaint as directed. However, to date, Plaintiff has not submitted the initial partial filing fee, or shown cause in writing for failing to do so.

Because Plaintiff has neither paid the initial partial filing fee nor shown cause in writing for his failure to do so as required by the Court’s Order of December 23, 1998, the Court finds that this action may not proceed and should be dismissed without prejudice for failure to prosecute.

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

SO ORDERED this 17 day of March, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

JASON SEAN WALSH,)
)
Plaintiff,)
)
vs.)
)
DEANNA LEMONS, LINDA PILLARS,)
and TOM PHILLIPS,)
)
Defendants.)

ENTERED ON DOCKET
DATE MAR 17 1999

No. 98-CV-974-K (J) ✓

F I L E D

MAR 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On December 28, 1998, Plaintiff's civil rights complaint pursuant to 42 U.S.C. § 1983 along with a motion for leave to proceed *in forma pauperis* was transferred to this Court from the United States District Court for the Western District of Oklahoma. By order entered December 31, 1998 (Docket #2), the Court granted Plaintiff leave to proceed without prepayment of the filing fee. Pursuant to 28 U.S.C. § 1915(b), the Court directed Plaintiff to pay an initial partial filing fee of \$23.34, and thereafter, to continue making monthly payments of 20% of the preceding month's income until the total filing fee of \$150.00 is paid. Plaintiff was also advised that "unless by [February 4, 1999] he has either (1) paid the initial partial filing fee, or (2) shown cause in writing for the failure to pay, this action will be subject to dismissal without prejudice to refiling" (#2). In addition, Plaintiff was ordered to submit properly completed summonses and USM Marshal service forms for service upon the named Defendants. To date, Plaintiff has neither submitted the initial partial filing fee, nor shown cause in writing for failing to do so, nor has he submitted the required service documents.

Because Plaintiff has not paid the initial partial filing fee in compliance with the Court's Order of December 31, 1998, the Court finds this action may not proceed and should be dismissed without prejudice for failure to prosecute.

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

SO ORDERED this 17 day of March, 1999.



TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

time. (#4, Ex. D). On June 25, 1997, the Oklahoma Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief. (#4, Ex. F). Petitioner filed the instant petition for writ of habeas corpus on May 20, 1998 (#1).

ANALYSIS

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

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

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

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

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

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

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

28 U.S.C. § 2244(d). Because the limitations period generally begins to run from the date on which a prisoner's direct appeal from his conviction became final, a literal application of the AEDPA limitations language would result in the preclusion of habeas corpus relief for any prisoner whose conviction became final more than one year before enactment of the AEDPA. Recognizing the retroactivity problems associated with that result, the Tenth Circuit Court of Appeals has held that

for prisoners whose convictions became final before April 24, 1996, the one-year statute of limitation does not begin to run until April 24, 1996. United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997). In other words, prisoners whose convictions became final before April 24, 1996, the date of enactment of the AEDPA, have been afforded a one-year grace period within which to file for federal habeas corpus relief.

The Tenth Circuit Court of Appeals has also ruled that the tolling provision of 28 U.S.C. § 2244(d)(2) applies to toll the one-year grace period afforded by Simmonds. Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998). Therefore, the one-year grace period is tolled during time spent pursuing properly filed state applications for post-conviction relief.

Application of these principles to the instant case leads to the conclusion that this habeas petition fails to meet the one-year limitations period. Because Petitioner failed to move to withdraw his guilty plea or to otherwise perfect a direct appeal following entry of the Judgment and Sentence on his plea, his conviction became final ten (10) days after entry of his Judgment and Sentence, or on December 26, 1975. See Rule 4.2, Rules of the Court of Criminal Appeals (requiring the defendant to file an application to withdraw guilty plea within ten (10) days from the date of the pronouncement of the Judgment and Sentence in order to commence an appeal from any conviction of a plea of guilty). Therefore, Petitioner's conviction became final more than twenty (20) years before enactment of the AEDPA. As a result, his one-year limitations clock began to run on April 24, 1996, when the AEDPA went into effect. Under Simmonds, 111 F.3d at 746, Petitioner had until April 23, 1997, to submit a timely petition for writ of habeas corpus.

However, pursuant to § 2244(d)(2), the running of the limitations period was tolled or suspended during the pendency of any properly filed post-conviction proceedings. Hoggro, 150 F.3d at 1226. Petitioner's application for post-conviction relief, filed December 7, 1995, before enactment

of the AEDPA, was denied by the Creek County District Court on April 25, 1996, one day after AEDPA's enactment. On April 11, 1997, or twelve days prior to the end of the judicially created grace period, Petitioner filed an application for a post-conviction appeal out-of-time. That request was granted and the State appellate court considered Petitioner's appeal from the trial court's denial of post-conviction relief. Therefore, at most, Petitioner would have thirteen days¹ within which to file his federal petition for writ of habeas corpus after the state appellate court concluded his post-conviction appeal.² In other words, once the Oklahoma Court of Criminal Appeals entered its order, on June 25, 1997, terminating his post-conviction appeal, the limitations clock again began to run and Petitioner had 13 days, or until July 8, 1997, to submit his federal petition for writ of habeas corpus. Petitioner filed his petition on May 20, 1998, well past the July 8, 1997 deadline. Absent a tolling event, this action is time-barred.

In his response to the motion to dismiss, Petitioner cites 28 U.S.C. § 2244(d)(1)(B) and argues that his petition is not time-barred by the AEDPA because it was filed within one year of the date on which a state-created impediment to the filing of his petition was removed. The impediment identified by Petitioner is that he was denied reasonable access to the rules and the law, specifically, Petitioner complains that he did not have a copy of the AEDPA and did not know its provisions. In

¹Thirteen days represents the sum of the twelve days remaining in the grace period when Petitioner filed his application for a post-conviction appeal out-of-time plus the one day of the grace period during which the application for post conviction relief was pending in the state trial court.

²The Court emphasizes that Petitioner's failure to perfect a post-conviction appeal pursuant to Oklahoma procedural rules could preclude the consideration of the time spent by Petitioner pursuing his post-conviction appeal out-of-time for tolling purposes under § 2244(d)(2) which provides that only "properly filed applications" serve to toll the limitations period. However, in this case, nothing in the record reveals the basis for either Petitioner's failure to perfect a timely post-conviction appeal or the state appellate court's decision to allow a post-conviction appeal out-of-time. In addition, even if the time is counted as tolling the limitations period, Petitioner's petition is nonetheless untimely.

support of his position, Petitioner provides his Request to Staff Member, dated June 16, 1998, requesting a copy of the AEDPA (#6, Ex. 1), as well as his own Affidavit (#6, Ex. 2). He also provides the Request to Staff Member completed by fellow inmate Eddie Lee, dated March 12, 1998, requesting a copy of the AEDPA. (#6, Ex. 3). In response to that request, the prison official stated that, "[a]t this time the Act you requested has been remove (sic) from the Law Library. Someone thought they needed it worse than us. When I get another copy I'll let you know." Lastly, Petitioner attaches the Affidavit of fellow inmate Gregory Williams (#5, Ex. 4), a "Legal Research Assistant," who states "I am not informed enough to advise anyone on [the AEDPA]."

The Court is unwilling to toll the limitations period based on Petitioner's argument. Petitioner's pursuit of the claims raised in this matter is marked by an extreme lack of diligence. Petitioner waited twenty (20) years after his conviction to seek post-conviction relief.³ In addition, he offers no explanation for the one-year delay between the state trial court's denial of post-conviction relief and his pursuit of an appeal out-of-time. Nor does he offers an explanation for the eleven (11) month delay between the conclusion of post-conviction proceedings in the state appellate court and the filing of the instant petition for writ of habeas corpus. The Court also finds it significant that the claims raised by Petitioner in the instant petition are identical to those raised in state post-conviction proceedings. Thus, assuming *arguendo* that any denial of access to the AEDPA amounted to unconstitutional state action, that action did not prevent Petitioner from filing the instant application. See Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998). The Court finds

³The Court notes that the Oklahoma Court of Criminal Appeals, relying on Paxton v. State, 903 P.2d 325, 326 (Okla. Crim. App. 1995), found that Petitioner's claim concerning the trial court's failure to conduct a pre-sentence investigation, also the first claim raised in the instant action, was barred by the doctrine of laches. (#4, Ex. F at 3).

Petitioner's failure to comply with the AEDPA's limitations period is directly attributable to his own lack of diligence and not to any state created impediment. Therefore, Petitioner's argument must be rejected and the Court concludes that the petition for writ of habeas corpus is untimely. Respondent's motion to dismiss this petition as time-barred should be granted.

CONCLUSION

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

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations (#3) is **granted**.
2. The petition for writ of habeas corpus is **dismissed with prejudice**.

SO ORDERED THIS 16 day of March, 1999.



TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED

MAR 18 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LISA RANSOM, an individual, and AMBER
RANSOM, a minor child, by and through her
natural mother and next friend, Lisa Ransom,

Plaintiffs,

vs.

Case No. 97-C-718-E ✓

BOARD OF COUNTY COMMISSIONERS OF
THE COUNTY OF WAGONER, STATE OF
OKLAHOMA, a political subdivision of the State
of Oklahoma, LANCE CHISUM, individually and
as an officer and employee of Wagoner County,
State of Oklahoma, ELMER SHEPHERD, an
officer and employee of Wagoner County, State of
Oklahoma, RUDY BRIGGS, as an officer and
employee of Wagoner County, State of Oklahoma,
and BRIAN SCOTT GORDON, an individual,

Defendants.

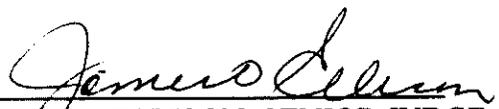
ENTERED ON DOCKET

DATE MAR 17 1999

JUDGMENT

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendants Lance Chisum, Board of County Commissioners of the County of Wagoner, Elmer Shepherd as a former officer and employee of Wagoner County, and Rudy Briggs, as an officer and employee of Wagoner County, and against the Plaintiffs, Lisa Ransom, and Amber Ransom. Plaintiffs shall take nothing of their claim.

DATED, THIS 15th DAY OF MARCH, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

F I L E D

MAR 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LISA RANSOM, an individual, and AMBER
RANSOM, a minor child, by and through her
natural mother and next friend, Lisa Ransom,

Plaintiffs,

vs.

Case No. 97-C-718-E ✓

BOARD OF COUNTY COMMISSIONERS OF
THE COUNTY OF WAGONER, STATE OF
OKLAHOMA, a political subdivision of the State
of Oklahoma, LANCE CHISUM, individually and
as an officer and employee of Wagoner County,
State of Oklahoma, ELMER SHEPHERD, an
officer and employee of Wagoner County, State of
Oklahoma, RUDY BRIGGS, as an officer and
employee of Wagoner County, State of Oklahoma,
and BRIAN SCOTT GORDON, an individual,

Defendants.

ENTERED ON DOCKET
DATE MAR 17 1999

ORDER

Now before the Court is the Motion for Summary Judgment (Docket # 21) of the Defendant Lance Chisum ("Chisum"), the Motion for Summary Judgment (Docket # 23) of the Defendant, Board of County Commissioners of the County of Wagoner, State of Oklahoma (the "county"), and the Motion for Summary Judgment (Docket # 19) of the Defendants Elmer Shepherd as a former officer and employee of Wagoner County, State of Oklahoma, and Rudy Briggs, as an officer and employee of Wagoner County, State of Oklahoma (collectively, the "sheriffs").

Plaintiff, Lisa Ransom asserts that, on December 2, 1995, outside the town of Porter, she was run off the road by Brian Gordon, the natural father of her then two year old daughter, Amber

39

Ransom, and that he took Amber from her at that time. Ransom then went to the Wagoner Sheriff's office, and found that Gordon was already there, with Amber. Ransom complains that the Sheriff's Deputy, Lance Chisum, did not allow her to speak, did not run a criminal history check on Gordon, called her a liar, and ultimately allowed Gordon to leave with Amber. Apparently Gordon was then able to keep Amber for about 45 days despite the fact that he had no custodial or visitation rights. Ransom now sues Chisum, Shepherd, who was the Sheriff of Wagoner County at the time of the incident, Briggs, who is now the Sheriff of Wagoner County, and the Board of County Commissioners of Wagoner County pursuant to §1983 for interference with the familial relationship, which is protected by the First and Fourteenth Amendments to the Constitution, and pursuant to state law for intentional infliction of emotional distress. Ransom also bring claims against Gordon for assault, battery, and false imprisonment.

The Defendants deny these claims, and all defendants but Gordon have filed motions for summary judgment. Chisum argues that he did not violate any constitutional rights of Ransom, and that he is entitled to qualified immunity. He also asserts that Plaintiff has not stated a claim for intentional infliction of emotional distress. The sheriffs argue that there is no policy or custom which caused Ransom to be deprived of her constitutional rights and that Plaintiff has not stated a claim for intentional infliction of emotional distress. The county argues that it cannot be liable because there was no affirmative link between the commissioners and the alleged acts and that immunity pursuant to the Oklahoma Governmental Tort Claims Act shields it from liability for state tort claims.

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).

Section 1983 Claims against Chisum

Chisum argues that he is entitled to qualified immunity because he did not violate any clearly established, statutory or constitutional right of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The Court in Hollingsworth v. Hill, 110 F.3d 733, 737 (10th Cir. 1997) discussed the framework under which assertions of qualified immunity must be analyzed: "first we determine whether the plaintiff has asserted a violation of a constitutional or statutory right, and then we decide whether that right was clearly established such that a reasonable person in the defendant's position would have known that [his] conduct violated that right." In this case, Plaintiff asserts that Chisum's actions in failing adequately to investigate the situation, failing to listen to Ms. Ransom's side of the story, failing to allow Ms. Ransom the opportunity to inform Chisum of the true facts, failing to determine the actual custodial rights

involved, failing to check Gordon's criminal history and ultimately allowing Gordon to leave with Amber resulted in the deprivations of Plaintiffs' constitutional rights of familial association with one another.

Ransom relies on Hollingsworth for her assertion that she has a fundamental liberty interest under the Fourteenth Amendment in the care, custody and management of her children. 110 F.3d at 738-39. Under Hollingsworth, a state may not deprive a person of that liberty interest without due process, and the process required predeprivation notice and a hearing. Id. Although the court, in Hollingsworth, outlines an exception to the requirement of due process, where the child's safety is under immediate threat, neither side seriously argues that there was any evidence to support such a finding.¹

Even assuming that plaintiff's right to the care, custody and management of her child was violated, Hollingsworth does not support Plaintiffs' assertion that Chisum should have known that his conduct violated that right. In Hollingsworth, it is clearly established that the removal of a child from the custody of a parent without notice or a meaningful opportunity to be heard violates the constitutional rights of that parent. Chisum did not remove Plaintiff's child from her custody. Rather, Chisum left the child in the custody of the natural parent with which she came to the police station. Moreover, Chisum had to weigh the interest of the admitted natural father of the child, who had her with him when he came to the station. The Court finds that Chisum's conduct was not objectively legally unreasonable when assessed in light of legal rules that were clearly established when the action was taken. See Trigalet v. Young, 54 F.3d 645, 647. Moreover, having found that

¹ In this respect, the argument regarding failure to check Gordon's police record misses the point. His police record was limited to several incidents occurring in 1988, approximately seven years prior to this occurrence.

Chisum's conduct was not unreasonable, the Court must further find that there is no proof of intent to interfere with the relationship between the Plaintiffs so as to give rise to a claim of intimate associational rights by Amber Ransom. See Trujillo v. Bd. of County Comm'rs, 768 F.2d 1186 (10th Cir. 1985). Chisum's Motion for Summary Judgment on the §1983 claims is granted.

Section 1983 Claims against the Sheriffs

The Sheriffs also argue that they are entitled to summary judgment because no policy or custom of the Sheriff's Department deprived Plaintiffs of a constitutional right. The parties are in agreement regarding the fundamental principles governing this claim. Plaintiffs must prove that their injury was attributable to a "policy or custom" of the county. See City of St. Louis v. Proprtnick, 485 zu.D. 112, 108 s.Ct. 915, 99 L.Ed. 2d 107(1988). Moreover, a plaintiff must demonstrate that a policy or custom caused him to be subjected to a deprivation of his constitutional rights. See City of Oklahoma City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2457, 85 L. Ed. 2d 791 (1985). In general a municipality cannot be held liable under §1983 on a respondeat superior theory. Monell v. Dept. of Soc. Serv., 436 U.S. 658, 690 (1978). But, "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may be fairly said to represent official policy, inflicts the injury," the "the government as an entity is responsible under §1983. Id. at 694.

