

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

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

JOHN BARTON, an individual, and)
SWEET PEAS, INC., an Oklahoma)
corporation, dba SALAD ALLEY.)

Plaintiffs,)

v.)

SOUPER SALAD, INC.,)
a Texas Corporation,)

Defendant.)

CASE NO. 98-CV-629E(E) ✓

ENTERED ON DOCKET
DATE 7-9-99

ORDER

Now before the Court is the Motion for Summary Judgment (Docket #15) of the Defendant Souper Salad, Inc.

Background

Plaintiff John Barton, shareholder of Sweet Peas, Inc., was employed by Defendant Souper Salad sometime around 1985 or 1986. Barton was originally hired as area supervisor for the Dallas restaurants, and was promoted about one year later to Vice President of Operations and moved to Houston. After allegations of unprofessional conduct with a subordinate, Barton's employment was terminated. Subsequently, Barton opened a competing restaurant, Salad Alley, in the Dallas area. In 1995, after Barton closed the Salad Alley in Dallas, he opened a Salad Alley in Tulsa. Around the same time Barton was opening his Tulsa restaurant, he and Defendant Souper Salad were involved in ongoing litigation against one another. This litigation was ultimately settled, with a specific settlement agreement providing that Defendant would keep

confidential any information relating to the alleged reasons for Barton's termination and any prior alleged improper conduct ("The Agreement"). In 1997, Souper Salad opened a restaurant in Tulsa.

Plaintiffs Barton and Sweet Peas, Inc., bring three claims against Defendant Souper Salad. First, Barton claims breach of contract, contending that Defendant substantially and materially breached the terms of the Agreement. Second, Barton brings a cause of action for slander, contending Defendant has engaged in a continuous pattern of purposefully and wilfully slandering his name. Specifically, Burton claims Defendant's employees have suggested to customers that he stole both recipes and the restaurant concept from Souper Salad. Third, it is claimed that Defendant has engaged in a continuous pattern of purposely and wilfully slandering Sweet Peas, Inc. Defendant seeks Summary Judgment, pursuant to Fed.R.Civ.P. 56, arguing that Plaintiffs cannot establish any claim for actionable slander or breach of contract because there is insufficient admissible supporting evidence.

Legal Analysis

Summary Judgment Standard

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

A recent Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

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.)

Id. at 1521.

Slander Claims

A. Special Damages

Plaintiffs contend that Defendant's employees made comments to customers that Barton stole both recipes and the concept for Salad Alley. For these alleged comments to establish a claim for slander under Oklahoma law, Plaintiffs must present admissible evidence that these comments acted as a false and unprivileged publication which:

- A. Charges any person with crime, or having been indicted, convicted or punished for crime.
- B. Imputes in him the present existence of an infectious, contagious or loathsome disease.
- C. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profit.
- D. Imputes to him impotence or want of chastity; or,
- E. Which, by natural consequences, causes actual damage.

OKLA. STAT. tit. 12, § 1442.

It is well settled that the first four subsections of the statute are slander *per se*, and require no proof of special damages. Shaffer v. Huff, 13 P.2d 108 (Okla. 1932). Subsection five requires pleading and proof of actual damages. Id. at 110. Defendant contends that, if there was admissible evidence that the alleged comments were in fact made by an employee of Souper Salad, the only cause of action for Plaintiff would be under subsection five. This would require a showing of special damages, and Defendant argues that Plaintiffs are unable to quantify the actual losses attributed to the alleged comments made.

The Court finds that the analysis of special damages is not necessary for the purposes of

summary judgment. Plaintiffs have alleged that Defendant, through its employees, has accused them of stealing recipes and the restaurant concept from Souper Salad. Assuming evidence sufficient to support these allegations, Plaintiffs' claims constitute an accusation of theft, pursuant to subsection one. Furthermore, the Court is persuaded that these comments could injure one's trade, pursuant to subsection three. Therefore, Plaintiff is not required to present any specific evidence of special damages for the purposes of summary judgment, as would be required if Plaintiffs only brought a claim under subsection five.

B. Sufficiency of Evidence

Defendant also argues that Plaintiffs do not have sufficient admissible evidence to support their slander claims. Plaintiffs have come forward with the affidavit of Jennifer Cook, which contains evidence as to allegedly slanderous comments made by Defendant's employees. In Cook's sworn testimony she states that she overheard "employees communicating to customers that John Barton stole the recipes and the restaurant concept." Defendant does not dispute the admissibility of this statement. Rather Defendant questions whether the statement is sufficient to give rise to liability of the part of Souper Salad. In essence, Defendant argues that not every employee can bind Defendant by his statement. The Court finds, however, that in absence of evidence specifically identifying the employees to whom Cook was referring, her statement is sufficient to get Plaintiffs' slander claim past summary judgment.

Breach of Contract

Defendant makes a similar argument in support of its motion for summary judgment for Plaintiff's breach of contract claim. Primarily, Defendant contends that Plaintiffs' evidence for his breach of contract claim consists of inadmissible hearsay. However, the Court finds that the affidavit of Jennifer Cook raises a genuine question of fact which cannot be decided in a summary judgment motion. In accordance with the Courts findings as to Plaintiffs' slander claims, the issue of special damages need not be considered at this time. Therefore, Defendant's motion for summary judgment as to Plaintiffs' breach of contract claim is denied.

The Defendant's Motion for Summary Judgment (Docket #15) is DENIED.

IT IS SO ORDERED THIS 8th DAY OF JULY, 1999.


JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

F I L E D

JUL - 8 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

TERRY McHENRY,)
)
 Petitioner,)
)
 vs.)
)
 RAY LITTLE,)
)
 Respondent.)

Case No. 97-CV-677-B ✓

ENTERED ON DOCKET
DATE JUL 09 1999

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, confined in the Oklahoma Department of Corrections at the time he filed his petition,¹ challenges his conviction entered in Tulsa County District Court, Case No. CF-96-596. Respondent has filed a Rule 5 response (#6). However, Petitioner has failed to reply.² After considering Petitioner's claims based on the petition and Respondent's response, the Court concludes that this petition should be denied.

BACKGROUND

On April 1, 1996, Petitioner pled guilty to Possession of Contraband Where Prisoners are Kept in Tulsa County District Court, Case No. CF-96-596, and received a sentence of two (2) years

¹It appears Petitioner has discharged his sentence during the pendency of this action. However, Petitioner's claims, attacking the validity of his conviction, have not been rendered moot simply because he is no longer "in custody" as required by 28 U.S.C. § 2254. See Spencer v. Kemna, 523 U.S. 1 (1998); Sibron v. New York, 392 U.S. 40, 55-56 (1968).

²The Court's April 23, 1998 Order granting Petitioner's motion for enlargement of time to reply was returned to the Court marked "discharged to street." To date, Petitioner has not provided notice of a new address.

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imprisonment. Petitioner did not move to withdraw his guilty plea and did not otherwise perfect an appeal.

However, Petitioner filed an application for post-conviction relief, alleging (1) ineffective assistance of counsel, and (2) violation of the prohibition against double jeopardy. On November 4, 1996, the state district court denied relief, finding that Petitioner had been provided effective assistance of counsel and that the double jeopardy claim was procedurally barred since Petitioner failed to file a direct appeal. (#6, attachment to Ex. B). Petitioner filed a post-conviction appeal and on February 27, 1997, the Oklahoma Court of Criminal Appeals affirmed the denial of post-conviction relief. (#6, Ex. A).

Petitioner filed the instant petition on June 13, 1997 alleging (1) counsel provided ineffective assistance when she failed to recognize the double jeopardy violation, and (2) his conviction was entered in violation of the constitutional prohibition against double jeopardy. In his response to the petition, Respondent argues that the double jeopardy claim is procedurally barred from this Court's review and that Petitioner is not entitled to habeas corpus relief on his ineffective assistance of counsel claim

ANALYSIS

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by either showing (a) the state's appellate court has had an opportunity to rule on the same claim presented in federal court, or (b) there is an absence of available State corrective process or circumstances exist that render such process ineffective to

protect the rights of the applicant. 28 U.S.C. § 2254 (b); see also White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). The exhaustion doctrine is "principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." Harris v. Champion, 15 F.3d 1538, 1554 (10th Cir. 1994) (quoting Rose v. Lundy, 455 U.S. 509, 518 (1982)). Respondent concedes, and this Court finds, that the Petitioner meets the exhaustion requirements under the law.

The Court also finds that an evidentiary hearing is not necessary because Petitioner did not seek an evidentiary hearing in state court and has not demonstrated that the claims now before the Court rely on either a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable, or a factual predicate that could not have been previously discovered through the exercise of due diligence. 28 U.S.C. § 2254(e)(2)(A). Petitioner has also failed to demonstrate that the facts underlying the claims would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found Petitioner guilty of the underlying offense. 28 U.S.C. § 2254(e)(2)(B).

A. Procedural Bar

The alleged procedural default in this case results from Petitioner's failure to file a direct appeal in order to raise his double jeopardy claim and his failure to provide the state courts with sufficient reason for his failure to raise this claim in a direct appeal. In its opinion affirming the trial court's denial of post-conviction relief, the Oklahoma Court of Criminal Appeals cited to the trial court's order for the proposition that petitioner had "waived any remaining issues." The trial court

relied on Hale v. State, 807 P.2d 264 (Okla. Crim. App. 1991); Mains v. State, 597 P.2d 774 (Okla. Crim. App. 1979); Webb v. State, 661 P.2d 904 (Okla. Crim. App. 1983); and Jones v. State, 704 P.2d 1138 (Okla. Crim. App. 1985) in reaching the conclusion that Petitioner had defaulted his claim.

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "'in the vast majority of cases.'" Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991)).

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

Because of his procedural default, this Court may not consider Petitioner's double jeopardy claim unless he is able to show cause and prejudice for the default, or demonstrate that a

fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 510 U.S. at 750. The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner attempts to show cause by alleging that because of his counsel's ineffective assistance, he did not become aware of the double jeopardy claim until after the 10 day period for filing a motion to withdraw guilty plea had passed. Ineffective assistance of counsel may serve as "cause" excusing a procedural bar, Murray v. Carrier, 477 U.S. at 488, and to establish ineffective assistance of counsel a petitioner must show that his counsel's performance was deficient and that the deficient performance was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984). There is a "strong presumption that counsel's conduct falls within the range of reasonable professional assistance." Id. at 688. In making this determination, a court must "judge . . . [a] counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id., at 690. To establish the prejudice prong of the Strickland test, Petitioner must show that the allegedly deficient performance prejudiced the defense; namely, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland, 466 U.S. at 694. Moreover, review of counsel's performance must be

highly deferential. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689.