It is undisputed that Chisum was acting in conformity with the policy of the Wagoner County Sheriff's office that a deputy cannot take a child from one parent and give it to another parent without evidence of physical abuse or a Court Order. The question is whether that policy is unconstitutional. Without any authority directly on point, Plaintiffs attempt to characterize the policy as unconstitutional by relying on Oklahoma cases which hold that an unmarried father does not have

automatic rights as a father and citing to the large percentage of children (by Plaintiffs' brief, approximately one third, in 1993) who are born out of wedlock. The Court simply cannot find that either of these facts is sufficient to require a deputy sheriff to supplant the role of a court and make a determination as to where custody should properly lie. This policy appears designed to protect all parties, a protection which appears all the more necessary in light of the factors cited by Plaintiffs. The Court declines to find that the policy is unconstitutional.

In the alternative, Plaintiffs argue that whether there is a failure to train or supervise which could give rise to liability on the part of the sheriff's office. A failure to train can be the basis of liability only where it amounts to deliberate indifference to the rights of persons with whom the police come into contact. City of Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed. 2. 412 (1989). A single violation can amount to deliberate indifference if the failure to train is so likely to result in a violation of rights that the need to train is patently obvious. Id. at 390. Otherwise a failure to train amounts to deliberate indifference only if a pattern of constitutional violations put the county on notice that employees' conduct was likely to result in a violation of rights. Id. at 397.

Here, since the policy followed by Chisum was not unconstitutional, the Court does not find that any failure to train was so likely to result in a violation of rights that the need to train was patently obvious. Moreover, while Plaintiff's present evidence that there may be some bias in how women are dealt with in domestic situations, the evidence here is that Chisum followed the established policy, which the Court finds not to be unconstitutional.

The Sheriffs' Motion for Summary Judgment on the §1983 claims is granted.

Section 1983 Claims against the County

Plaintiffs also name the county in their claims. Defendants argue that the County can only

be liable if an official policy or established custom of the Board of County Commissioners caused Plaintiffs' constitutional rights to be violated. Plaintiffs argue that , pursuant to Okla.Stat.tit.19, §4, the name in which a county shall be sued is the "Board of County Commissioners" of that county, and that the county is liable for the decisions of its policymaker with regard to Wagoner County's Sheriff's Office. Because the Court has found that there is no basis for liability on the part of the Sheriff's Office, it need not decide this issue.

The County's Motion for Summary Judgment on the §1983 claims is granted.

Intentional Infliction of Emotional Distress Claims against all Defendants

The Defendants argue, essentially, that the facts do not support a claim for intentional infliction of emotional distress, that Chisum is not individually liable pursuant to Okla.Stat.tit.51, §163(C), and that the governmental entity is immune pursuant to Okla.Stat.tit. 51, §155(6). Plaintiffs concede that Chisum is not individually liable because it is undisputed that he was acting in the scope of his employment, but argue that the facts do support a claim against the governmental entity and that immunity is not applicable in this situation.

For their immunity argument, Defendants rely on Okla.Stat.tit. 51, §155(6), which provides that a political subdivision shall be immune from any injury or damages as a result of "[c]ivil disobedience, riot, insurrection or rebellion or the failure to prove, or the method of providing, police, law enforcement, or fire protection." In Schmidt v. Grady County, 943 P.2d 595, 597(Okla. 1997), the Court rejected the broad interpretation of §155(6) that it provides "complete immunity from suit for any negligence of its employees when carrying out their duties," and similarly rejected the narrow interpretation that §155(6) should "be limited to decisions regarding how police protection should be provided." The Court instead held that the analysis should center on the

defendant's relationship to the plaintiffs and the task it was performing at the time. Id. at 598. The Court held that, as to a person who was injured while being transported by a police officer while in protective custody, the defendant was acting as a police officer in relation to the plaintiff and the county would be immune. In this instance the Court concludes that Chisum was undertaking to investigate conflicting claims, that he was acting as a police officer in relation to plaintiffs, and that the county would therefore be immune.

The Motions for Summary Judgment by all Defendants regarding the intentional infliction of emotional distress claim are granted.

The Motion for Summary Judgment (Docket # 21) of the Defendant Lance Chisum is **granted**, the Motion for Summary Judgment (Docket # 23) of the Defendant, Board of County Commissioners of the County of Wagoner, State of Oklahoma is **granted**, and the Motion for Summary Judgment (Docket # 19) of the Defendants Elmer Shepherd as a former officer and employee of Wagoner County, State of Oklahoma, and Rudy Briggs, as an officer and employee of Wagoner County, State of Oklahoma is **granted**.

IT IS SO ORDERED THIS 15th DAY OF MARCH, 1999.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

F I L E D

MAR 15 1999 *llw*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHERIE PIPKIN, CATHY COYAZO,)
GINGER RENO, CRYSTAL BAKER,)
ANGELA KINYON, ANNIE MORGAN,)
JENNIFER PRUETT, CARA RUMLEY)
DAINA WHISENHUNT, KELLY BROOKS,)
ANTHONY JAMAR, SUSAN)
LITTLEDAVE, BRIAN MURRAY, JEROLD)
SAPPINGTON, REBA COLENE)
RAGSDALE, LINDA BROWN, CHERYL)
WILSON-FUNK, APRIL GARRETT, JARA)
McCOY, and CAROL SHULL, individuals,)

Plaintiffs,)

vs.)

COMMERCIAL FINANCIAL SERVICES,)
INC., an Oklahoma corporation, and)
WILLIAM R. BARTMANN, individually and)
as an officer, director, agent and representative)
of Commercial Financial Services, Inc.,)

Defendants.)

ENTERED ON DOCKET
DATE MAR 17 1999

Case No. 98-CV-939-B *J*

ORDER

Comes on for hearing before the Court Plaintiffs' Motion for Remand (Docket #6) and the Court, being fully advised, finds the same shall be granted as to the claims against William R. Bartmann, but stayed as to Commercial Financial Services, Inc., ("CFS"), based upon CFS's filing notice of filing bankruptcy on 12/18/98.

The twenty (20) plaintiffs filed this action in the District Court for Tulsa County, alleging ten (10) separate causes of action against Defendants. The first nine (9) causes of

16

action involve all twenty (20) plaintiffs and arise from the alleged violation by Defendants of Oklahoma common and statutory law. A tenth cause of action, involving only three (3) of the plaintiffs, arises out of the Family [and] Medical Leave Act of 1993, which provides for concurrent jurisdiction in state and federal court. 29 U.S.C. §2617(a)(2)(A).

Defendants filed their Notice of Removal alleging Plaintiffs' claims are "based upon federal question jurisdiction; namely the Family [and] Medical Leave Act ... and the Civil Rights Act of 1967" On the same day, CFS filed a Voluntary Petition for Bankruptcy. In their motion for remand, Plaintiffs urge the Court has the right to consider whether the automatic stay provision applies to matters before it and that they can ask the Court to rule on the remand issue without being in violation thereof. This Court does not find the authority submitted in support of this position persuasive as it applies to CFS. However, because the claims against Bartmann are not subject to the automatic stay provision, the Court can consider the remand issue as to those claims. This is true even where the severed claims involve a controlling person of the debtor which could ultimately create a claim against the debtor or the Court enters a partial remand order only as to claims involving purely state law questions, retaining claims involving federal law. *Hill ex. rel. Pleasant Green Enterprises, Inc., v. Maton*, 944 F. Supp. 695 (N.D.Ill.1996); *In re Conference of African Union First Colored Methodist Protestant Church*, 184 B.R. 207 (Bkrcty. D.Del.1995).

The Court finds the vast majority of claims are based upon state and common law. Only three of the twenty plaintiffs raise claims under the Federal Family and Medical

Leave Act. Those three plaintiffs also raise other state and common law claims which must be decided under the law of the state of Oklahoma. Defendants attempt to characterize some of the claims as falling under the Civil Rights Act of 1967 is premature at this point in time. Further, Defendant admits that the federal rights which are asserted in this matter fall under the concurrent jurisdiction of the courts. Under these circumstances, and particularly where state law claims predominate, Plaintiffs choice of forum should be given great deference.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiffs' claims against Defendant William R. Bartmann are hereby remanded to the District Court for Tulsa County, Oklahoma. The Court retains jurisdiction as to all claims against Defendant CFS and holds the motion to remand in abeyance until completion of the bankruptcy proceedings and/or lifting of the automatic stay by the United States Bankruptcy Court. The Clerk of Court is directed to take the necessary action to remand Plaintiffs' claims against Defendant William R. Bartmann without delay.

DATED THIS 15th DAY OF MARCH, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

F I L E D

MAR 16 1999 *site*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CURTIS CAMPBELL,)
)
Plaintiff,)
)
vs.)
)
RON PALMER, Chief of Police; STANLEY)
GLANZ, Sheriff; PARKSIDE HOSPITAL)
and COMMUNITY MENTAL HEALTH CARE)
FACILITY; and DR. BARBARA DAVIS,)
)
Defendants.)

No. 98-CV-417-BU (M) ✓

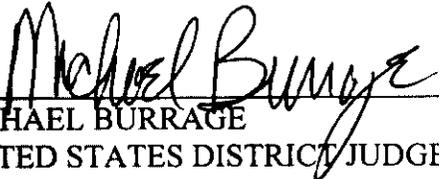
ENTERED ON DOCKET
DATE MAR 17 1999

ORDER

By Order entered October 9, 1998 (#7), this Court found Plaintiff had sufficient funds to effect service of process by certified mail and, therefore, denied Plaintiff's motion for leave to proceed *in forma pauperis* for the purpose of effecting service of process by the U. S. Marshal. Plaintiff was directed to effect service of process, within sixty (60) days, or by December 9, 1998, "by mailing in a separate envelope to each Defendant a summons, a copy of the complaint and a copy of [the October 9, 1998] Order, via 'certified mail, return receipt requested and delivery restricted,' or show cause for his failure to do so." (#7). To date, Plaintiff has neither effected service on the Defendants nor shown cause for his failure to do so as directed in the October 9, 1998 Order. Therefore, the Court finds that this action should be dismissed without prejudice for failure to effect service of process within the time period specified in the October 9, 1998 Order of this Court.

ACCORDINGLY, IT IS HEREBY ORDERED that this action is **dismissed without prejudice** for failure to effect service of process within the time period specified in the October 9, 1998 Order of this Court.

SO ORDERED this 16th day of MARCH, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

REGINALD EUGENE HAWKINS,)
)
Plaintiff,)
)
vs.)
)
JERRY PRATHER; PATRICK ABITBOL;)
JOHN AKIN; and RAY HASSELMAN,)
)
Defendants.)

MAR 16 1999

Pril Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-627-BU (J) ✓

ENTERED ON DOCKET

DATE MAR 17 1999

ORDER

On August 17, 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 August 24, 1998, the Court informed Plaintiff of deficiencies in his papers. Specifically, Plaintiff was advised that this action could not proceed unless he provided a certified copy of the trust fund account statement or institutional equivalent, an amended complaint identifying all defendants and all claims, and properly completed summonses and USM Marshal service forms. On September 21, 1998, Plaintiff filed an amended complaint (#6), an amended motion for leave to proceed *in forma pauperis* (#7), 4 summonses and 3 USM-285 forms.

Based on the representations contained in the amended motion for leave to proceed *in forma pauperis*, the Court issued an Order dated December 29, 1998 (#8), granting Plaintiff leave to proceed without prepayment of the filing fee. Pursuant to 28 U.S.C. § 1915(b), the Court directed Plaintiff to pay an initial partial filing by of \$4.87, and thereafter, to continuing making monthly payments of 20% of the preceding month's income until the total filing fee of \$150.00 is paid. Plaintiff was advised that "unless by [January 28, 1999] he has either (1) paid the initial partial filing

fee (of \$4.87), or (2) shown cause in writing for the failure to pay, this action will be subject to dismissal without prejudice to refiling . . .” (#8). However, although Plaintiff has recently advised the Court of his change of address (#9), Plaintiff has not, to date, submitted the initial partial filing fee, or shown cause in writing for failing to do so.

Because Plaintiff has neither paid the initial partial filing fee nor shown cause in writing for his failure to do so as required by the Court’s Order of December 29, 1998, the Court finds that this action may not proceed and should be dismissed without prejudice for failure to prosecute.

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

SO ORDERED this 16th day of March, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

MAR 16 1999 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SEBASTIAN SMITH,)
)
Plaintiff,)
)
vs.)
)
TOM FITZGIBBON, Captain;)
STANLEY GLANZ, Tulsa County Sheriff,)
)
Defendants.)

No. 98-CV-868-BU (E) ✓

ENTERED ON DOCKET
DATE MAR 17 1999

ORDER

On November 16, 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 20, 1998, the Court granted Plaintiff's motion to proceed *in forma pauperis* and, pursuant to 28 U.S.C. § 1915(b), instructed Plaintiff to submit, by December 21, 1998, an initial partial payment of \$36.75 or show cause in writing for his failure to do so. On December 21, 1998, the Court received Plaintiff's written response to the November 20, 1998 Order. Plaintiff advised the Court that he could not pay the initial partial filing fee as ordered. In an Order entered January 5, 1999, the Court found that the initial partial filing fee had been correctly calculated based on rather significant deposits made to Plaintiff's account during the months preceding the filing of complaint and noted that Plaintiff chose how the funds deposited to his account were expended. Had this litigation been a priority, the Court reasoned Plaintiff would have found funds sufficient to make the initial partial filing fee payment. The Court concluded that in order for this action to proceed, Plaintiff had to either pay the initial partial filing fee of \$36.75 as previously ordered or supplement his motion for leave to proceed *in forma pauperis* to identify the source(s) of the deposits made to

his prison account during the months preceding the filing of the complaint. The Court set a deadline of February 4, 1999 for Plaintiff's compliance. However, to date, Plaintiff has submitted neither the initial partial filing fee nor a supplemental motion for leave to proceed *in forma pauperis* as directed by the Court. Therefore, the Court finds that this action may not proceed and should be dismissed without prejudice for failure to prosecute.

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

SO ORDERED this 16th day of MARCH, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

RANDY & CATHERINE MARTIN, as parents)
and next friend of their minor daughter,)
BRANDY MARTIN; RANDY & CATHERINE)
MARTIN, as parents and next friend of their)
minor daughter, CANDICE MARTIN; RANDY)
& CATHERINE MARTIN, as parents and next)
friend of their minor daughter, KASEY)
HOBENS; RANDY & CATHERINE MARTIN,)
as parents and next friend of their minor)
daughter, KENDALL HOBENS; RAY & SUE)
WOLF, as parents of their minor daughter,)
SAMANTHA WOLF;)

Plaintiffs,)

v.)

INDEPENDENT SCHOOL DISTRICT NO. 8)
OF TULSA COUNTY, a/k/a SPERRY PUBLIC)
SCHOOLS; JERRY BURD, individually and in)
his official capacity as Superintendent;)
and Does 1 through 50,)
Defendants.)

ENTERED ON DOCKET

DATE ~~MAR 17 1999~~

Case No. 98-CV-416-H(J) ✓

F I L E D

MAR 16 1999 *gjk*

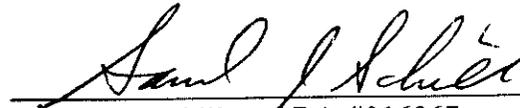
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CLASS ACTION

**JOINT STIPULATION OF DISMISSAL AS TO JERRY BURD, SUPERINTENDENT
OF SPERRY PUBLIC SCHOOLS**

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the Plaintiffs, Randy and Catherine Martin, as parents and next friend of their minor daughter, Brandy Martin, *et al.*, hereby stipulate with the Defendants, Independent School District No. 8 of Tulsa County, a/k/a Sperry Public Schools, *et al.*, and Jerry Burd (individually and in his official capacity), that this action shall be dismissed with prejudice as to Defendant, Jerry Burd, in his individual capacity.

Respectfully submitted,



Samuel J. Schiller, OBA #016067
SCHILLER LAW FIRM
P.O. Box 159
Haskell, OK 74436

Ray Yasser, OBA #009944
3120 East Fourth Place
Tulsa, OK 74104

Attorneys for Plaintiffs and Class



Karen L. Long, OBA #5510
ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 700
Tulsa, OK 74103-4500
(918) 585-9211

*Attorneys for all Defendants Except
Does 1 through 50*

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

F I L E D

MAR 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

Civil No. 98-CV-0304C (M)

COUPLING DISTRIBUTORS INC., an)

Oklahoma corporation; COUPLING)

DISTRIBUTORS INCORPORATED OF)

OKLAHOMA, an Oklahoma corporation;)

MICHAEL D. GREENE; MDG)

INCORPORATED, an Oklahoma)

corporation; and COUPLING)

DISTRIBUTORS INTERNATIONAL,)

INC., an Oklahoma corporation,)

Defendants.)

ENTERED ON DOCKET
DATE MAR 16 1999

JUDGMENT

On motion of plaintiff, pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure, the Clerk of this Court having entered default against defendants Coupling Distributors Inc., Coupling Distributors Incorporated of Oklahoma, Michael D. Greene, MDG Incorporated, and Coupling Distributors International, Inc. on February 4, 1999, it is hereby

ORDERED AND ADJUDGED as follows:

1. Judgment is entered in favor of the plaintiff, United States of America, against the defendants Coupling Distributors Inc. and Coupling Distributors Incorporated of Oklahoma for the unpaid assessed balances of federal corporation income taxes and related interest and penalties set forth below:

Tax Year	Assessment Date	Amt. Assessed^{1/}	Unpaid Balance
1989	March 13, 1995	(T) 279,247.00	
	March 13, 1995	(I) 212,930.48	
	March 13, 1995	(P) 69,812.00	
	October 9, 1995	(I) 36,242.11	
	November 6, 1995	(I) 3,797.50	
	December 11, 1995	(I) 5,100.86	
	March 4, 1995	(F) 32.00	
	June 23, 1997	(F) 16.00	\$607,177.95
1990	March 13, 1995	(T) 48,132.00	
	March 13, 1995	(I) 25,158.66	
	March 13, 1995	(P) 9,626.00	\$ 82,916.66
Total Unpaid Assessed Balance			\$690,094.61

plus all penalties accruing under law after the dates of assessment, plus interest accruing after the dates of assessment pursuant to 26 U.S.C. § 6601, 6621, and 6622, and 28 U.S.C. § 1961(c) until paid.

2. Judgment is entered determining that on the dates of the assessments listed above, federal tax liens arose and attached to all property and rights to property then belonging to or subsequently acquired by defendant Coupling Distributors Inc.

^{1/} For purposes of this chart, T = tax; P = penalty; I = interest; F = fees and costs.

3. Judgment is entered determining that Coupling Distributors Incorporated of Oklahoma is the same entity as, alter ego of, and nominee of Coupling Distributors Inc.

4. Judgment is entered determining that the federal tax liens against Coupling Distributors Inc. attach to all property and rights to property belonging to Coupling Distributors Incorporated of Oklahoma, including, without limitation, property fraudulently transferred to third parties.

5. Judgment is entered determining that any transfer of any assets to any of the other defendants by either Coupling Distributors Inc. or Coupling Distributors Incorporated of Oklahoma, made with actual intent to hinder, delay, or defraud the Internal Revenue Service ("IRS") or in exchange for less than reasonable consideration, were fraudulent transfers.

6. Judgment is entered determining that the transfer of any other assets by either Coupling Distributors Inc. or Coupling Distributors Incorporated of Oklahoma, made with actual intent to hinder, delay, or defraud the IRS or in exchange for less than reasonable consideration, were fraudulent transfers.

7. Judgment is entered determining that Michael D. Greene has no interest in the assets of either Coupling Distributors Inc. or Coupling Distributors Incorporated of Oklahoma, and that Michael D. Greene has no interest in any assets of Coupling Distributors Inc. or Coupling Distributors Incorporated of Oklahoma to which the federal tax liens have attached.

8. Judgment is entered determining that MDG Incorporated has no interest in the assets of either Coupling Distributors Inc. or Coupling Distributors Incorporated of Oklahoma, and that MDG Incorporated has no interest in any assets of Coupling Distributors Inc. or Coupling Distributors Incorporated of Oklahoma to which the federal tax liens have attached.

9. Judgment is entered determining that Coupling Distributors International, Inc. has no interest in the assets of either Coupling Distributors Inc. or Coupling Distributors Incorporated of Oklahoma, and that Coupling Distributors International, Inc. has no interest in any assets of Coupling Distributors Inc. or Coupling Distributors Incorporated of Oklahoma to which the federal tax liens have attached.

ORDERED AND ADJUDGED this 12th day of March, 1999.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAR 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

R.J. MEYER

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner, Social
Security Administration,

Defendant.

Case No. 97-CV-467-EA

ENTERED ON DOCKET

DATE MAR 16 1999

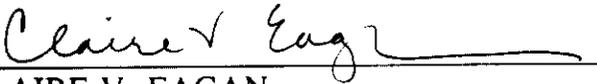
ORDER

On December 21, 1998, this Court reversed and remanded this case to the Commissioner for further proceedings. 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 \$2,298.25 for attorney fees and no 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 \$2,298.25 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.

It is so ORDERED THIS 15th day of March 1999.



CLAIRE V. EAGAN
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney


WYN DEE BAKER, OBA #465
Assistant United States Attorney
333 West 4th Street., Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

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

F I L E D

MAR 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLES F. POST,)
SSN: 445-72-2633,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL, Commissioner,)
Social Security Administration,)
)
Defendant.)

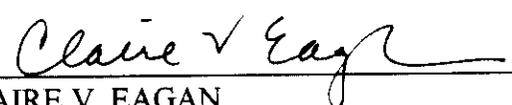
Case No. 98-CV-0586-EA

ENTERED ON DOCKET
DATE MAR 16 1999

JUDGMENT

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

It is so ORDERED this 15th day of March, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

102

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

FILED

MAR 15 1999

Phil Lombardi, Clerk

DARRELL M. PATTERSON,)
)
Plaintiff,)

v.)

Case No. CIV-97-1055-H

OKLAHOMA MILITARY DEPARTMENT,)
THUNDERBIRD YOUTH ACADEMY,)
MICHAEL D. BEDWELL, BARBARA ERWIN,)
individually and in their official capacities, and)
Does I through X, inclusive,)
)
Defendants.)

ENTERED ON DOCKET

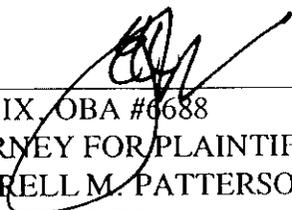
DATE MAR 16 1999

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE
OF ALL CLAIMS ALLEGED AGAINST
DEFENDANT OKLAHOMA MILITARY DEPARTMENT-
THUNDERBIRD YOUTH ACADEMY

Come now Plaintiff Darrell M. Patterson and Defendant Oklahoma Military Department-Thunderbird Youth Academy, by and through their respective attorneys and pursuant to Rule 42(a)(1)(ii) of Federal Rules of Civil Procedure, stipulate to the dismissal with prejudice of all claims alleged in this action against Defendant Oklahoma Military Department-Thunderbird Youth Academy. Plaintiff Darrell M. Patterson and Defendant Oklahoma Military Department-Thunderbird Youth Academy having previously stipulated to the dismissal with prejudice of all claims alleged against prior Defendants, Michael D. Bedwell and Barbara Erwin, it is the intent of Plaintiff Darrell M. Patterson and Defendant Oklahoma Military Department-Thunderbird Youth Academy to dismiss with prejudice all claims alleged against Defendant Oklahoma Military Department-Thunderbird Youth Academy, and that this action be dismissed with prejudice.

26

Dated this 15 day of March, 1999.



JEFF NIX, OBA #6688
ATTORNEY FOR PLAINTIFF
DARRELL M. PATTERSON
NIX & SCROGGS
601 S. Boulder, Suite 610
Tulsa, OK 74119
(918) 587-3193 Fax (918) 587-3491



ROBERT M. ANTHONY, OBA #311
ATTORNEY FOR DEFENDANTS OKLAHOMA
MILITARY DEPARTMENT-THUNDERBIRD
YOUTH ACADEMY, MICHAEL D. BEDWELL
and BARBARA ERWIN
4545 N. Lincoln, Suite 260
Oklahoma City, OK 73105
(405) 521-4274 Fax (405) 528-1867

20

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

MAR 15 1999 *S.F.*

DARRELL M. PATTERSON,)
)
Plaintiff,)
)
v.)
)
OKLAHOMA MILITARY DEPARTMENT,)
THUNDERBIRD YOUTH ACADEMY,)
MICHAEL D. BEDWELL, BARBARA ERWIN,)
individually and in their official capacities, and)
Does I through X, inclusive,)
)
Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. CIV-97-1055-H ✓

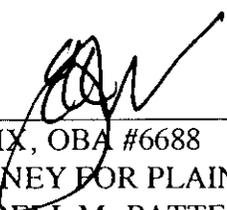
ENTERED ON DOCKET

DATE MAR 16 1999

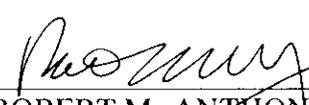
JOINT STIPULATION OF DISMISSAL WITH PREJUDICE
OF ALL CLAIMS ALLEGED AGAINST
DEFENDANTS MICHAEL D. BEDWELL AND BARBARA ERWIN

Come now Plaintiff Darrell M. Patterson, Defendant Oklahoma Military Department-Thunderbird Youth Academy, and Defendants Michael D. Bedwell and Barbara Erwin, by and through their respective attorneys, and pursuant to Rule 42(a)(1)(ii) of Federal Rules of Civil Procedure, stipulate to the dismissal with prejudice of all claims alleged in this action against Defendants Michael D. Bedwell and Barbara Erwin.

Dated this 15 day of March, 1999.



JEFF NIX, OBA #6688
ATTORNEY FOR PLAINTIFF
DARRELL M. PATTERSON
NIX & SCROGGS
601 S. Boulder, Suite 610
Tulsa, OK 74119
(918) 587-3193 Fax (918) 587-3491



ROBERT M. ANTHONY, OBA #311
ATTORNEY FOR DEPENDANTS OKLAHOMA
MILITARY DEPARTMENT-THUNDERBIRD
YOUTH ACADEMY, MICHAEL D. BEDWELL
and BARBARA ERWIN
4545 N. Lincoln, Suite 260
Oklahoma City, OK 73105
(405) 521-4274 Fax (405) 528-1867

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

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

FILED

MAR 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FREDRIC C. ROBIN,)
)
Plaintiff,)
)
v.)
)
OKLAHOMA GAS AND ELECTRIC)
COMPANY,)
)
Defendant.)

Case No. 97-CV-985-H(M)

ENTERED ON DOCKET

DATE MAR 16 1999

STIPULATION FOR DISMISSAL WITH PREJUDICE

It is hereby stipulated by and between Plaintiff Fredric C. Robin and Defendant Oklahoma Gas and Electric Company that the above-entitled action be dismissed with prejudice.

Dated effective this 15th day of March, 1999.

Respectfully submitted,



Lewis N. Carter, OBA #1524
Tom Q. Ferguson, OBA #12288
DOERNER, SAUNDERS, DANIEL &
ANDERSON, L.L.P.
320 South Boston Avenue, Suite 500
Tulsa, Oklahoma 74103-3725
(918) 582-1211

Attorneys for Plaintiff
FREDRIC C. ROBIN

Michael R. Perri

Michael R. Perri, OBA # 11954
Robert J. Campbell, Jr., OBA # 1451
RAINEY, ROSS, RICE & BINNS
735 First National Center West
120 North Robinson Avenue
Oklahoma City, Oklahoma 73102
(405) 235-1356 (telephone)
(405) 235-2340 (facsimile)

ATTORNEYS FOR DEFENDANT
OKLAHOMA GAS AND ELECTRIC COMPANY

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

MAR 12 1999

NELLIE CAMPBELL,)
)
) Plaintiff(s),)
)
 vs.)
)
 KENNETH S. APFEL, Commissioner of Social)
 Security Administration)
)
) Defendant(s).)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-1027-J

ENTERED ON DOCKET

DATE MAR 15 1999

ORDER

Plaintiff filed an application for attorney fees pursuant to the Equal Access to Justice Act on February 16, 1999. [Doc. No. 22-1]. Defendant responded to Plaintiff's application and objected to portions of Plaintiff's request. Plaintiff did not file a reply. The Court concludes that Plaintiff's request for attorneys fees should be **GRANTED**. Plaintiff is awarded attorneys fees in the amount of \$2,204.22, as more fully detailed below.

Plaintiff's Attorney Fee and Cost Request

Plaintiff requests fees and costs totaling \$3,253.25. Plaintiff requests compensation for an hourly rate of \$175.00 per hour. Plaintiff's attorney claims she worked 18.59 hours on Plaintiff's appeal, and requests \$3253.25 in attorneys fees. Plaintiff additionally requests compensation for \$15.00 in reimbursement for the costs of service by certified mail.

Defendant objects to Plaintiff's hourly rate and to the total number of hours for which Plaintiff requests compensation. Defendant does not specifically object to the reimbursement of Plaintiff for the costs of service by certified mail.

Hourly Rate

Plaintiff requests reimbursement for an hourly rate at \$175 per hour. Plaintiff's attorney does not explain this hourly rate, with the exception that this rate is "her hourly rate for service in this type of case."

As noted by Defendant's attorney, a prevailing party requesting attorneys fees pursuant to EAJA is entitled to reasonable attorney fees which "shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the cost of living or a special factor . . . justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A). Defendant has agreed, based on a cost of living adjustment in the consumer price index to hourly rates of \$131 in 1998 and \$132 in 1999. Plaintiff does not respond or otherwise challenge Defendant's argument. The Court concludes that Plaintiff may be compensated for attorneys fees based on an hourly rate of \$131 in 1998 and \$132 in 1999.

Objections to Plaintiff's Hourly Work

Defendant additionally objects to portions of Plaintiff's hourly billing. Defendant objects to 1.8 hours of work completed on November 18, 1997. Defendant asserts that the work was essentially "paperwork" for completing a *in forma pauperis* form and should have been completed by the clerical staff in Plaintiff's office. The entry for November 18, 1997, states "preparation of petition and check with federal court about

pauper's affidavit procedure – draft of same– conference with client about information required." Defendant's point is well taken, and Plaintiff makes no response. However, a portion of the attorneys' time appears to have been spent drafting the petition and discussing information with the Plaintiff. The Court concludes that the amount of time billed by Plaintiff's attorney should be reduced by .8 hours, with Plaintiff compensated for 1.0 hours of time on November 18, 1997.

Defendant additionally objects to .1 hours on November 30, 1997, .1 hours on December 2, 1997, .1 hours on December 5, 1997, and .12 hours on December 18, 1997, which were billed by Plaintiff's attorney for receiving the green return receipt request in the mail, and the consent to proceed. Defendant asserts that this .42 hours of time is non-compensable as constituting clerical work. Plaintiff did not respond to Defendant's argument. The Court concludes that Plaintiff's attorney should not be compensated for the .42 hours of primarily clerical work.

Defendant objects to the amount of time spent by Plaintiff in drafting and filing two of Plaintiff's three extensions of time. Defendant objects to a total of .55 hours incurred on September 9, 1998 and October 9, 1998. Plaintiff has no response to Defendant's objection. The Court concludes that Plaintiff's billings should be reduced by .55 hours for the time spent by Plaintiff in obtaining two of Plaintiff's three requested extensions of time.

Summary of Billable Hours Multiplied by Billable Rate

Plaintiff requests a total of 18.59 billable hours. The Court concludes that this total should be reduced by 1.77 hours.^{1/} Plaintiff is therefore entitled to compensation for 16.82 billable hours.

The appropriate billable rate for fees incurred in 1998 is \$131.00. Plaintiff's attorney billed a total of 16.02 hours^{2/} in 1998. The appropriate attorneys fees award for 1998 is therefore \$2098.62.^{3/} The 1999 billable rate is \$132.00, and Plaintiff's attorney billed .8 hours in 1999. The appropriate attorneys fees award for 1999 is therefore \$105.60.^{4/} Plaintiff's total EAJA award is therefore \$2,204.22.

Costs Pursuant to EAJA

Plaintiff additionally requests \$15.00 in costs for service by certified mail. Plaintiff does not specify the statute which authorizes such an award. Section 2412 of Title 28 provides:

(a)(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action.

^{1/} This number reflects decreases in billable time of .8 (clerical work - ifp), .42 (receipt of green cards), and .55 (filing two additional extensions of time), for a total of 1.77.

^{2/} Plaintiff's attorney requested billable hours of 18.59, minus the 1.77 billable hours disallowed by the Court.

^{3/} The number of billable hours (16.02) multiplied by the applicable billable rate of \$131.00.

^{4/} The number of billable hours (0.8) multiplied by the applicable billable rate of \$132.00.

Section 1920 specifically lists the costs which can be awarded.

A judge or clerk of any court of the United States may tax as costs the following:

- (1) Fees of the clerk or marshal;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

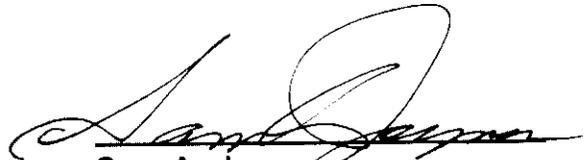
Service by certified mail is not specifically included in the list of itemized costs permitted by statute. The Court concludes that Plaintiff is not entitled to the \$15.00 in costs.

CONCLUSION

The Court concludes that Plaintiff shall be awarded EAJA fees totaling \$2,204.22.

IT IS SO ORDERED.

Dated this 12 day of March 1999.