Petitioner's claim in this case, that he failed to appeal because of counsel's ineffective assistance, is without merit and does not satisfy the first prong of the Strickland standard. Petitioner's conviction for Possession of Contraband followed an administrative finding of guilty at a Department of Corrections disciplinary hearing. As a result of the misconduct finding, Petitioner lost 50 earned credits and was fined \$15.00. Petitioner claims that his subsequent criminal conviction constituted double jeopardy. It is well-established that "prison disciplinary hearings are not part of a criminal prosecution, Wolff v. McDonnell, 418 U.S. 539, 556, 94 S.Ct. 2963, 2974, 41 L.Ed.2d 935 (1974), and therefore do not implicate double jeopardy concerns." Lucero v. Gunter, 17 F.3d 1347, 1351 (10th Cir. 1994). See also United States v. Brown, 59 F.3d 102, 103 (9th Cir.1995) (stating that the "bar against double jeopardy does not preclude criminal prosecution for conduct for which prison authorities have already imposed administrative discipline" and citing to United States v. Apker, 419 F.2d 388 (9th Cir.1969)); see also United States v. Galan, 82 F.3d 639 (5th Cir.1996). This Court concludes that counsel's failure to advise Petitioner of the double jeopardy prior to the deadline for filing a motion to withdraw guilty plea was not ineffective assistance and Petitioner has failed to demonstrate "cause" sufficient to overcome the procedural bar.

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 113 S.Ct. 853, 862 (1993); Sawyer v. Whitley, 112 S.Ct. 2514, 2519-20 (1992). Petitioner, however, does not claim that he is actually innocent of the crime for which he was convicted. Therefore, Petitioner's double jeopardy claim is procedurally barred.

B. Ineffective Assistance of Counsel

The state district court considered and rejected Petitioner's claim of ineffective assistance of counsel claims on the merits. The Oklahoma Court of Criminal Appeals acknowledged the district court's consideration of the claim and wrote, "[t]here is nothing within the record presented on appeal that would cause us to find that the District Court erred in reaching these conclusions." (#6, Ex. A). Pursuant to 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), this Court cannot grant habeas corpus relief on Petitioner's ineffective assistance of counsel claims unless the adjudication of the claim –

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). In other words, unless the Court of Criminal Appeals's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," this Court must deny the requested habeas relief as to Petitioner's ineffective assistance of counsel claims. 28 U.S.C. § 2254(d).

As discussed above, in Strickland v. Washington, 466 U.S. 668, 687 (1984), the United States Supreme Court established the standard for reviewing claims of ineffective assistance of counsel. The Strickland test, used by the Oklahoma state courts to evaluate ineffective assistance of counsel claims, requires a showing of both deficient performance by counsel and prejudice to Petitioner as a result of the deficient performance. Strickland, 466 U.S. at 687.

In the instant case, Petitioner alleges his counsel provided ineffective assistance of counsel when she failed to recognize the validity of the double jeopardy claim. However, as determined

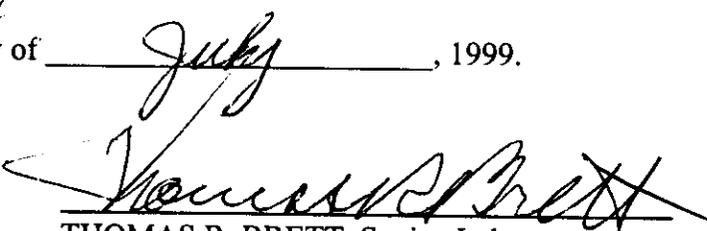
above, the double jeopardy claim lacks merit and counsel's failure to argue the claim does not constitute deficient performance. Because Petitioner has failed to demonstrate deficient performance, he has failed to satisfy the first prong of the Strickland standard. As a result, the Court finds that the Oklahoma Court of Criminal Appeals's rejection of Petitioner's ineffective assistance of counsel claims was entirely consistent with Supreme Court precedent and habeas corpus relief on this basis should be denied.

CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he was in custody in violation of the Constitution or laws of the United States.

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

SO ORDERED THIS 8th day of July, 1999.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

FILED

JUL 9 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROBERT C. VOWELL,)
)
Plaintiff,)
)
vs.)
)
WITMER, INC., d/b/a WOODCRAFT)
FURNITURE, and EDWARD)
BRUBAKER,)
)
Defendants.)

Case No. 99 CV 0368 E (M)

ENTERED ON DOCKET

DATE JUL 9 1999

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

The Plaintiff, Robert C. Vowell, and the Defendants, Witmer, Inc., d/b/a Woodcraft Furniture, and Edward Brubaker, hereby stipulate to the dismissal of this case with prejudice, each party to bear his or its own costs, expenses and attorneys' fees.



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2



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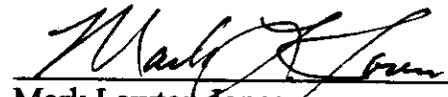
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ATTORNEYS FOR DEFENDANT EDWARD
BRUBAKER

ORDERED this 8th day of July, 1999.


HONORABLE JAMES O. ELLISON
United States District Court


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ATTORNEYS FOR DEFENDANTS

F I L E D

JUL - 8 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

RAYMOND BROYLES, JR.,)
)
Plaintiff,)
)
v.)
)
THE FRANKLIN LIFE)
INSURANCE COMPANY,)
)
Defendant.)

Case No.: **98-CVO-444-B**

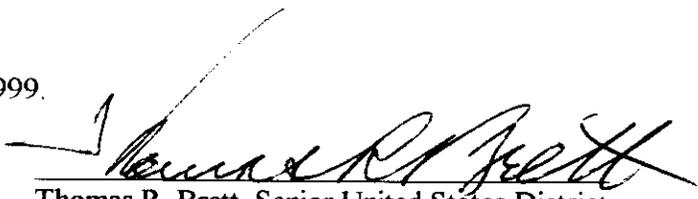
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JUL 09 1999

AGREED ORDER OF DISMISSAL

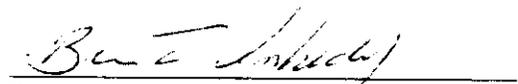
On this 8 day of July, 1999, came to be heard Plaintiff Raymond Broyles, Jr. and Defendant, The Franklin Life Insurance Company's Agreed Motion to Dismiss with Prejudice. Having found that the parties have settled all claims and disputes, this Court enters the following Order:

IT IS THEREFORE ORDERED, that the Agreed Motion to Dismiss with Prejudice is GRANTED.

SIGNED this 8th day of July, 1999.


Thomas R. Brett, Senior United States District
Court Judge, Northern District, Oklahoma

AGREED:


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7-7-99

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

FILED

JUL 8 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
Plaintiff,)
v.)
CHARLES J. ABERNATHY,)
Defendant.)

Civil Case No. 99 CV 061 C (E)

ENTERED ON DOCKET
DATE JUL 09 1999

CONSENT JUDGMENT

Upon review of the file and the settlement agreement between the Plaintiff United States and Defendant Charles J. Abernathy (hereinafter the "Parties") entered into by the Parties the Court herewith makes the following findings and orders:

1. The Parties agree and the Court finds that this Court has jurisdiction over the Parties and subject matter of this matter.
2. The Parties agree and the Court finds that Judgment will be entered in favor of the United States against Charles J. Abernathy on Count II (Unjust Enrichment) of the Complaint. Count I (False Claims Act) will be dismissed upon the Court's entering this Judgment.
3. The Parties agree and the Court finds that for purposes of this Consent Judgment that Charles J. Abernathy is indebted to the United States in the amount of \$12,466.00 under Count II of the Complaint.
4. The Parties agree and the Court finds that the Parties have reached a valid and enforceable settlement agreement, the terms of which are detailed and memorialized in a separate written settlement agreement.
5. The Parties agree and the Court finds that each party will pay their own costs and attorneys fees.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this Court has jurisdiction over the Parties and subject matter of this matter;

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment is entered in favor of the United States and against the Defendant Charles J. Abernathy on count II of the Complaint, for Unjust Enrichment, and Count I, regarding the False Claim Act is hereby dismissed;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Charles J. Abernathy is indebted to the United States in the amount of \$12,466.00 under Count II of the Complaint;

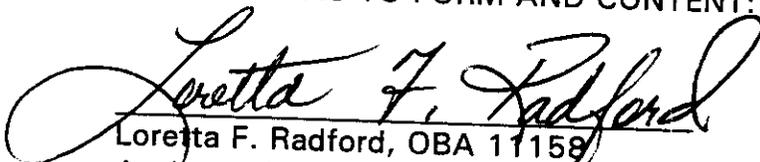
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Parties have reached a valid and enforceable settlement agreement, the terms of which are detailed and memorialized in a separate written settlement agreement; and,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this case is concluded and each party will pay its own costs, expenses and attorneys fees in this matter.

IT IS SO ORDERED ON July 8, 1999.

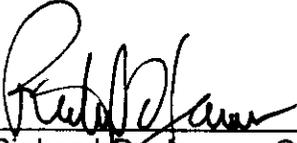

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:



Loretta F. Radford, OBA 11158
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918-581-7463
Attorneys for the Plaintiff

SIGNATURE PAGE TO CONSENT JUDGMENT
IN CIVIL ACTION 99CV061 C (E)



Richard D. James, OBA #4617
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consent judgment after settlement form.wpd(collection forms)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,
Plaintiff,
v.
JOHN A. KINSLOW,
Defendant.

ENTERED ON DOCKET
DATE JUL 9 1999

No. 99CV0145K(J)✓

FILED

JUL 08 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEFAULT JUDGMENT

This matter comes on for consideration this 7 day of July, 1999, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, John A. Kinslow, appearing not.

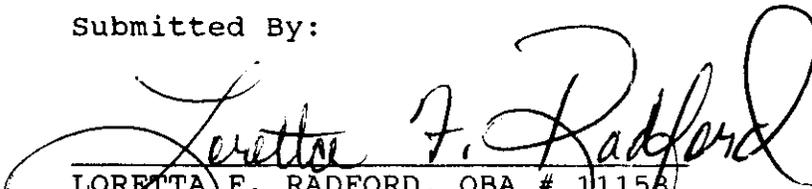
The Court being fully advised and having examined the court file finds that Defendant, John A. Kinslow, was served with Summons and Complaint on April 23, 1999. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, John A. Kinslow, for the principal amounts of \$4,524.82 and \$2,564.25, plus accrued interest of \$3,026.51 and \$1,466.30, plus interest thereafter at the rates of 9.13 and 8 percent per annum until

judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.163 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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

LFR/llf

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

~~FILED~~
JUN 18 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

AMY FARLEY, an individual,

Plaintiff,

vs.

NORTH AMERICAN HEALTH PLANS, INC.,
a foreign insurance company, NORTH AMERICAN
ADMINISTRATORS, INC., a foreign insurance
company and PUROLATOR PRODUCTS CO., a
foreign Corporation,

Defendants.