Sam A. Joyner
United States Magistrate Judge

Handwritten: 3-11-99

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICHARD D. THOMAS,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL,)
Commissioner, Social)
Security Administration,)
)
Defendant.)

Case No. 97-CV-952-J ✓

ENTERED ON DOCKET
DATE MAR 15 1999

ORDER

On December 7, 1998, this Court reversed and remanded this case to the Commissioner for further proceedings. 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 \$2,447.75 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 \$2,449.75 and \$150.00 in costs for a total award of \$2,599.75 under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

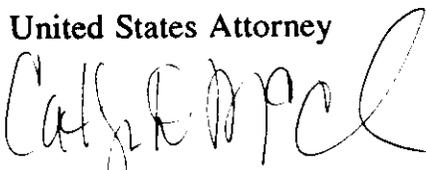
Handwritten initials: RL

It is so ORDERED THIS 12 day of March 1999.


SAM A. JOYNER
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney



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

BARBER & BARTZ
Attorneys for Defendant

By: 
Robert J. Bartz, OBA #580
Joe M. Fears, OBA #2850
One Ten Occidental Place
110 West Seventh St., Suite 200
Tulsa, Oklahoma 74119-1018
(918) 599-7755
Fax (918) 599-7756

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

ENTERED ON DOCKET

DATE MAR 15 1999

UNITED STATES OF AMERICA,)
)
Plaintiff,)
v.)
)
THOMAS L. STUESSY, and)
AMERICAN FAMILY LIFE)
ASSURANCE COMPANY)
OF COLUMBUS,)
)
Defendants.)

No. 98CV0664K (J)

FILED

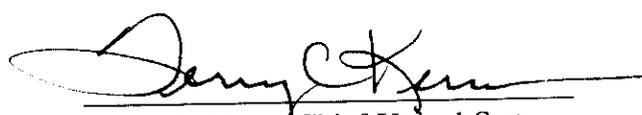
MAR 11 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

**ORDER DISMISSING DEFENDANT AMERICAN
FAMILY LIFE ASSURANCE COMPANY OF COLUMBUS**

Pursuant to the attached Stipulation for Dismissal as to Defendant American Family
Life Assurance Company of Columbus ("AFLAC"), it is, this 10 day of March
1999,

ORDERED, that the complaint in the above-captioned action is dismissed with
prejudice as to defendant AFLAC only, with plaintiff and AFLAC to bear their respective
costs, including any possible attorneys' fees or other expenses of this litigation.



Terry C. Kern, Chief United States
District Court Judge

FILED

MAR 11 1999

Paul Lombardi, Clerk
U.S. DISTRICT COURT

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

TED DOUGLAS DECKER and JAMES STAMPES)
Plaintiffs)
V.)
ADVANCED SPINE FIXATION SYSTEMS, INC.,)
Defendant)

Case No. 97CV360 B(E)

ENTERED ON DOCKET
DATE MAR 15 1999

ORDER OF DISMISSAL WITHOUT PREJUDICE

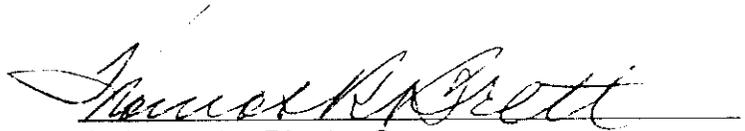
Now on this 11th day of Mar, 1999, this matter comes on for consideration of the parties' Joint Stipulation. The Court having examined the files and records herein, having considered the legal arguments of and authorities cited by the parties, and being otherwise fully advised in the premises, finds and adjudges as follows:

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

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

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

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


Judge of the District Court

\\OrdofDismissal.doc

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

FILED
MAR 11 1999 SA
FEDERAL BUREAU OF INVESTIGATION
U.S. DISTRICT COURT

DONNA HAMLET, ET AL.,
Plaintiffs

v.

ADVANCED SPINE FIXATION SYSTEMS, INC.,
Defendant

Case No. 97CV361B(E)

ENTERED ON DOCKET
DATE MAR 15 1999

ORDER OF DISMISSAL WITHOUT PREJUDICE

Now on this 11th day of March, 1999, this matter comes on for consideration of the parties' Joint Stipulation. The Court having examined the files and records herein, having considered the legal arguments of and authorities cited by the parties, and being otherwise fully advised in the premises, finds and adjudges as follows:

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

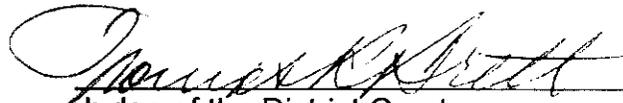
2. The parties agree and stipulate that this Court should exercise its judicial discretion pursuant to Rule 41 of the Federal Rules of Civil Procedure and dismiss this

1

2

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

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



Judge of the District Court

\\OrdofDismissal.doc

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

F I L E D

MAR 11 1999 SA

LINDA CARRUTHERS,)
Plaintiff,)
vs.)
KENNETH S. APFEL, Commissioner)
Social Security Administration,)
Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE MAR 15 1999

Case No. 98-CV-544-EA

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 23, 1998, is hereby dismissed.

Dated this 1st day of March, 1999.

Claudia S. ...
United States Magistrate Judge

13

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAR 11 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRIAN R. ELLIS,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner, Social
Security Administration,

Defendant.

Case No. 98-CV-426-M ✓

ENTERED ON DOCKET

DATE MAR 12 1999

ORDER

On February 16, 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 \$2,098.50 for attorney fees and no 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 \$2, 098.50 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.

19

It is so ORDERED THIS 11th day of March 1999.


FRANK H. McCARTHY
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney


for PETER BERNHARDT, OBA #741
Assistant United States Attorney
333 West 4th Street., Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JANIE E. ROSE,
SSN: 444-56-0838

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

MAR 11 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-287-J

ENTERED ON DOCKET

DATE MAR 12 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 11th day of March 1999.


Sam A. Joyner
United States Magistrate Judge

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

FILED

MAR 11 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JANIE E. ROSE,
SSN: 444-56-0838

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

No. 98-CV-287-J

ENTERED ON DOCKET
DATE MAR 12 1999

ORDER^{1/}

Plaintiff, Janie E. Rose, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts that the Commissioner erred because (1) the ALJ applied an incorrect legal standard at Step Two, (2) the ALJ failed to make appropriate credibility findings, and (3) the ALJ failed to adequately "develop the record." For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff was born May 7, 1952, and did not complete high school or obtain her GED. [R. at 159]. According to Plaintiff, her main problems are her nerves and her

^{1/} 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.

^{2/} Administrative Law Judge James D. Jordan (hereafter "ALJ") concluded that Plaintiff was not disabled on November 4, 1996, at Step Two. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on February 14, 1998. [R. at 4].

anxiety. [R. at 166]. Plaintiff testified that when she becomes nervous she has difficulty speaking.

Plaintiff had a severe substance abuse problem. Plaintiff testified that she has overcome this problem. Plaintiff suffers from facial dyskinesia (the involuntary movement of facial muscles) which is attributed to a cocaine overdose by Plaintiff. [R. at 42, 91]. A social security examiner indicated that Plaintiff had "some difficulty" answering questions and that Plaintiff talked out of the side of her mouth. [R. at 69]. Some of Plaintiff's records indicate Plaintiff has a limited degree of difficulty with speech. [R. at 132, 134]. Plaintiff testified that it was difficult for people to understand her. [R. at 74, 169]. However, Plaintiff's speech is also described as "fluent." [R. at 141].

Plaintiff additionally testified that she is agitated and has difficulty sitting or remaining still. Plaintiff's records suggest that she has some degree of anxiety. [R. at 138]. Plaintiff's attorney acknowledged, at the hearing, that the evidence regarding Plaintiff's anxiety "might seem a little lacking." [R. at 189].

The ALJ referred Plaintiff for a consultative examination after the hearing. The consultative examiner indicated that Plaintiff had a verbal I.Q. of 84, a performance I.Q. of 77, and a full scale I.Q. of 80. [R. at 141]. The examiner noted that Plaintiff was in the upper part of the borderline range of mental ability. [R. at 142].

Plaintiff reported that her regular household activities included cooking, cleaning and laundry. [R. at 65]. Plaintiff indicated that she was able to drive and participate

in crafts. [R. at 65]. Plaintiff does her own grocery shopping, sleeps six - eight hours each night, and enjoys listening to the radio and watching television. [R. at 74].

Plaintiff's treating physician wrote that Plaintiff was "certainly able to work," and that Plaintiff had no condition which would prevent her from working. [R. at 98].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{3/} 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

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. . . .

^{3/} 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).

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^{4/} 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 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

^{4/} 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."

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

The ALJ concluded that Plaintiff was not disabled at Step Two of the sequential evaluation. The ALJ concluded that, pursuant to the regulations, Plaintiff's impairment was not "severe."

IV. REVIEW

STEP TWO EVALUATION

Step Two of the Sequential Evaluation Process is governed by the Secretary's "severity regulation." Bowen, 482 U.S. at 140-41; Williams, 844 F.2d at 750-51.

The "severity regulation" provides that:

If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, [the Secretary] will find that you do not have a severe impairment and are, therefore, not disabled. [The Secretary] will not consider your age, education, and work experience.

20 C.F.R. § 404.1520(c). Pursuant to this regulation, claimant must make a "threshold showing that his medically determinable impairment or combination of

impairments significantly limits his ability to do basic work activities." Williams, 844 F.2d at 751. This threshold determination is to be based on medical factors alone. Vocational factors, such as age, education, and work experience, are not to be considered. Bowen, 482 U.S. at 153; Williams, 844 F.2d at 750.

The ability to do basic work activities is defined as "the abilities and aptitudes necessary to do most jobs." 20 C.F.R. § 404.1520(b). These abilities and aptitudes include the following:

- (1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;
- (2) Capacities for seeing, hearing, and speaking;
- (3) Understanding, carrying out, and remembering simple instructions;
- (4) Use of Judgment;
- (5) Responding appropriately to supervision, co-workers and usual work situations; and
- (6) Dealing with changes in a routine setting.

20 C.F.R. § 404.1521(b).

Plaintiff's burden on the severity issue is *de minimis*. Williams, 844 F.2d at 751.

If the claimant is unable to show that his impairments would have more than a minimal effect on his ability to do basic work activities, he is not eligible for disability benefits. If, on the other hand, the claimant presents medical evidence and makes the *de minimis* showing of medical severity, the decision maker proceeds to step three.

Id. As the United States Supreme Court explains, the Secretary's severity regulation

increases the efficiency and reliability of the evaluation process by identifying at an early stage those claimants whose medical impairments are so slight that it is unlikely they would be found to be disabled even if their age, education, and experience were taken into account.

Bowen, 482 U.S. at 153 (emphasis added). The Secretary's own regulations state that

[g]reat care should be exercised in applying the not severe impairment concept. If an adjudicator is unable to determine clearly the effect of an impairment or combination of impairments on the individual's ability to do basic work activities, the sequential evaluation process should not end with the not severe evaluation step. Rather, it should be continued.

Social Security Ruling 85-28 (1985). In other words, Step Two "is an administrative convenience [used] to screen out claims that are 'totally groundless' solely from a medical standpoint." Higgs v. Bowen, 880 F.2d 860, 863 (6th Cir. 1988) (per curiam) (quoting Farris v. Secretary of HHS, 773 F.2d 85, 89 n. 1 (6th Cir. 1985)).

Plaintiff testified that her facial dyskinesia affects her ability to speak. At the hearing before the ALJ the ALJ stated that "[from] what I am seeing and hearing the testimony here, I'm, I'm [sic] hearing about a serious problem and it would appear to me it would be great difficulty going out there and working." [R. at 186]. The ALJ's acknowledgment certainly appears to contradict his ultimate conclusion that Plaintiff's asserted impairment is "not severe" at Step Two.

In addition, the ALJ referred Plaintiff to a consultative examiner who determined that Plaintiff's I.Q. was in the upper part of the borderline range of mental functioning.

The examiner additionally completed a Mental Residual Functional Capacity Assessment form, but concluded that numerous categories could not be completed absent additional information. [R. at 145]. The presence of a borderline I.Q. could interfere, more than minimally, with an individual's ability to perform work-related activities, which would require that the Commissioner proceed past Step Two. Due to a rather unusual turn of events,^{6/} the ALJ did not consider the report concerning Plaintiff's I.Q.

The record in support of Plaintiff's asserted impairments is certainly sparse. Plaintiff has neither visited nor been treated by many doctors. Plaintiff's treating physician's opinion is that Plaintiff is not disabled and that nothing about Plaintiff's condition prevents her from working. Plaintiff's complaints are of facial dyskinesia (uncontrolled facial movement), anxiety, and a below-normal I.Q. These complaints certainly do not seem to prohibit Plaintiff from performing substantial gainful activity.

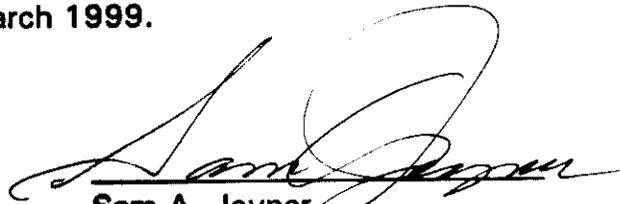
However, the Step Two level has been interpreted as presenting a very low "severity" threshold. The Tenth Circuit Court of Appeals' "*de minimis*" standard appears to have been met in this case. Under the facts presented to the Court, this

^{6/} Because this examination was not conducted until after the hearing before the ALJ, the ALJ submitted the examiner's report to Plaintiff's attorney, requesting that the attorney inform the ALJ of any objections. Plaintiff's attorney objected and requested a subsequent hearing pursuant to Allison v. Heckler, 711 F.2d 145. The ALJ declined to hold an additional hearing, and based on Plaintiff's objection, did not consider the report from the examiner. The Court concludes that this is an anomalous result. Certainly Plaintiff's attorney objected to the report absent an opportunity to challenge the findings of the examiner. However, the report contained information which could be interpreted as "favorable" to the Plaintiff. The attorney was given an "all or nothing" choice, but was not informed that the ALJ would decline to consider the report rather than permit additional questioning by the attorney. The refusal of the ALJ to consider evidence which could be favorable to the Plaintiff based on the objection of Plaintiff's attorney led to a rather strange result. Regardless, however, the report is included in the record and is before the Court on review.

Court wishes that it had the authority to conduct the remaining steps of the Five Step analysis. However, restrictions on the reviewing Court's capabilities exist for good reason. The Court concludes that the Step Two conclusion by the ALJ must be reversed, and the action remanded to the Commissioner for further evaluation.

Accordingly, the Commissioner's decision is **REVERSED AND REMANDED** for further proceedings consistent with this opinion.

Dated this 11 day of March 1999.



Sam A. Joyner
United States Magistrate Judge

LB

IN THE UNITED STATES COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT LOBATO,)
)
Plaintiff,)
)
vs.)
)
ROBERT ABRAHAM,)
)
Defendant.)

Case No. 98-CV-0144- K(E) ✓

ENTERED ON DOCKET

DATE **MAR 11 1999**

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

The parties, by and through their counsel of record, submit to the Court their joint stipulation that the above captioned matter should be dismissed with prejudice to the refiling thereof. This joint stipulation for dismissal is based upon the successful resolution of the matter during a private mediation held between and among the parties and others involved in the bankruptcy case pending in the Northern District of Oklahoma, Case No. 96-00395-M and the Adversary Proceeding No. 96-0265-M. It is so stipulated.