ENTERED ON DOCKET

DATE JUL 9 1999

Case No. 98-CV-0148-K

FILED
JUL 08 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DISMISSAL WITHOUT PREJUDICE

NOW on this 7 day of July, 1999, the above matter is dismissed
without prejudice as to the re-filing of same.

IT IS SO ORDERED.



THE HONORABLE TERRY KERN
JUDGE OF THE DISTRICT COURT

David Humphreys, OBA #12346
Luke J. Wallace, OBA #16070
Tanya Humphreys, OBA #15021
1724 East Fifteenth Street
Tulsa, Oklahoma 74104
(918) 747-5300/(918) 747-5311 fax

ATTORNEYS FOR PLAINTIFF

4

CERTIFICATE OF SERVICE

I, David Humphreys, hereby certify that on the _____, day of _____, 1999, a true and correct copy of the above and foregoing instrument was mailed via United States Mail, proper postage prepaid thereon, and addressed to:

Amy Farley
1141 South 73rd East Avenue
Tulsa, Oklahoma 74112

David Humphreys

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

NANCY HARRINGTON,

Plaintiff,

v.

COMMERCIAL UNION INSURANCE
COMPANY and EMPLOYER'S FIRE
INSURANCE COMPANY,

Defendants.

FILED

JUL 8 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-C-977-C

ORDER

Before the Court is defendant, Commercial Union Insurance Company's, motion to strike plaintiff, Nancy Harrington's, amended complaint. At the status hearing conducted on May 26, 1999, the Court granted Harrington leave to amend her complaint to add defendant Employer's Fire Insurance Company. On May 27, Harrington filed her amended complaint. Commercial states that Harrington not only added Employer's as a defendant, but also added an additional claim against Commercial, i.e., breach of contract. Commercial argues that adding the breach of contract claim was done without its consent or leave of Court, and, therefore, violates F.R.C.P. 15.

In response, Harrington argues that the bad faith claim which was pled in her original complaint included the underlying contract claim, under Oklahoma law. Harrington argues that these two claims are a single cause of action, and that her amended complaint merely clarified her theories of recovery. Commercial has not filed a reply addressing Oklahoma law on this matter or otherwise contesting Harrington's argument. The Court is satisfied that the amended complaint is proper.

Accordingly, Commercial's motion to strike is hereby DENIED.

IT IS SO ORDERED this 7th day of July, 1999.


H. DALE COOK

Senior United States District Judge

16

MT

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

FILED
JUL 8 1999

JESSICA A. MOORE,)
)
)
 Plaintiff,)
)
)
 vs.)
)
)
 BARRETT RESOURCES CORPORATION,)
 ASSOCIATED RESOURCES, INC., and)
 BRIAN L. RICE,)
)
)
 Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99CV0017H (J) ✓
Hon. Sven Holmes

ENTERED ON DOCKET
DATE JUL 8 1999

**STIPULATION OF DISMISSAL WITH PREJUDICE OF
ASSOCIATED RESOURCES, INC., OF CROSS-CLAIM AGAINST
DEFENDANT, BARRETT RESOURCES CORPORATION**

COME NOW the Defendants, Associated Resources, Inc., by and through its attorney of record, James K. Deuschle, and Barrett Resources Corporation, by and through its attorney, Randall Snapp, and hereby stipulate to the dismissal with prejudice of Defendant, Associated Resources, Inc.'s Cross-Claim filed in this matter against Defendant, Barrett Resources Corporation and both parties agree that each shall bear their own costs and attorneys fees incurred in this action.

The Defendant,
Associated Resources, Inc.
By its attorney,


JAMES K. DEUSCHLE, OBA #011593
525 South Main, Suite 209
Tulsa, Oklahoma 74103-4503
(918) 592-2280 Telephone
(918) 592-2281 Facsimile

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C/S

The Defendant,
Barrett Resources Corporation
By its attorney,



Mr. Randall J. Snapp, OBA#11169
Crowe & Dunlevy
321 S Boston, Suite 500
Tulsa, OK 74103-3313
(918) 592-9855 Telephone
(918) 599-6335 Facsimile

CERTIFICATE OF SERVICE

I, James K. Deuschle, do hereby certify that on the 8th day of July, 1999, I mailed a true and correct copy of the foregoing instrument with proper postage affixed thereto to the following:

Mr. Randall L. Iola
Mr. R. Tom Hillis
Attorney-at-Law
15 E Fifth Street, Suite 2750
Tulsa, OK 74103-4334

Mr. Randall Snapp
Attorney-at-Law
321 S Boston Ave, Suite 500
Tulsa, OK 74103-3313

Mr. Danny P. Richey
Attorney-at-Law
320 S Boston, Suite 1119
Tulsa, OK 74103



JAMES K. DEUSCHLE

MT

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

F I L E D

JUL 8 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JESSICA A. MOORE,

Plaintiff,

vs.

BARRETT RESOURCES CORPORATION,
ASSOCIATED RESOURCES, INC., and
BRIAN L. RICE,

Defendants.

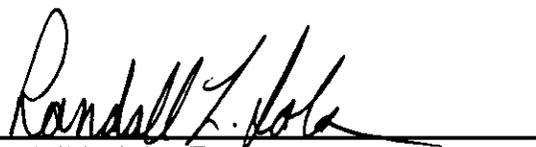
Case No. 99CV0017H (J)
Hon. Sven Holmes

ENTERED ON DOCKET
JUL 8 1999
DATE _____

**STIPULATION OF DISMISSAL WITH PREJUDICE
BY PLAINTIFF, JESSICA A. A. MOORE AGAINST
THE DEFENDANT, ASSOCIATED RESOURCES, INC.**

COME NOW the Plaintiff, Jessica A. A. MOORE, by and through her attorney,
Randall L. Iola, and the Defendant, Associated Resources, Inc., by and through its attorney
of record, James K. Deuschle, and hereby stipulate to the dismissal with prejudice of
Plaintiff, Jessica A. A. Moore's Complaint filed in this matter against Defendant, Associated
Resources, Inc., and both parties agree that each shall bear their own costs and attorneys
fees incurred in this action.

The Plaintiff,
Jessica A. A. Moore
By her attorney,



Randall L. Iola, Esq.
Law Offices of Randall L. Iola, P.L.L.C.
15 E 5th St, Suite 2750
Tulsa, OK 74103
(918) 582-7030 Telephone
(918) 587-6822 Facsimile

34

ckj

The Defendant
Associated Resources, Inc.
By its attorney


JAMES K. DEUSCHLE, OBA #011593
525 South Main, Suite 209
Tulsa, Oklahoma 74103-4503
Telephone (918) 592-2280
Facsimile (918) 592-2281

CERTIFICATE OF SERVICE

I, James K. Deuschle, do hereby certify that on the 8th day of July, 1999, I mailed a true and correct copy of the foregoing instrument with proper postage affixed thereto to the following:

Mr. Randall L. Iola
Mr. R. Tom Hillis
Attorney-at-Law
15 E Fifth Street, Suite 2750
Tulsa, OK 74103-4334

Mr. Randall Snapp
Attorney-at-Law
321 S Boston Ave, Suite 500
Tulsa, OK 74103-3313

Mr. Danny P. Richey
Attorney-at-Law
320 S Boston, Suite 1119
Tulsa, OK 74103


JAMES K. DEUSCHLE

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

FILED

JUL 8 1999

JERRY TAYLOR,)
)
Plaintiff,)
)
vs.)
)
OSU MEDICAL COLLEGE,)
)
Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-0891-BU(J) ✓

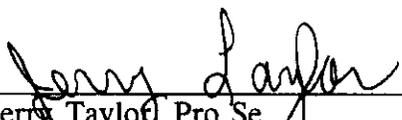
ENTERED ON DOCKET
JUL 8 1999
DATE _____

**JOINT STIPULATION OF DISMISSAL AND
APPLICATION FOR DISMISSAL WITH PREJUDICE**

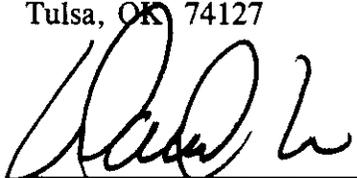
The Plaintiff, Jerry Taylor, and the Defendant OSU Medical College, jointly stipulate that the above-referenced case should be dismissed with prejudice pursuant to Fed. R. Civ. P. 41(a)(1) to the refiling thereof.

WHEREFORE, Plaintiff and Defendant request that this Court enter an order dismissing this case with prejudice.

Respectfully submitted,



Jerry Taylor, Pro Se
1812 W. Haskell Street
Tulsa, OK 74127



David W. Lee
Ambre C. Gooch
LEE & GOOCH, P.C.
5500 N. Western, Suite 101C
Oklahoma City, OK 73118-4011
(405) 848-1983
TELEFAX: (405) 848-4978

mail
copy ret'd
0/5

2/5

Michael Scott Fern
Oklahoma State University
Student Union Building, Room 220
Stillwater, OK 74078
(405) 744-6494
Telefax: (405) 744-7998

ATTORNEYS FOR DEFENDANT

taylor.j\stipulation

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

F I L E D

JUL 7 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CONNIE FRIEDL,)
)
Plaintiff,)

vs.)

Case No. 98-CV-590K(E)

PACIFICARE OF OKLAHOMA,)
INC., an Oklahoma corporation,)
and PACIFICARE OF TEXAS,)
INC., a Texas corporation,)
)
Defendant.)

ENTERED ON DOCKET
DATE JUL 8 1999

**JOINT STIPULATION OF
DISMISSAL WITHOUT PREJUDICE
OF PACIFICARE OF TEXAS, INC.**

Pursuant to Fed. R. Civ P 41(a)(1), Plaintiff Connie Friedl, and Defendants PacifiCare of Oklahoma, Inc. and PacifiCare of Texas, Inc., stipulate to the dismissal without prejudice of all claims alleged by Plaintiff against PacifiCare of Texas, Inc., with each party bearing their own costs and attorneys fees, if any, that may have arisen out of those claims.

The parties further stipulate that if the summary judgment previously granted by the Court to PacifiCare of Oklahoma, Inc. on Plaintiff's claims under the Americans with Disabilities Act is appealed and reversed, PacifiCare of Texas, Inc. will be deemed to have been served with the Amended Complaint at the time the parties are served with notice that the District Court has regained jurisdiction of the case. By entering into this Stipulation of Dismissal, PacifiCare of Texas, Inc. does not waive any substantive or procedural claims, rights or defenses, save and except that PacifiCare of Texas, Inc. will not contest service of the First Amended Complaint and

C/S

will not raise a defense based solely on the mere passage of time between the date of this Stipulation and any reversal by the Court of Appeals.

Dated this 7th day of July, 1999.