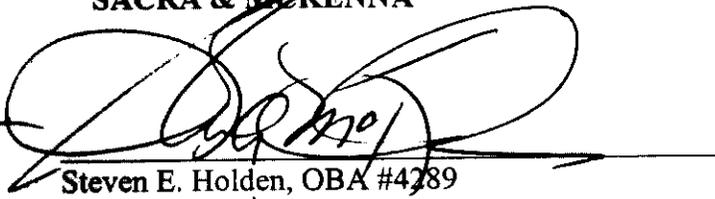
Respectfully submitted,

**HOLDEN, GLENDENING, PACKEL,
SACRA & MCKENNA**



Todd Maxwell Henshaw, OBA No.
320 South Boston, Suite 1130
Tulsa, Oklahoma 74103

Attorney for Plaintiff



Steven E. Holden, OBA #4289
Bruce A. McKenna, OBA # 6021
200 Reunion Center
Nine East Fourth Street
Tulsa, Oklahoma 74103
(918) 295-8888
(918) 295-8889 (facsimile)
Attorneys for Defendant

13

015

CERTIFICATE OF MAILING

I hereby certify that on the 10th day of March, 1999, I deposited in the United States Mails, postage prepaid, a true and correct copy of the above and foregoing to:

Paul Thomas
Assistant U. S. Trustee
United States Trustee's Office
244 South Boulder Avenue, Suite 225
Tulsa, Oklahoma 74103

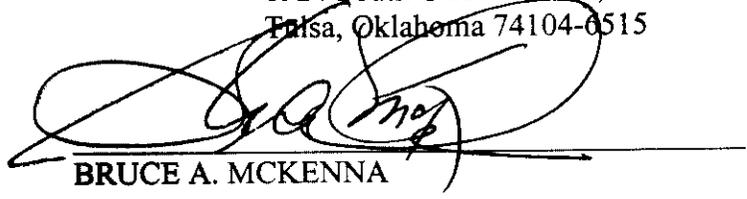
John E. Howland
Rosenstein, Fist & Ringold
525 South Main, Suite 700
Tulsa, Oklahoma 74103

Patrick O'Connor
Moyers, Martin, Santee, Imel & Tetrick
320 South Boston Building, Suite 920
Tulsa, Oklahoma 74103

Brian J. Rayment
Kivell, Rayment & Francis, P.C.
7666 East 61st Street, Suite 240
Tulsa, Oklahoma 74133

Terry Thomas
Crowe & Dunlevy
321 South Boston, Suite 500
Tulsa, Oklahoma 74103

Patrick J. Malloy
Malloy & Malloy
1924 South Utica Avenue, Suite 810
Tulsa, Oklahoma 74104-6515



BRUCE A. MCKENNA

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

MAR 10 1999

CONNIE SMITH,)
)
 Plaintiff,)
)
 vs.)
)
 SHERRY LABORATORIES,)
)
 Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

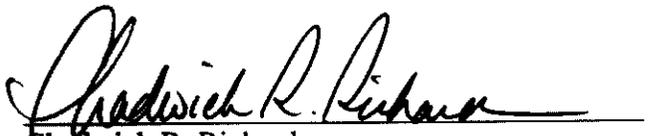
Case No. 98-CV-0353H (M) ✓

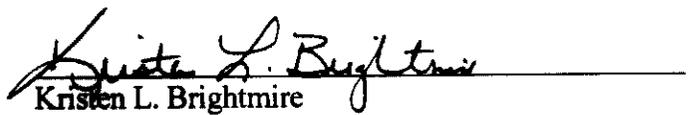
ENTERED ON DOCKET
DATE MAR 11 1999

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the parties hereby stipulate to a dismissal with prejudice of Plaintiff Connie Smith's causes of action in this case against Defendant Sherry Laboratories.

DATED this 9th day of March, 1999.


Chadwick R. Richardson
RICHARDSON & WARD
6555 S. Lewis, Suite 200
Tulsa, OK 74136
(918) 492-7674
(918) 493-1925 (Fax)
Attorneys for Plaintiff


Kristen L. Brightmire
DOERNER, SAUNDERS, DANIEL
& ANDERSON, L.L.P.
320 South Boston, Suite 500
Tulsa, OK 74103
(918) 582-1211
(918) 591-5360 (Fax)
Attorneys for Defendant

view

12

13

CD

Law

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

FILED

MAR 10 1999

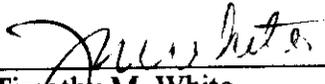
LINDA CARRUTHERS,)
Plaintiff,)
vs.)
KENNETH S. APFEL, Commissioner)
Social Security Administration,)
Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT
ENTERED ON DOCKET
DATE **MAR 11 1999**
Case No. 98-CV-544-EA

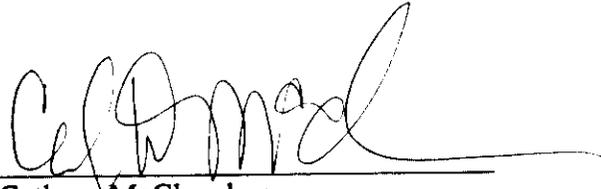
STIPULATION OF DISMISSAL

The parties herein, through their respective counsel, have reached an agreement, whereby, upon approval of the Court, the *Complaint* of the Plaintiff filed on July 23, 1998, shall be dismissed.

Approved as to Form & Content:



Timothy M. White
Attorney for Plaintiff
2526 E. 71st Street, Suite A
Tulsa, OK 74136-5576
(918) 492-9335



Cathryn McClanahan
Attorney for Defendant
Assistant U.S. Attorney
333 W. Fourth Street, Room 3460
Tulsa, OK 74104-3809
(918) 581-7463

fedct/dismisno/StipDismissCARRUTHERS1-f

12

ml/kt

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

TOM D. WALKER and KATHY A.
WALKER, individually and TOM
D. WALKER and KATHY A. WALKER,
on behalf of their minor children,
THOMAS W. WALKER and DANIEL L.
WALKER,

Plaintiffs,

vs.

GENERAL AMERICAN LIFE INSURANCE
COMPANY, a Missouri corporation,

Defendant/
Third-Party Plaintiff,

vs.

THE HARDESTY COMPANY, INC., an
Oklahoma corporation and BIZJET
INTERNATIONAL SALES & SUPPORT,
INC., an Oklahoma corporation,

Third-Party Defendants.

)
)
)
)
)
) Case No. 98-CV-0300H(M)
) Judge Sven Erik Holmes
)
)

FILED

MAR 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

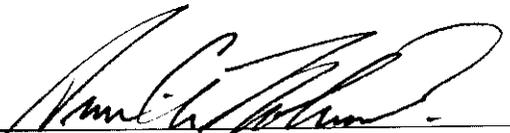
DATE MAR 11 1999

ORDER DISMISSING ALL CLAIMS

Upon the joint application of the parties, and for good cause shown, IT IS ORDERED, ADJUDGED AND DECREED that all claims, counterclaims, third-party claims, and all other claims or causes of action asserted or attempted to be asserted by any party to this action against any other party, including those claims or causes of action by or against The Hardesty Company or Bizjet International Sales & Support, Inc., that are asserted in this matter by virtue of the consolidation of claims previously asserted under

another case number, are DISMISSED WITH PREJUDICE.

Dated this 10TH day of MARCH, 1999.



JUDGE OF THE DISTRICT COURT

W
5-99

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

FILED

MAR 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRIDGETTE WOOD, an individual,)
)
Plaintiff,)
)
vs.)
)
ELECTRONIC LABEL TECHNOLOGY,)
an Oklahoma corporation)
)
Defendant.)

Case No. 98-CV-0686H (E)

ENTERED ON DOCKET

DATE MAR 11 1999

ORDER DISMISSING CASE WITHOUT PREJUDICE

On the 5th day of March 1999 the Court held a Case Management Conference/Status Hearing. The Court finds and holds as follows:

1. This action was filed on September 9, 1998. The Complaint was served upon the Defendant on December 30, 1998. The Defendant's Answer was filed on February 3, 1999.
2. Plaintiff's attorney, Katherine Waller, filed an Application to Withdraw as Attorney of Record for Plaintiff on February 12, 1999.
3. By Order of February 18, 1999, the Court scheduled a Case Management Conference/Status Hearing for 9:00a.m. on March 5, 1999.
4. On February 23, 1999 the Court entered an Order, which was filed of record and mailed to all counsel on February 24, 1999, granting Katherine Waller's Application to Withdraw as Attorney of record for Plaintiff conditioned upon the entry of appearance of substitute counsel, or upon the filing of a statement by Plaintiff to the effect that she wishes to represent herself in this matter. Plaintiff was directed to cause new counsel to enter an appearance in this matter or to file a statement as described should she wish to proceed in propria persona. The Order recited that failure to abide by these requirements could result in the imposition of appropriate sanctions. Katherine Waller was required to actively serve as counsel by attending all scheduled hearings,

preparing necessary orders, and adhering to dates previously set by the Court until such time as the conditions set forth in the Order had been met with in full compliance.

5. As of March 5, 1999 at 9:00a.m. substitute counsel for the Plaintiff had not filed an entry of appearance and the Plaintiff had not filed a statement indicating her desire to proceed in propria persona.

6. At the Case Management Conference/Status Hearing on March 5, 1999, Defendant's counsel John F. McCormick, Jr. and Kevin P. Doyle appeared. Neither the Plaintiff nor her counsel Katherine Waller appeared. The Court contacted Katherine Waller's office and waited forty (40) minutes but received no response. Whereupon, the Court sua sponte ordered the action dismissed without prejudice and ordered counsel for Defendant to prepare an Order reflecting the same.

It is hereby ordered that this case is dismissed without prejudice.

IT IS SO ORDERED
This 10th day of March, 1999


Sven Erik Holmes
United States District Judge

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

FILED

MAR 11 1999

IN RE:

LIMITED GAMING OF AMERICA, INC.,

Formerly
BAP No. NO-99-001
BAP No. NO-99-002

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Debtor.

99CV01891

IN RE:

SUNRISE ISLAND, LTD.,

ENTERED ON DOCKET

Debtor.

DATE 3-11-99

ROBERT ABRAHAM,

Appellant,

Bankr. No. 96-00395
Chapter 11

v.

Bankr. No. 96-00396
Chapter 11

LIMITED GAMING OF AMERICA,
INC.; GOLDMAN, SACHS &
COMPANY; PATRICK J. MALLOY,
III; and ROBERT LOBATO,

Appellees.

ORDER DISMISSING APPEAL

Upon consideration of the Joint Motion to Dismiss Appeal of Appellant, Robert Abraham, and Appellee, Limited Gaming of America, Inc., the Court finds that the appeal of the Order of the United States Bankruptcy Court for the Northern District of Oklahoma, that is dated December 18, 1998 and that confirmed the Third Amended Joint Plan of Reorganization filed by Limited Gaming of America, Inc., should be dismissed.

The appeal of the Bankruptcy Court's order of December 18, 1998, confirming the Third Amended Joint Plan of Reorganization, is hereby dismissed, with each party bearing its own costs.

Dated: Mar 11th, 1999.


UNITED STATES DISTRICT COURT JUDGE
Judge James C. Ellison

CPY 7. 02a
3-11-99

Approved as to form and content:



John E. Howland, OBA No. 4416
ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 700
Tulsa, OK 74103
(918) 585-9211

Attorney for Robert Abraham



Patrick O'Connor, OBA No. 6743
MOYERS, MARTIN, SANTEE, IMEL & TETRICK
320 S. Boston Bldg., Suite 920
Tulsa, OK 74103
(918) 582-5281

Attorney for Limited Gaming of America, Inc.

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

FILED

MAR 11 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN RE:
LIMITED GAMING OF AMERICA, INC.,

Formerly
BAP No. NO-99-001
BAP No. NO-99-002

Debtor.

99CV0190B

(E)

IN RE:
SUNRISE ISLAND, LTD.,

ENTERED ON DOCKET

Debtor.

DATE 3-11-99

ROBERT ABRAHAM,
Appellant,

Bankr. No. 96-00395
Chapter 11

v.

Bankr. No. 96-00396
Chapter 11

LIMITED GAMING OF AMERICA,
INC.; GOLDMAN, SACHS &
COMPANY; PATRICK J. MALLOY,
III; and ROBERT LOBATO,

Appellees.

ORDER DISMISSING APPEAL

Upon consideration of the Joint Motion to Dismiss Appeal of Appellant, Robert Abraham, and Appellee, Limited Gaming of America, Inc., the Court finds that the appeal of the Order of the United States Bankruptcy Court for the Northern District of Oklahoma, that is dated December 18, 1998 and that confirmed the Third Amended Joint Plan of Reorganization filed by Limited Gaming of America, Inc., should be dismissed.

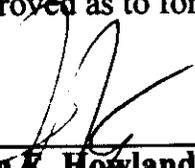
The appeal of the Bankruptcy Court's order of December 18, 1998, confirming the Third Amended Joint Plan of Reorganization, is hereby dismissed, with each party bearing its own costs.

Dated: Mar 11th, 1999.


UNITED STATES DISTRICT COURT JUDGE

CPY to Bk
3-11-99

Approved as to form and content:



John E. Howland, OBA No. 4416
ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 700
Tulsa, OK 74103
(918) 585-9211

Attorney for Robert Abraham



Patrick O'Connor, OBA No. 6743
MOYERS, MARTIN, SANTEE, IMEL & TETRICK
320 S. Boston Bldg., Suite 920
Tulsa, OK 74103
(918) 582-5281

Attorney for Limited Gaming of America, Inc.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JIMMY CRITTENDEN,
SS# 443-66-6838

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of
Social Security,

Defendant.

MAR 10 1999 *AL*
Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 97-C-1038-J ✓

ENTERED ON DOCKET

DATE MAR 10 1999

ORDER^{1/}

Plaintiff, Jimmy Crittenden, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner denying Social Security benefits.^{2/} Plaintiff asserts that the Commissioner erred because when all of Plaintiff's physical and mental restrictions were presented to the vocational expert, the vocational expert concluded that Plaintiff would be unable to hold a job on a sustained basis. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff's "first" hearing before the ALJ occurred on August 11, 1993. [R. at 47]. Plaintiff testified that he was 26 years old at the time of the hearing and had not completed high school. [R. at 59]. Plaintiff claimed that he was disabled as of

^{1/} 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.

^{2/} Administrative Law Judge Stephen C. Calvarese (hereafter, "ALJ") determined by decision dated April 21, 1997, that Plaintiff was not disabled. [R. at 398]. The Appeals Council affirmed the decision of the ALJ. [R. at 373A].

October 15, 1990. Plaintiff acknowledged that he had worked since that date, but that his work did not constitute "substantial gainful activity."

Plaintiff testified, at his first hearing, that he could lift 30 pounds approximately three times, but that his back would be sore after lifting the weight. [R. at 67]. Plaintiff additionally testified that bending hurt, that his right shoulder hurt, and that walking 30 yards caused him pain. [R. at 67]. Plaintiff stated that he could stand for 15 minutes, and sit for 15 minutes. [R. at 77]. Plaintiff testified that he did some dishes, vacuumed, and did some laundry. [R. at 71].

Plaintiff testified that, after his accident in 1989 (when a car that he was working under fell and pinned him) he had not driven. [R. at 71]. (Plaintiff did report, on various occasions, that he had driven. For example, Plaintiff drove 70 miles to his psychiatric examination on May 21, 1996.) Plaintiff was hospitalized for several days following a snakebite. [R. at 78]. Plaintiff was again hospitalized after he had an adverse reaction to the snake anti-venom.

Plaintiff testified that he has lots of anger and hostility and that he had previously had fights with his co-workers. [R. at 86].

Plaintiff's medication list as of August 27, 1991 included only Tylenol for pain relief. [R. at 143]. Plaintiff's medication list dated August 3, 1993, indicated Plaintiff was taking pain for high blood pressure and his snake bite. In addition Plaintiff was on indomethracin for pain in his back and shoulders, a muscle relaxer, and trazadone to help him sleep. [R. at 238]. Plaintiff's medication list dated February 5, 1997, indicates Plaintiff was taking Fosinopril for high blood pressure, Acetaminophen with

Codeine for pain (one tablet daily), Hydrochlorothiazide for high blood pressure, and Ibuprofen for pain (one tablet three times each day).

A Psychiatric Review Technique form completed December 17, 1991 by Ron Smallwood, Ph.D., noted that Plaintiff's impairment was "not severe." [R. at 161]. The doctor indicated that Plaintiff exhibited "explosive personality traits." [R. at 166]. Plaintiff's restriction of activities of daily living was reported as "slight." Plaintiff's difficulty in maintaining social functioning was reported as "slight." Plaintiff's deficiencies of concentration, persistence or pace was reported as "seldom." And, Plaintiff's episodes of deterioration or decompensation in work or work-like settings was noted as "never." [R. at 168].

On November 13, 1991, in completing a "Mental Residual Functional Capacity Assessment," Carolyn Goodrich, Ph.D., indicated that Plaintiff was "moderately limited" in his abilities to understand and remember detailed instructions, and in his ability to carry out detailed instructions. [R. at 170]. Plaintiff's ability to interact with the general public was noted as "markedly limited." [R. at 171]. Dr. Goodrich wrote that "Mr. Crittenden is capable of understanding and performing simple tasks. He can do some complex tasks. He has the social skills to interact appropriately at a superficial level with co-workers and supervisors, but not the general public. He can adapt to a work situation." [R. at 172]. In completing a Psychiatric Review Technique Form, Dr. Goodrich indicated that Plaintiff exhibited "explosive disorder" with no restriction of activities of daily living, "moderate" difficulty in social functioning,

"seldom" deficiencies of concentration or persistence or pace, and no episodes of deterioration or decompensation in work or work-like settings. [R. at 181].

Plaintiff was examined by a psychiatrist on October 29, 1991. [R. at 199]. Plaintiff reported that one of his problems was "nerves" which Plaintiff said meant that he was easily angered and lost control. "The patient did not describe any significant mood abnormalities, except for the occasional explosive episodes as noted previously. He states that when these occur that he typically feels remorse afterwards because of his explosiveness." [R. at 200]. William J. Klontz, M.D., M.P.H., diagnosed Plaintiff as exhibiting "Adjustment Disorder with mixed emotional features." [R. at 201]. Dr. Klontz noted that, in his opinion, Plaintiff had some restriction in his ability to relate to fellow workers and supervisors, but that he otherwise had the capability of following instructions. [R. at 201]. Dr. Klontz additionally reported that he had some question as to Plaintiff's ability to withstand the stress and pressures of work because Plaintiff did not tolerate criticism well.

A Medical Assessment of Ability to do Work-Related Activities (Physical) completed on December 15, 1992, indicates that Plaintiff can occasionally lift 20 pounds a day and frequently lift 10 pounds a day. [R. at 211]. Plaintiff's ability to stand/walk was noted as three hours in an eight hour day and one hour without interruption. Plaintiff's sitting ability was reported as six hours in an eight hour day and two hours without interruption. [R. at 212].

A Psychological Evaluation conducted November 11, 1992, was done at the request of one of Plaintiff's attorneys. [R. at 226]. The evaluator noted that Plaintiff's

vocabulary level suggested limited education, but that Plaintiff was able to express himself clearly and concisely. In addition, "he did not show any evidence of psychotic ideation, nor were there any indications of severe disturbances in his judgment or his reality testing." [R. at 227]. The evaluator concluded that "there [was] no evidence here of an active psychotic process in this young man, but there is clearcut evidence of significant symptoms of emotional and psychological impairment." [R. at 228]. The evaluator noted that caution must be exercised in interpreting the results of the tests he utilized with Plaintiff because, in regard to each test, the "dissimulation index is high and in the direction of 'fake bad.'" [R. at 228]. The examiner did not interpret this as a conscious attempt on Plaintiff's part to deceive but commented that it reflected a test-taking attitude that "indicated a tendency to over endorse pathological items." [R. at 228]. The examiner concluded that Plaintiff could be helped through a psychiatric referral and appropriate medications. [R. at 228].

Plaintiff was examined May 20, 1996. The examiner noted Plaintiff's range of motion in his cervical spine and upper extremities was normal, but that Plaintiff had some limitation in his thoraco lumbar spine. [R. at 441]. The examiner concluded that Plaintiff could perform light or medium work where he was able to change positions fairly frequently to either standing or sitting. [R. at 442].

Plaintiff was examined by a psychiatrist on May 21, 1996. The psychiatrist reported that Plaintiff walked with a normal gait and did not appear to be in pain or discomfort. [R. at 445]. The examiner noted that Plaintiff began moving around ten minutes into the interview, and at the end of the hour interview Plaintiff was leaning

against a table top and reported that he could not sit or stand for too long without pain. The examiner commented that when Plaintiff left the office he moved as if he had considerable pain. [R. at 445]. Plaintiff reported that his typical day consisted of taking care of his two small children and the child of his older brother. Plaintiff stated that his only relief from pain was through the use of Tylenol #3, one tablet daily. [R. at 446]. Plaintiff also informed the examiner that he had had a lot of problems working due to fights with his bosses and fellow workers. [R. at 447]. For Plaintiff's "GAF" (Global Assessment of Functioning), the evaluator reported that "[a]ccording to the claimant he functioned well, except for occasional outbreaks of rage, prior to the back injury. This could not be validated. There is nothing in this evaluation that would support a claim of disability for psychological reasons." [R. at 448]. As a "Psychosocial stressor" the evaluator indicated "authority in any form." [R. at 448]. The evaluator completed a "Medical Source Statement - Mental," and indicated that Plaintiff was moderately limited in his ability to perform activities within a schedule, maintain regular attendance and be punctual, and moderately limited in the ability to accept instructions and respond appropriately to criticism from supervisors. [R. at 452]. "Moderately limited" was defined as "an impairment that affects but does not preclude ability to function." [R. at 451]. The examiner concluded, "[o]ther than the physical disability claimed by the client, there is no psychological reason the claimant cannot function in the workplace." [R. at 454].

Plaintiff was examined by J.E. Kilbane, D.O., on November 20, 1996. [R. at 492]. Dr. Kilbane reported that Plaintiff was taking Fosinopril for high blood pressure,

Acetaminophen with Codeine for pain, Hydrochlorothiazide for high blood pressure, and Ibuprofen for pain. [R. at 493]. The doctor's clinical impressions were mild arthritis of the spine, possible back strain, possible disc disease, and hypertension. [R. at 494]. Dr. Kilbane completed a "Medical Assessment of Ability to do Work-Related Activities (Physical)" and concluded that Plaintiff could sit one hour at a time or six hours in an eight hour day, stand 30 minutes at a time, or three hours in an eight hour day, and walk 15 minutes at a time or two hours in an eight hour day. [R. at 435]. Plaintiff was reported as having the ability to occasionally carry 26 - 50 pounds. Dr. Kilbane additionally reported that "[t]here are no objective medical findings that support the statements except muscle deconditioning because of lack of treatment or exercise or proper physical therapy during the term of his illness." [R. at 496].

Plaintiff's "second" hearing before the ALJ, following an appeal and subsequent remand by this Court, occurred on February 19, 1997. [R. at 502]. Plaintiff testified that he quit his last work, in May 1991, because his employers changed him to a harder job with additional lifting and carrying requirements and he could not handle the physical demands. [R. at 511]. Plaintiff testified that he could not work due to the pain in his lower back and his right hip. [R. at 512]. Plaintiff additionally stated that he had experienced pain in his right shoulder, his neck and spine, and the back of his head. [R. at 513]. Plaintiff noted that he experienced headaches approximately four or five times each day lasting an hour or more. [R. at 514]. Plaintiff testified that he has a short temper which created problems with his supervisors. According to Plaintiff, he lost his job at the salad plant due to a disagreement with his supervisor.

[R. at 514-15]. Plaintiff additionally testified that he had had a few conflicts with his supervisor at Hard Wall Fabricators, and a fist fight with an employee at the chicken plant. [R. at 515].

Plaintiff testified that he drove approximately eight blocks to the store one time each week, and that the longest drive he had made since he stopped working was approximately 25 miles.^{3/} [R. at 522].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{4/} 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

^{3/} One of Plaintiff's psychological examiners reported that Plaintiff had driven to the appointment, which was approximately 70 miles. [R. at 445].

^{4/} 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).

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

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

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^{5/} 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 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 April 21, 1997, the ALJ concluded that Plaintiff was not disabled. [R. at 401]. The ALJ concluded that although Plaintiff had worked at a few jobs after his "onset" date of October 15, 1990, each of the jobs was an unsuccessful work attempt and the ALJ concluded that none of them constituted substantial gainful activity.

^{5/} 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."

The ALJ noted that the "record contains no evidence that the claimant received any significant medical attention from August 1993 to May 1996." [R. at 406]. The ALJ concluded that Plaintiff had the residual functional capacity to perform the physical demands of light work reduced by no sitting for more than one hour (or for more than six hours in a work day), no standing for more than 30 minutes (or for more than three hours in a work day), no walking for more than 15 minutes (or for more than two hours in a work day), no lifting more than 50 pounds occasionally or carrying more than 50 pounds infrequently, and no bending or crawling more than occasionally. In addition, the ALJ found the Plaintiff was limited in his ability to use his feet for repetitive movements, was unable to do significant squatting or climbing, had mild limitation on working at unprotected heights or in environments with exposure to dust or fumes, and limitations on being exposed to marked changes in temperature or humidity. [R. at 408]. The ALJ additionally found that Plaintiff could perform the mental demands of basic work activities except that Plaintiff was moderately limited in his abilities to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances, moderately limited in his ability to accept instructions and respond to criticism from supervisors.

Based on the testimony of a vocational expert, the ALJ concluded that Plaintiff was not disabled.

IV. REVIEW

Plaintiff asserts that when his RFC, as defined by the ALJ, was presented to the vocational expert, the expert testified that Plaintiff could not perform work on a sustained basis. Plaintiff asserts that based on his physical limitations, the vocational expert concluded that Plaintiff could perform some unskilled light and sedentary jobs. However, Plaintiff argues that when Plaintiff's mental limitations were presented to the vocational expert, the expert concluded that those limitations would prevent Plaintiff from performing work on a sustained basis. Plaintiff therefore asserts that he is disabled because he is unable to perform work on a sustained basis.

Assuming an individual has the physical and mental demands to obtain employment, such individual is still disabled if that individual cannot sustain employment.

A finding that a claimant is able to engage in substantial gainful activity requires more than a simple determination that the claimant can find employment and that he can physically perform certain jobs; it also requires a determination that the claimant can hold whatever job he finds for a significant period of time.

Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994) (*quoting Singletary v. Bowen*, 798 F.2d 818, 822 (5th Cir. 1986)). Therefore, to support a finding of non-disability, the record must contain substantial evidence that Plaintiff can perform the physical and mental demands of substantial gainful activity for a "significant period of time."

Plaintiff testified at his first hearing before the ALJ that he has lots of anger and hostility and that he had previously had fights with his co-workers. [R. at 86].

A Psychiatric Review Technique form completed December 17, 1991 by Ron Smallwood, Ph.D., noted that Plaintiff's impairment was "not severe." [R. at 161]. The examiner noted that Plaintiff exhibited "explosive personality traits." [R. at 166]. Plaintiff's restriction of activities of daily living was reported as "slight." Plaintiff's difficulty in maintaining social functioning was reported as "slight." Plaintiff's deficiencies of concentration, persistence or pace was reported as "seldom." And, Plaintiff's episodes of deterioration or decompensation in work or work-like settings was noted as "never." [R. at 168].

On November 13, 1991, Dr. Goodrich wrote that Plaintiff was "moderately limited" in his abilities to understand and remember detailed instructions, and in his ability to carry out detailed instructions. [R. at 170]. Plaintiff's ability to interact with the general public was noted as "markedly limited." [R. at 171]. In completing a Psychiatric Review Technique Form, Dr. Goodrich indicated that Plaintiff exhibited "explosive disorder" with no restriction of activities of daily living, "moderate" difficulty in social functioning, "seldom" deficiencies of concentration of persistence or pace, and no episodes of deterioration or decompensation in work or work-like settings. [R. at 181].

Plaintiff was examined by a psychiatrist on October 29, 1991. [R. at 199]. Plaintiff reported that he was easily angered and lost control. [R. at 200]. William J. Klontz, M.D., M.P.H., diagnosed Plaintiff as exhibiting "Adjustment Disorder with

mixed emotional features." [R. at 201]. Dr. Klontz noted that, in his opinion, Plaintiff had some restriction in his ability to relate to fellow workers and supervisors, but that he otherwise had the capability of following instructions. [R. at 201]. Dr. Klontz additionally reported that he had some question as to Plaintiff's ability to withstand the stress and pressures of work because Plaintiff did not tolerate criticism well.

A Psychological Evaluation conducted November 11, 1992, was done at the request of one of Plaintiff's attorneys. [R. at 226]. The evaluator concluded that no evidence of an active psychotic process existed in Plaintiff, "but there is clearcut evidence of significant symptoms of emotional and psychological impairment." [R. at 228]. In regard to interpreting the results of the tests that he gave to Plaintiff, the evaluator noted that caution must be exercised because, in regard to each test, the "dissimulation index is high and in the direction of 'fake bad.'"^{6/} [R. at 228]. The examiner concluded that Plaintiff could be helped through a psychiatric referral and appropriate medications. [R. at 228].

Plaintiff was examined by a psychiatrist on May 21, 1996. According to the examiner, Plaintiff also told him that he had experienced problems with work due to fights with his bosses and fellow workers. [R. at 447]. The evaluator reported that "[a]ccording to the claimant he functioned well, except for occasional outbreaks of rage, prior to the back injury. This could not be validated. There is nothing in this

^{6/} The examiner did not interpret this as a conscious attempt on Plaintiff's part to deceive but commented that it reflected a test-taking attitude that "indicated a tendency to over endorse pathological items." [R. at 228].

evaluation that would support a claim of disability for psychological reasons." [R. at 448]. As a "Psychosocial stressor" the evaluator indicated "authority in any form." [R. at 448]. The evaluator completed a "Medical Source Statement – Mental," and indicated that Plaintiff was moderately limited in his ability to perform activities within a schedule, maintain regular attendance and be punctual, and moderately limited in the ability to accept instructions and respond appropriately to criticism from supervisors. [R. at 452]. "Moderately limited" is defined on the form as "an impairment that affects but does not preclude ability to function." [R. at 451]. The examiner concluded, "[o]ther than the physical disability claimed by the client, there is no psychological reason the claimant cannot function in the workplace." [R. at 454].

Plaintiff's "second" hearing before the ALJ occurred on February 19, 1997. Plaintiff testified that he has a short temper. Plaintiff testified that he lost his job at a salad plant due to a disagreement with his supervisor, and that he had had some conflicts with another supervisor and employees. [R. at 514-15].

The ALJ presented the following mental restrictions to the vocational expert.

There'd [sic] be moderate limitation as far as the ability to perform activities within a schedule, retain regular attendance and be punctual with – within customary tolerances Moderate limitation as far as ability to accept instructions, respond appropriately to criticism from supervisors. . . . With those additional restrictions, would there be any jobs in the regional or national economy such a person could perform?

[R. at 537]. The vocational expert answered:

There would be the same types of jobs that I gave you previously. It would not preclude the performance of those

jobs. It would go toward the ability of the individual to maintain satisfactory attendance, and satisfactory interaction with the supervisors. So the impact may be that, if those things become accumulative over time, the person would be terminated for tardiness or inability to - incompatibility with the supervisor.

[R. at 539]. The following exchange occurred between the vocational expert and Plaintiff's attorney.

A: My response to that would be somewhat similar to the second hypothetical from Judge Calvarese, in that those limitations would not preclude the person from doing that type of work. But it would go toward their ability to, to maintain it. That if they got into a disagreement with a coworker, and, and had a severe temper and got into a fight, they would probably be terminated. And, and all of this work does require that the person be able to complete tasks in a, a timely manner, and be punctual as far as attendance and, and those sorts of things. Which I think would be the, the last part of that hypothetical you gave me.

Q: No. No. Actually . . . [at the last hearing] you said in answer to that question, that the person couldn't withstand the stress of typical work activity, there would not be, I guess, work. And then you went on to say that they would only be able to hold the work for a very short period of time. Which I think that's what you're saying, isn't it?

A: Yes.

Q: And the first or second time they would have some kind of interaction with a coworker or supervisor, they'd be terminated. In other words, most of these jobs aren't going to put up with much, because they'll just find somebody else. Isn't that right?

A: Yes.

Q: And so - and actually the jobs have a very short temper in that regard, if I could kind of, kind of give an analogy.

A: Well, from the employer standpoint, they have a very narrow tolerance for abnormal behavior.

At the prior hearing before the ALJ, the vocational expert had testified that an individually with "extremely poor" ability to withstand criticism and limited by the ability to withstand stress probably would not be able to work on a sustained basis.

What that would typically be would be that the person would only be able to hold the work for a very short period of time so that the first or second time they would have some kind of an interaction with a co-worker or supervisor, they would be terminated, so they would not be able to perform a job for a sustained, consistent period of time.

[R. at 102].

Plaintiff's vocational report indicated that he worked for a construction company from March 1986 until November 1988. [R. at 128]. Plaintiff additionally testified that he worked in the "chicken industry" for a period of time. [R. at 66]. According to Plaintiff he left the chicken industry job for a higher paying construction job.^{7/} [R. at 512]. Plaintiff worked as a custodian at the University of Arkansas from February 1989 until January 1990. [R. at 128]. Plaintiff testified that he left his job as custodian because he moved. [R. at 511]. Plaintiff worked at a truck salvage operation from March of 1990 until April of 1990. [R. at 128]. Plaintiff worked at a canning company from June 1990 until November 1990. [R. at 128]. Plaintiff stated, at his second hearing, that he left the job at the canning factory because the work became too strenuous. [R. at 511]. Plaintiff testified at the first hearing that he was

^{7/} Plaintiff additionally testified that he got into a fistfight with a fellow worker while at the chicken plant. [R. at 515].

terminated from this job due to conflicts with his workers. Plaintiff also stated that the job placed a strain on his back. [R. at 61]. According to Plaintiff the conflicts were primarily verbal arguments. [R. at 62]. Plaintiff worked for two days in May of 1991 at a salad factory, but quit that job due to a conflict with his supervisor over whether or not Plaintiff had the physical capability to squeegee condensation from a roof. [R. at 62, 128, 514]. Plaintiff worked at Hardwall Fabricators, finishing concrete manholes. Plaintiff testified that he worked there for approximately six months before he had a conflict with a supervisor regarding the "flow" on his "inverts." [R. at 63]. A form completed by Hardwall Fabricators, on January 12, 1993, indicates that Plaintiff stopped working because his back hurt while he was working. [R. at 224].