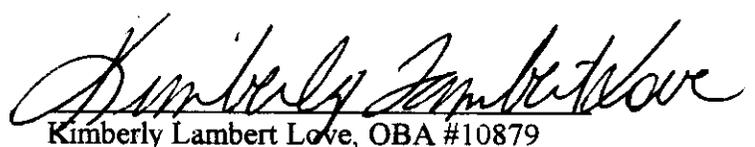
STEPHEN L. ANDREW & ASSOCIATES
A Professional Corporation
Attorneys for Plaintiff
CONNIE FRIEDL
125 West Third Street
Tulsa, Oklahoma 74103
(918) 583-1111

By: 

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

-and-

Boone, Smith, Davis, Hurst & Dickman
Attorneys for Defendants
PacifiCare of Oklahoma, Inc. and
PacifiCare of Texas, Inc.
500 ONEOK Plaza, 100 West 5th Street
Tulsa, Oklahoma 74103
(918) 587-0000

By: 

Kimberly Lambert Love, OBA #10879
Mary J. Lohrke, OBA #15806

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 07 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ELIZABETH B. FISH,
SSN: 448-40-5620

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

No. 98-CV-592-J ✓

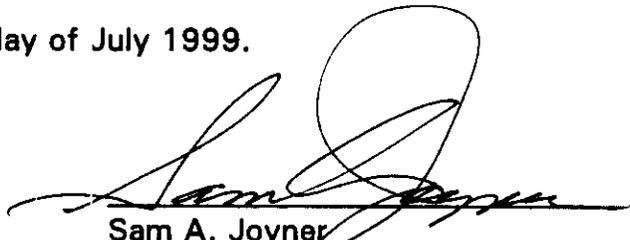
ENTERED ON DOCKET

DATE JUL 8 1999

JUDGMENT

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

It is so ordered this 7th day of July 1999.


Sam A. Joyner
United States Magistrate Judge

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

ELIZABETH B. FISH,
SSN: 448-40-5620

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

JUL 07 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-592-J ✓

ENTERED ON DOCKET
DATE JUL 8 1999

ORDER^{1/}

Plaintiff, Elizabeth B. Fish, 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's determination was contrary to the testimony of the vocational expert, (2) the ALJ's conclusion that Plaintiff experienced only "mild to moderate" pain was contrary to the medical evidence, (3) the vocational expert concluded that no jobs existed which Plaintiff could perform, (4) the vocational expert did not identify a significant number of jobs which Plaintiff can perform, and (5) the ALJ erroneously found that Plaintiff was capable of performing a variety of activities of daily living. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

^{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") concluded that Plaintiff was not disabled on January 29, 1997. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on June 9, 1998. [R. at 6].

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I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed an initial application for social security benefits which was denied after a hearing before the ALJ on September 22, 1994. Plaintiff did not appeal this decision. Plaintiff filed a subsequent application for benefits, and had a hearing before the ALJ on this application for benefits on December 9, 1996. [R. at 543]. The ALJ, in his decision dated January 19, 1997, noted Plaintiff's prior application and failure to appeal. The ALJ concluded that Plaintiff's prior adjudication was *res judicata* and that the earliest date which Plaintiff's disability could commence was September 23, 1994. [R. at 15]. The ALJ additionally noted that Plaintiff was insured only through December 31, 1996. [R. at 15]. Plaintiff does not challenge these findings.

A Residual Functional Capacity ("RFC") assessment dated February 18, 1993 indicated Plaintiff could occasionally lift 50 pounds, frequently lift 25 pounds, stand or walk a total of six hours in an eight hour day, and sit for six hours in an eight hour day. [R. at 37].

In Plaintiff's initial social security disability application, Plaintiff noted that she had pain all over and that nothing seemed to relieve the pain. [R. at 91]. Plaintiff wrote that she ate breakfast in the morning, that she slept approximately four hours at night due to difficulty sleeping, that she frequently forgot things, and that she prepared some meals. [R. at 93].

Plaintiff was examined by Dr. Inbody on April 13, 1990. He reported that Plaintiff stated she left her prior work because she was hurting and her employer wanted her to change to a job which would be too physically difficult for her to

perform. [R. at 141]. Dr. Inbody noted that he could detect no serious loss of memory. [R. at 141].

Plaintiff was seen by Armen Marouk, D.O., for a neurosurgical evaluation on February 11, 1991. [R. at 305]. He noted that Plaintiff complained of constant low back pain. He observed that Plaintiff had no gross abnormality of gait and was able to heel/toe walk although the toe walk resulted in pain. [R. at 305-06]. He reported that Plaintiff had no evidence of nerve compression and prescribed Norflex and recommended Ibuprofen. [R. at 306]. In March of 1991 Plaintiff reported that she was walking approximately one mile a day. [R. at 313].

Joseph A. Keuchel, D.O., wrote on November 2, 1992, that Plaintiff had been under his care for several years, and that he was her gynecologist and primary care physician. [R. at 101]. He noted that she had asthma, allergic rhinitis, and fibromyositis/fibromyalgia. "She has not been able to carry on her job mainly from the pain of the fibromyositis/fibromyalgia." [R. at 101].

Plaintiff's doctor completed a handicapped parking permit application for Plaintiff on March 4, 1992. [R. at 104].