Plaintiff alleges that the date of onset of disability is October 15, 1990. Prior to this date, Plaintiff held jobs in construction, the chicken industry, and as a custodian. Plaintiff does note that he had some conflicts with workers while he was in the "chicken industry," but Plaintiff does not allege that he was terminated from any of these jobs. After the "date of onset," Plaintiff attempted to perform several jobs. Plaintiff states he was terminated from one of the jobs because he and a supervisor disagreed over whether Plaintiff had the physical capability to squeegee a roof. Plaintiff claims that he was terminated from Hardwall Fabricators due to a conflict with a supervisor, but the company states Plaintiff stopped working because Plaintiff experienced back pain after a car wreck.

The May 21, 1996, examiner concluded that "[o]ther than the physical disability claimed by the client, there is no psychological reason the claimant cannot function in the workplace."^{8/} [R. at 454]. The examiner did note that Plaintiff was "moderately limited" in his ability to perform activities within a schedule, maintain regular attendance and be punctual, and moderately limited in his ability to accept instructions and respond appropriately to criticism from supervisors. [R. at 452]. The form defines "moderately limited" as "an impairment that affects but does not preclude ability to function." [R. at 451].

The ALJ concluded that Plaintiff had the mental ability to perform work with "moderate limitations" such as an inability to accept criticism and be punctual. The ALJ's conclusions as to Plaintiff's mental limitations are supported by the record. The issue which becomes the focus of Plaintiff's appeal is whether or not substantial evidence supports the ALJ's decision that Plaintiff can perform substantial gainful activity for a "significant period of time." The Court concludes that this is a close call. The vocational expert did identify several jobs of light and sedentary activity which an individual of Plaintiff's physical abilities could perform. The vocational expert additionally testified that an individual with the stated mental limitations would not be precluded from performing those jobs. The vocational expert cautioned, however, that the mental limitations described by the ALJ would "go toward the ability of the

^{8/} The ultimate conclusion of whether or not the claimant can perform substantial gainful activity is a decision left to the ALJ. However, in this instance, the evaluator's conclusion indicates that although the evaluator believed Plaintiff had some limitations, the evaluator believed that the limitations would not significantly impair the Plaintiff in the performance of workplace activities.

individual to maintain satisfactory attendance, and satisfactory interaction with the supervisors. So the impact may be that, if those things become accumulative over time, the person would be terminated for tardiness or inability to – incompatibility with the supervisor." Therefore, in accordance with the vocational expert's testimony, if Plaintiff's incompatibility with the supervisor and failure to be punctual was of sufficient degree, Plaintiff would be unable to maintain his employment. If Plaintiff cannot maintain employment, Plaintiff is disabled.

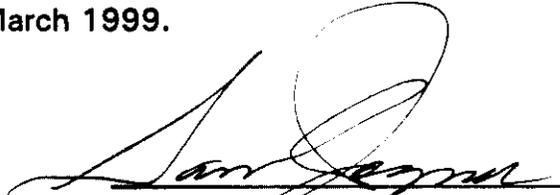
The Court does not view the vocational expert's testimony as concluding that Plaintiff either would or would not be able to maintain employment. Rather, the vocational expert appears to be providing guidance to the ALJ – dependant upon Plaintiff's degree of conflict with his supervisors and work, Plaintiff may or may not be able to maintain a job. The ALJ concluded, based on the testimony of the vocational expert and the evidence submitted by Plaintiff's psychological evaluators, that Plaintiff would be able to perform substantial gainful activity. The Court concludes that this finding is supported by substantial evidence.

Substantial evidence requires more than a scintilla but is less than a preponderance. Several evaluators placed "moderate" limitations on Plaintiff with regard to his ability to accept criticism from supervisors and his ability to function in the workplace. The most recent examiner concluded that Plaintiff had no mental restrictions which would interfere with his ability to perform work activity. Plaintiff's

work record indicates Plaintiff was able to sustain several jobs for a period of time.^{9/} Although the record contains some support for Plaintiff's claims, the Court concludes that it also contains substantial evidence to support the decision of the ALJ.

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

Dated this 10th day of March 1999.



Sam A. Joyner
United States Magistrate Judge

^{9/} Plaintiff stated he left Hardwall Fabricators due to a conflict, but Hardwall Fabricators states he left due to trouble with his back. Plaintiff testified that he had a conflict with a supervisor at the salad plant because Plaintiff was unable to perform the physical demands of the job.

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

SILVERADO FOODS, INC.,)
an Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
GOURMET SPECIALTY BAKERS, INC.,)
a California corporation,)
)
Defendant.)

ENTERED ON DOCKET

DATE MAR 11 1999

No. 99-CV-0118-H (E)

FILED

MAR 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PRELIMINARY INJUNCTION RESTRAINING DISPOSITION OF PROPERTY

CAME ON before the Court on February 22, 1999, the Application of Plaintiff SILVERADO FOODS, INC. ("Silverado") for a preliminary injunction restraining Defendant GOURMET SPECIALTY BAKERS, INC. ("Defendant") and its agents, servants, employees and all persons acting on its behalf or by or under its authority from transferring, concealing, damaging or destroying any of that certain property in the possession of Defendant as alleged in the verified Complaint filed in this case wherein Silverado has requested such an Order pursuant to 12 O.S. 1991, § 1571(C) and which property is identified on Exhibit "A" attached hereto (hereinafter, the "Assets"). Andrew R. Turner of Conner & Winters appeared for Silverado; Kenneth E. Crump, Jr. and Rodney Dusingberre of Crump, Tolson & Page, L.L.P. appeared for the Defendant.

The Court, having previously entered on February 12, 1999 its Order Restraining Disposition of Property (hereinafter, the "Temporary Restraining Order"), accepted into evidence the Promissory Note and the Security Agreement between the parties. The Court further accepted the stipulation of the Defendant, offered for the purposes of the preliminary injunction hearing only, as recited on the record at the hearing as to the existence of the Promissory Note from Defendant to Silverado, the existence of the Security Agreement from Defendant to Silverado, and nonpayment by Defendant under the Note and Security Agreement. The Court found that Silverado is entitled to the issuance

3/1/99

12

of a preliminary injunction as sought by the application and that Silverado might otherwise suffer irreparable damage unless the Defendant is enjoined as requested by Silverado. Accordingly, the Court continued the Temporary Restraining Order in effect until the parties could prepare and submit this Preliminary Injunction for entry by the Court. Accordingly,

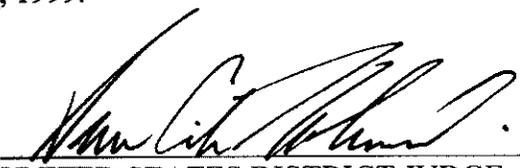
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant, its agents, servants, employees and all persons acting on its behalf or by or under its authority be and hereby are enjoined and restrained from transferring, concealing, damaging or destroying any of the Assets except as may be consumed or disposed of in the ordinary course of business. Nothing in this Order shall prohibit or restrain Defendant from operating its business in the ordinary course of business.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that no security is required of Plaintiff herefor.

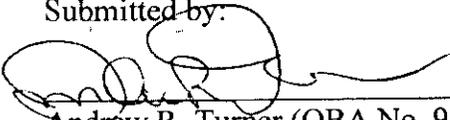
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Order shall continue until further order of the Court or entry of final judgment herein; provided that the expiration of this Order shall not permit or license any of the Defendant to commit any act prohibited by law, including 12 O.S. 1991, § 1571.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a copy of this Order shall be served on counsel for the Defendant and that such service shall be deemed sufficient notice of entry of this Order.

ISSUED this 10TH day of MARCH, 1999.


UNITED STATES DISTRICT JUDGE

Submitted by:

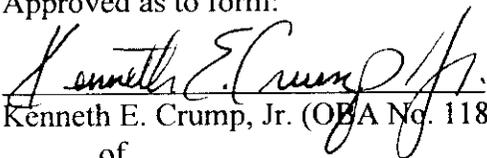

Andrew R. Turner (OBA No. 9125)

of

CONNER & WINTERS,
A Professional Corporation
3700 First Place Tower
15 East Fifth Street
Tulsa, Oklahoma 74103-4344
(918) 586-5711; *fax* (918) 599-9404

Attorneys for Plaintiff,
SILVERADO FOODS, INC.

Approved as to form:


Kenneth E. Crump, Jr. (OBA No. 11803)

of

CRUMP, TOLSON & PAGE L.L.P.
1516 S. Boston, Suite 310
Tulsa, Oklahoma 74119
(918) 583-2393, *fax* (918) 583-2394

Attorneys for Defendant
GOURMET SPECIALTY BAKERS, INC.

EXHIBIT "A" — DESCRIPTION OF ASSETS

(a) All of the assets acquired by Gourmet Specialty Bakers, Inc. ("GSB") from Silverado Foods, Inc. ("Silverado") pursuant to the Asset Purchase Agreement dated June 12, 1998 (the "Purchase Agreement"), relating to Silverado's bagel and bagel bar production business located in Santa Ana, California (the "Business"), including the following:

(i) the product lines related to the Business which are described in Exhibit 1.1(a) attached hereto and made a part hereof (the "Product Lines");

(ii) the purchase orders related to the Business;

(iii) the contracts which are described in Exhibit 1.1(c) attached hereto and made a part hereof;

(iv) the building, office, and equipment leases which are described in Exhibit 1.1(d) attached hereto and made a part hereof;

(v) the art work, plates, dies, customer lists, files, marketing information, sales literature, mailing lists, books, and records related to the Business;

(vi) the trademarks which are described in Exhibit 1.1(f);

(vii) all inventories of Silverado related to the Business, including without limitation finished goods, work-in-progress, and raw materials;

(viii) the equipment, supplies, furniture, fixtures, and displays related to the Business which are described in Exhibit 1.1(h) attached hereto and made a part hereof; and

(b) All accounts receivable arising after the current date relating to the sale of products included within the Product Lines; and

(c) All assets of GSB other than the Bagel Assets, including all accounts receivable, inventory, contracts, trademarks, other general intangibles machinery and equipment, whether now owned or hereafter acquired (the "Other Assets"); provided that Silverado acknowledges and agrees that the Other Assets shall be subject to any existing prior lien(s) of any lender, lessor or other financial institution providing financing to GSB of any predecessor owner of the Other Assets, and that Silverado agrees, at the request of GSB, to subordinate Silverado's interest in the Other Assets to any lender of Silverado that requires such subordination to enable GSB to obtain or continue financing for its operations; provided further, notwithstanding the foregoing, the lien held by Crescent Hermanson Family Limited Partnership in the Other Assets shall be prior to the lien of GSB only to the extent of the first \$152,000 of secured indebtedness owed to Crescent Hermanson Family Limited Partnership and/or Gennie Hermanson, with Silverado's lien being prior as to any secured indebtedness in excess of \$152,000.

(d) All proceeds and products of the foregoing.

00/12/00 10:00 FAX 810 300 0340 CENTER & HANDED 10000

Exhibit 1.1(a)

DESCRIPTION OF THE PRODUCT LINES

ITEM #	UPC	DESCRIPTION	CASE PACK	UNIT WEIGHT
MOM'S BEST CREAM CHEESE POUND CAKES				
16100101	16110	Original	3/12 ct	2.5 oz
16100105	17110	Marble	3/12 ct	2.5 oz
16100110	15112	Chocolate Fudge	3/12 ct	2.5 oz
BAGEL BARS/ENERGY BARS – CLUB PACKS				
16100918	12376	American Fitness Classic	1/18 pk	45.0 oz
1610601	20001	Tropical	1/12 pk	30.0 oz
FROZEN AMERICAN FITNESS CLASSIC ENERGY BAR – SAM'S				
16100901	12376	American Fitness Classic	9/18 pk	45.0 oz
1610612	20001	Tropical	12/12 pk	30.0 oz
16100415	40045	Apple, Cinn., Raisin & Walnut	10/15 pk	33.75 oz
16100915	40095	Cinnamon Swirl	10/15 pk	33.75 oz
NATURAL ENERGY BARS				
16010412	12350	Natural	12/12 pk	30.0 oz
16141001	20038	Chocolate Chip 2.5 oz I/P	1/12 pk	30.0 oz
166010712		Cranberry/Orange	1/12 pk	30.0 oz
BJ'S ENERGY BARS – PALLET PROGRAM				
	17011	Natural 2.5 oz I/P	10/12 pk	27.0 oz
	17101	Chocolate Chip 2.5 oz I/P	10/12 pk	27.0 oz
	17061	Tropical 2.25 oz I/P	10/12 pk	27.0 oz
	17071	Cranberry/Orange 2.25 oz I/P	10/12 pk	27.0 oz

Exhibit 1.1(c)

MATERIAL CONTRACTS

1. Carbon Dioxide Application Equipment Rental Agreement dated February 1, 1993 between the Seller and AIRCO Industrial Gases Company governing the lease of a Spiral Freezer.
2. Application Equipment Rental Agreement dated April 6, 1994 between Seller and AIRCO Gases Company governing the lease of a Spiral Freezer.
3. Lease Agreement dated October 21, 1994 between Seller and Southwest Material Handling, Inc. governing the lease of a Toyota forklift.
4. Equipment Lease Agreement dated September 1, 1993 between Seller and Advance Acceptance Corporation governing the lease of a floor-scrubbing machine.
5. Lease Agreement dated February 2, 1995 between Seller and Minolta Business Systems governing the lease of a copying machine. Also included is a Maintenance Agreement dated March 15, 1996 between Seller and Minolta Business Systems governing the maintenance of said copying machine. *Lease on current copier*
6. Lease Agreement dated October 10, 1992 between Seller and Pitney Bowes Credit Corp. governing the lease of a postage/scale mail machine.
7. Rental Agreement dated February 15, 1995 between Seller and ARDCO Equipment Corp. governing the rental of a baler.
8. ~~Orix Credit Alliance - Voice Mail System. Accepted June 2, 1994. Term of 60 months, at \$239.00 per month, 10% buyout.~~
9. AIRCO Carbon Dioxide Equipment Rental Agreement: Dated December 17, 1992 between the Seller and AIRCO Industrial Gases Company governing the lease of a 30-ton CO₂ Receiver.
10. Carbon Dioxide Supply Agreement: Dated February 1, 1993 between Seller and the BOC Group.
11. ~~Partner II and 4 Port Voice Mail: Dated January 9, 1995 between Seller and AT&T.~~
12. Citicorp Del-Lease, Inc. Forklift, dated February 14, 1995 between Seller and Citicorp Del-Lease. 1995 Baker Model E15 W/B & C
13. Chemical Leasing: 5400 Copier with Automatic Document Feeder and 1 Sharp 5450 Facsimile. Agreement dated June 22, 1995 between Seller and Chemical Leasing.

14. Koll Business Center Lease: Dated May 31, 1996, for Building/Unit FO1/05-06 for 60 months between Seller and Robert P. Mosier.
15. Koll Business Center Lease: Dated May 31, 1996 for Building/Unit OI01/ALL for 60 months between Seller and Robert P. Mosier.
16. Koll Business Center Lease: Dated May 31, 1996 for Building Unit OJ01/ALL for 60 months between Seller and Robert P. Mosier.
17. Seller has distribution agreements with the following distributors of its products:
 - a) Salesaid Brokerage (verbal) – Commissions for sales to McCarthy Holman. Promotional allowance of 60¢ per case. Commission of 5% of the difference between gross sales to McCarthy Holman less promotional.
 - b) Bud Suarez (verbal) – Commissions for sales to Specialty Foods (Fla.) – 5% of gross sales.
 - c) Dayman Associates, Inc. – Agreement dated December 9, 1997 between Seller and Dayman Associates for commission of 1.5% for sales to Price Costco.
 - d) EGF Brokerage – Agreement dated March 1, 1994 between Seller and EGF Brokerage for commission of 5% for managing Canadian sales.
 - e) Café Valley (verbal) – Distributor of Seller's products to Price/Costco stores in Arizona. Seller pays Café Valley a distribution of 20% of gross sales.
 - f) High Summit (verbal) – Distributor of Seller's products to Price/Costco stores in Colorado. Seller pays High Summit a distribution fee of 15% of gross sales.
 - g) Costco Eastern Canada - Agreement dated March 19, 1997
 - h) North American Strategic Alliance – Agreement dated June 30, 1997 between Seller and North American Strategic Alliance for commission of 1.5% on current sales of American Fitness Classic Energy Bars, 18 ct. Apple, Cinnamon, Raisin and Nuts and American Fitness Classic 12 ct. Energy Bagel Bars, 12 ct. Rotating Flavors and a commission of 3% on all new items sold to Sam's Clubs.

18. Seller pays a 1% discount on gross sales to Price/Costco Canada, and a 2% discount on gross sales to Sam's Clubs, if paid within 10 days.
19. Seller is an approved provider of bagels and bagel bars for the U.S. Department of Defense.
20. Seller has a verbal agreement with Automatic Data Processing, Inc. regarding payroll facilitation.

Exhibit 1.1(d)

LEASES

1. Carbon Dioxide Application Equipment Rental Agreement dated February 1, 1993 between the Seller and AIRCO Industrial Gases Company governing the lease of a Spiral Freezer.
2. Application Equipment Rental Agreement dated April 6, 1994 between Seller and AIRCO Gases Company governing the lease of a Spiral Freezer.
3. Lease Agreement dated October 21, 1994 between Seller and Southwest Material Handling, Inc. governing the lease of a Toyota forklift.
4. Equipment Lease Agreement dated September 1, 1993 between Seller and Advance Acceptance Corporation governing the lease of a floor-scrubbing machine.
5. Lease Agreement dated February 2, 1995 between Seller and Minolta Business Systems governing the lease of a copying machine. Also included is a Maintenance Agreement dated March 15, 1996 between Seller and Minolta Business Systems governing the maintenance of said copying machine.
6. ~~Lease Agreement dated October 10, 1992 between Seller and Pitney Bowes Credit Corp. governing the lease of a postage/scale mail machine.~~
7. Rental Agreement dated February 15, 1995 between Seller and ARDCO Equipment Corp. governing the rental of a baler.
8. ~~Orix Credit Alliance - Voice Mail System. Accepted June 2, 1994 Term of 60 months, at \$239.00 per month; 10% buyout.~~
9. AIRCO Carbon Dioxide Equipment Rental Agreement: Dated December 17, 1992 between the Seller and AIRCO Industrial Gases Company governing the lease of a 30-ton CO₂ Receiver.
10. Carbon Dioxide Supply Agreement: Dated February 1, 1993 between Seller and the BOC Group.

↳ see on present copier

OK

J

ll

11. Partner II and 4 Port Voice Mail: Dated January 9, 1995 between Seller and AT&T
12. Citicorp Del-Lease, Inc.: Forklift, dated February 14, 1995 between Seller and Citicorp Del-Lease. 1995 Baker Model E15 W/B & C
13. Chemical Leasing: 5400 Copier with Automatic Document Feeder and 1 Sharp 5450 Facsimile. Agreement dated June 22, 1995 between Seller and Chemical Leasing.
14. Koll Business Center Lease: Dated May 31, 1996, for Building/Unit FO1/05-06 for 60 months between Seller and Robert P. Mosier.
15. Koll Business Center Lease: Dated May 31, 1996 for Building/Unit OI01/ALL for 60 months between Seller and Robert P. Mosier.
16. Koll Business Center Lease: Dated May 31, 1996 for Building Unit OJ01/ALL for 60 months between Seller and Robert P. Mosier.

Exhibit 1.1(f)

DESCRIPTION OF TRADEMARKS

1. "Mom's Best" -- Registered trademark with United States Patent and Trademark Office, Reg. No. 1,775,358, Registered June 8, 1993.

2. "Little Missy" -- registered trademark with Florida Department of State, Registration No. T15744, April 7, 1992. Application was made for a United States trademark registration, Serial No. 741246,440, and publication was made as of June 1, 1993; however, McKee Foods Corporation has filed a notice of opposition with respect to such application.

3. American Fitness Classic (U.S. Serial No. 74-692,638)

4. The Natural (U.S. Serial No. 73-775,523)

5. Such other trademarks as may be applicable to the Product Lines to the extent of Seller's interest in such marks; without warranty

Exhibit 1.1 (h)

DESCRIPTION OF THE EQUIPMENT

- 1- 1991 Baking Machinery Design
Model FS Silo, sn 91-7-661,
Vertical Bolted Rectangular Steel
Construction, with Roots 1 hp
Blower, Rotary Air Lock Bottom
Discharge Valve, 7.5 hp Vacuum
Blower Loader, and Flighted
Aluminum Transfer Conveyor
- 1- Gump Model CP32 Sifter,
sn CP2149, Pressure Type, 32"
Diameter
- 1- Bohn Walk-In Freezer, 12'
x 10', with Condensers, and Bally
Model PN200A1 Refrigeration
Compressor
- 1- Russell Walk-In Freezer,
22' x 8', with Condensers, and
Maneurop Model CMT64-361
Refrigeration Compressor

- 1- Hobart Model H-600 Mixer,
sn 11-335-778, 80 Quart, Floor
Type
- 1- Reed Proofer, Stainless
Steel, Rack Type, Pass Through,
6-Lane, 20' x 20', with McKenna
15 hp Package Boiler, Gas Fired
- 1- Rheon Model Conucopia
KN400 Encruster, sn 56
- 1- Pfaudler Filler, Rotary
Piston Type, 2-Valve
- 12- Baxter Model OV210G-M2B
Advantage Rack Ovens,
(1992/1994), Gas Fired, Stainless
Steel, Rotating Type, with Stainless
Steel Exhaust Hoods
- 1- Food Makers Spiral Cooler,
10' Diameter, 8-Tier, with Stainless
Steel Mesh Conveyor Belt, Stainless
Steel Frame, and Polyethylene Belt
Infeed Conveyor
- 1- Belt Conveyor, 23"W x
Approximately 40'L, Ceiling Hung,
Inclined, with Plastic Mesh Belt,
and Stainless Steel Channels
- 1- Belt Conveyor, 90-Degree
Turn, 23" Wide, with Plastic Mesh
Belt, and Stainless Steel Frame
- 1- Belt Conveyor, 12"W x
Approximately 20'L, with Plastic
Chain-Top Belt, and Stainless Steel
Frame

- 1- Hobart Model V-1401 Mixer,
sn 1650698, 140 Quart, Floor
Type, with Bowl
- 1- Day Model Hercules B Mixer,
Trough Type, Stainless Steel
Jacketed Trough, Painted Steel
Frame, 500 Lb. Batch Capacity,
with Top-Mounted Weigh Bin,
Flex-Weigh Model DWM IV
Digital Scale System, and Glycol
Chiller
- 1- Day Model Hercules Mixer,
Trough Type, Stainless Steel
Jacketed Trough, Painted Steel
Frame, 1,300 Lb. Batch Capacity,
with Top-Mounted Weigh Bin,
Flex-Weigh Model DWM IV
Digital Scale System, and Glycol
Chiller
- 1- Rondo/Custom Bagel Bar
Line, To Include:
- (1) 1994 Baking Machines
Model BM-SBE-144
Elevator, sn 101394004,
Stainless Steel Bowl Lift
and Dumper, 12' Lift, with
 - (3) Portable Dough Mixing
Bowls
 - (1) 1992 Rondo Model TBF
Extruder, sn 23150049215,
16" Width Capacity,
Stainless Steel, with Baking
Machines Model
BM-RRF-10000 Elevated
Stainless Steel Dough
Depositer, with Gear Drive
Discharge Bottom; 24"W x
8'L Polyethylene Belt
Transfer Conveyor; and (2)
Stainless Steel Flour Sifters,
Extruder
 - (1) Rondo Sheeter, 24" Width
Capacity, 2-Roll, with Flour
Sifter/Smoothen
 - (1) Food Makers Slicer, 24"
Maximum Width Capacity.

00712/00 10.12 FAX 810 300 0340 CONCRETE & MATERIALS TOLSON 4001

Stainless Steel, with Plastic
Mesh Belt Scrap Return
Conveyors

(1) Moline Brusher, 24"
Maximum Width Capacity,
with 10-Lane Belt Spreader
Conveyor Table, and (2)
Dayton Dust Collectors

(1) Food Makers Panner, 24"
Pan Width Capacity, with
Bottom Paper Application
and Cutting System,
Polyethylene Feed Belt, and
Automatic Pan Loader

- 1- 1994 LVO Model TW1548G Pan
Washer, sn 4211-0894-4297, Sheet
Pan Washer, 150 Degrees
Fahrenheit Minimum Wash
Temperature, 180 Degrees to 195
Degrees Fahrenheit Rinse
Temperature, 3 Minute Wash
Cycle, 15 Second Rinse Cycle
- 1- Fedco Model PP203R1 Food Pump,
sn 526, Stainless Steel, Portable
- 1- Fedco Model PP203P Food
Pump, sn 441, Painted Steel Frame,
Stainless Steel Pump, Portable
- 1- Fedco Depositor, 3-Pocket,
18" Maximum Width Capacity,
Stainless Steel, Portable, with
Polyethylene Belt Conveyor
- 1- Yale Model MP040C Low-Lift
Walkie, sn N333046, 4,000 Lb.
Capacity
- 1- A & D Model AD-4327A
Platform Scale, sn H7000332
- 1- Toyota Model 5FBC20
Electric Lift Truck, sn 12107,
4,000 Lb. Capacity, 3-Stage Mast,
Solid Tire

- 1- Belco Model STC Shrink
Wrap Machine, sn 1146, L-Bar
Sealer, 16" x 20" Capacity, with
Shrink Tunnel
- 1- 3M Model 22A/28600 Box
Taper, sn 8375, Top and Bottom
Case Sealer, Adjustable
- 1- 1988 Doboy Model Mustang I
Wrapping Machine, sn 88-24981,
Horizontal Form, Fill, and Seal
Overwrapper; Print Registration;
with Stainless Steel Infeed; Film
Unwind and Tension Infeed Station;
Rotary Heat Sealer Cutoff; and
Label-Aire Model 2015CDL
Labeler
- 1- 1983 Formost Model
FW-370A-MC2 Wrapping Machine,
sn H035001, Stainless Steel;
Horizontal Form, Fill, and Seal
Overwrapper; Print Registration;
with Stainless Steel Infeed; Film
Unwind and Infeed Tension Station;
Rotary Heat Sealer Shear; and
Infeed Sorting Table
- 1- Ilapak Model LYNX DUE
Wrapping Machine, sn 1017/8P07,
Horizontal Form, Fill, and Seal
Overwrapper; Film Registration;
with Film Unwind and Infeed
Tension Station; Rotary Heat Sealer
Shear; Infeed Sorting Table; and
Markem Model 905 Labeler
- 1- Advanced Detection Systems
Model 1000 Metal Detector, sn
540147, 24"W x 6"H Opening, with
Plastic Chain-Top Pass-Through
Conveyor
- 1- 1994 Ilapak Model Cougar
Sr-UNO Wrapping Machine, sn
002-94, with Film Unwind and
Tension Infeed Station, Rotary Heat
Sealer Shear, Polyethylene Flighted
- 1- AND Model FS-30K Digital
Scale, 35 Lb. Capacity, Stainless
Steel, Bench Type

**Belt Product Infeed Conveyor, and
Infeed Sorting Conveyor Table**

- 1- 1994 UBE Model 771 Bagging Machine, sn 7771, Side Feed, Automatic, with Plastic Chain-Top Infeed Conveyor; Belt Conveyor Sorting Table; Kwik Lok Model 872ABGJL Bag Closer; and Kwik Lok Model 1011E-CL Imprinter, sn 48240-1995
- 1- 1966 Doboy Model H-400 Wrapping Machine, sn 66-050, Horizontal Form, Fill, and Seal Overwrapper
- 1- 1994 UBE Model 771R Bagging Machine, sn 7774, In-Line Feed, Automatic, Modified for Multiple Layer Bagging, with Plastic Chain-Top Infeed Conveyor, Belt Conveyor Sorting Table, Kwik Lok Model BGN Bag Closer, and Kwik Lok Model 1011E Imprinter
- 1- 3M Model 700A/29200 Box Taper, sn 4838, Random Top and Bottom Box Taper
- 1- S.V.D. Case Sealer, sn 3255, with Slautterback Model KB20 Hot Melt Glue System, sn 229648MA
- 1- Willett Model 3170 Ink Jet Labeler, with Label Jet Bulk Ink System, and (2) Printing Heads
- 1- Infrapak Model LPS-FS Stretch Wrap Machine, sn 32718T, Automatic, with Forklift Access Ramp

- 1- Kilkom Model KV-60
Vertical Baler, sn 68365,
Hydraulic, 30" x 60" x 48" Bale
Size
- 1- Kilkom Vertical Baler,
Model and Serial Number
Unknown, 36" x 24" x 30" Bale
Size
- 1- Speedaire Model 5Z399-2
Reciprocating Air Compressor,
Serial Number Unknown, 5 hp,
Vertical Tank Mounted
- 1- Reciprocating Air Compressor,
Manufacturer Unknown, 10 hp
- 1- Speedaire Model 5Z641
Reciprocating Air Compressor,
Serial Number Unknown, with (2) 5
hp Compressor Heads, Horizontal
Tank Mounted
- 1- 1995 Chill Water System,
Roof Mounted, with (1) SBC, Inc.
Model EX14 Chiller, 140-Ton
Capacity; (1) SBC, Inc. Model
EX13 Chiller; (1) SBC, Inc. Model
EX8 Chiller, 80-Ton Capacity;
Pumps; and Piping
- 30- Pallet Racks, 42"D x 8"W x
10'H, 2-Tier, Heavy Duty
- 1- 1985 Caterpillar Model
V30D LP Gas Lift Truck, sn
5HB900, 3,000 Lb. Capacity, 154"
Lift, 3-Stage Mast, Solid Tire
- 1- Larkin Walk-In Freezer,
Self-Contained, 13' x 37' x 10'H,
with Condensers, and Compressors

- 1- Walk-In Freezer, Manufacturer Unknown, L-Shaped, Self-Contained, with Condensers, and Compressors

- 1- Lot of Maintenance Equipment, To Include:
 - (1) Carolina Hydraulic Press, sn CF18969, H-Frame
 - (1) 1992 Delta Model 14-070 Drill, sn R9242, Floor Type
 - (1) Miller Model Maxstar 150 Welder, 150 Amps, with Carts
 - (1) 1991 Vulcan Model 3189 Disc/Belt Grinder, sn 040070, 1" Belt, 8" Disc
 - (1) Allied Double-End Grinder, 6", Bench Type
 - (1) Ohio Forge Table Saw, 10"
 - (1) 1996 Milwaukee Model 6175 Cut-Off Saw, sn 96061357, Abrasive, Bench Type
 - (1) Miller Model Millermatic 200 Welder, sn KA898941, 200 Amps, with Cart
 - (1) Thermal Dynamics Model Pakmaster 25 Plasma Cutter

- 1- Kwik Lok Model 872A-BGJL Bag Closer, sn 45761, with Model 1011E-CL Imprinter, (Not In Service)

- 1- 1993 Advance Model Convertamatic 260B Floor Scrubber, sn 936524, Electric, Walk-Behind, (Not In Use)

- 1- Esmach Depositor, (Not In Service)

- 1- Murata Model Imagemate MX Facsimile Machine

- 1- Hewlett-Packard Model Deskjet 520 Ink Jet Printer
- 1- Compaq Model Presario 433 Personal Computer, 486 Processor, 33 MHz
- 1- Compaq Model Presario 660 Personal Computer, 486 Processor, 66 MHz
- 1- Hewlett-Packard Model Laserjet 4P Laser Printer
- 1- Power Spec Personal Computer, 486 Processor
- 3- Epson Model LX-810 Line Printers
- 1- Gateway 2000 Model P5-166 Personal Computer, Pentium Processor, 166 MHz, Mini Tower
- 1- Radio Shack Model JP1000 Ink Jet Printer
- 1- Certified Network Systems Personal Computer, 486 Processor
- 1- Okidata Model Okijet 2010 Ink Jet Printer
- 1- Austin Model Power System 90 Personal Computer, Pentium Processor, 90 MHz
- 1- Okidata Model Microline 393 Plus Line Printer
- 1- Epson Model Action Laser 1500 Laser Printer
- 1- Certified Network Systems Personal Computer, 486 Processor

- 1- Hewlett-Packard Model
Laser Jet 4 Laser Printer
- 1- Epson Model LX-300 Line
Printer
- 1- AZI Model Computrac Max
500 Moisture Analyzer
- 1- CSC Moisture Balance
- 1- Micom Model Marathon 5K
Turbo Network Node Integrator
- 1- Lot of Equipment, Not In
Service, In Storage, To Include:
 - (1) LeMatic Automatic Roll
Slicer, sn 19031295
 - (1) Moline Model 250 Slicer
Head, sn B-4037-73
 - (1) Oliver Model 702 Slicer
Head, sn 131387
 - (1) UBE Automatic Bagging
Machine
 - (1) Edlund Floor-Type Mixer
 - (1) 4-Head Piston Batter
Depositor
- 1- Lot of Factory and Support
Equipment, To Include: Stainless
Steel Tables, Wire Racks, Shelving,
Pan Racks, Sheet Pans, Baking
Pans, Ingredient Bins, Pallet Jacks,
Hand Trucks, Miscellaneous Scales,
Hand Tools, Conveyors, etc.
- 1- Lot of Office Furniture and
Business Machines, To Include:
Desks, Credenzas, Chairs, Tables,
File Cabinets, Shelves, Typewriter,
etc.