Plaintiff was referred to Dr. Raymond F. Sorensen for pain management. Plaintiff was examined on November 8, 1992. [R. at 131]. Plaintiff reported that she had been in two prior motor vehicle accidents in April and August of 1990. [R. at 131]. Plaintiff's past surgical history included gastric stapling, ear surgeries, hysterectomy, D&C, and a tubal ligation. On examination, Plaintiff's doctor noted multiple trigger points and muscle tenderness. He initially diagnosed Plaintiff with

fibromyalgia, arthritis, facet disease, and degenerative joint disease. [R. at 132]. He noted that Plaintiff "will have difficulties with employment that is physical in nature, such as lifting objects of greater than five to ten pounds, or activities that are repetitive in nature or exposed to extreme, sudden temperature changes." [R. at 133]. Plaintiff had a facet injection on December 4, 1992. [R. at 113-118]. On December 14, 1992 Plaintiff reported a significant decrease in her pain after the facet injection. [R. at 118]. Plaintiff was additionally given a TENS unit for pain management. Plaintiff reported that the TENS unit was helping but she was required to return the unit because her insurance declined to pay for it. [R. at 120-22].

Plaintiff was examined by Gerald C. Zumwalt, M.D., on February 9, 1993. He noted that Plaintiff reported walking for approximately one mile before her legs and feet hurt, and feeling worn out upon climbing ten stairs. [R. at 134]. Plaintiff additionally told Dr. Zumwalt that she limited her driving to 12 - 15 minutes at a time, and could walk through a store if she leaned on a cart. [R. at 134]. Dr. Zumwalt concluded that Plaintiff exhibited "obesity, chronic pain with diagnosis of fibromyalgia, and slight restriction of motion primarily in the lower back and right knee, but otherwise no objective evidence of arthritis. She has well controlled hypertension and a history although no evidence, of asthma. The patient appears to be on adequate medical therapy for all of her complaints, but does appear to be poorly motivated toward working through her diffuse muscular pain. The patient obviously needs to lose a vast amount of weight and participate in some active physiotherapy. At the present time it would appear that the patient would be able to do light to sedentary

activities without any problem. It is not anticipated that the patient's condition will change in the foreseeable future." [R. at 136].

Dr. Sorensen wrote on June 14, 1993, that Plaintiff had an initial diagnosis of fibromyalgia with associated arthritis, facet disease, and degenerative joint disease. [R. at 150]. "The syndrome, because of the involvement of muscle and connective tissue and ligaments does lead to a condition that the individual is unable to be active or be employed in any type of job situation, even a sedentary one. In my medical judgement at this time, due to the severity and chronicity [sic] of the pain symptomatology that Elizabeth Fish exhibits, I do not feel that she can be gainfully employed in any type of job activity. She does exhibit difficulties with sleep, fatigue and also chronic pain that will become incapacitating with activity." [R. at 150]. On July 28, 1993, Dr. Keuchel, Plaintiff's treating physician wrote that he had reviewed Dr. Sorensen's letter in which Dr. Sorensen wrote that Plaintiff would be unable to be gainfully employed and that he agreed with Dr. Sorensen's opinion. "In my opinion this lady most definitely is a good candidate for Disability Insurance Benefits from Social Security." [R. at 153]. The doctor who treated Plaintiff for her asthma wrote in September of 1993 that her asthma was controlled. [R. at 156].

Plaintiff's attorney submitted a pamphlet discussing fibromyalgia prior to the first decision of the ALJ. The pamphlet notes that low or non-impact exercise is recommended for individuals with fibromyalgia. [R. at 197].

An RFC completed October 26, 1995, indicates that Plaintiff could occasionally lift 20 pounds, frequently lift 10 pounds, stand or walk six hours in an eight hour day,

sit six hours in an eight hour day, and push or pull and unlimited amount. [R. at 216]. This Assessment was "affirmed as written" on December 10, 1995. [R. at 223].

On August 10, 1995, Plaintiff wrote that she did some cleaning and light cooking, and participated in crafts for approximately two hours each week. [R. at 258].

Plaintiff complained of swelling in her right knee in December of 1992 and the records indicate Plaintiff had a tear in the medial meniscus of her right knee. [R. at 324]. In March of 1995 Plaintiff had arthroscopic surgery on her left knee. [R. at 353]. On August 29, 1995, Plaintiff had arthroscopic surgery on her right ankle. [R. at 366]. In May Plaintiff reported minimal relief from the arthroscopic surgery, and a total knee arthroplasty was recommended. [R. at 469]. On June 13, 1995, Plaintiff reported her knee was doing well and she was beginning to obtain a good range of motion. [R. at 381].

On February 8, 1996, Plaintiff complained of headaches which had been bothering her for over one month. Examinations on February 23, 1996 indicated no serious underlying pathology for the headaches. [R. at 450].

In July Plaintiff reported severe pain in her cervical region and her shoulders. [R. at 496].

Plaintiff's hearing before the ALJ occurred on December 19, 1996. [R. at 543]. Plaintiff testified that she was born September 11, 1941, and completed high school. [R. at 547]. According to Plaintiff she suffered from fibromyalgia, asthma, depression, headaches, sensitivity to cold, tarsal tunnel syndrome, bad memory, and knee surgery

and replacements leaving her with an inability to walk and stand appropriately. [R. at 548]. Plaintiff testified that she could sit for approximately 15 minutes before her back would begin hurting forcing her to lie down. [R. at 551]. Plaintiff later amended her statement to suggest she could sit perhaps 30 minutes to one hour. [R. at 558]. Plaintiff believes she could stand for approximately 15 minutes and lift only five pounds. [R. at 552]. Plaintiff noted that she could lift one gallon of milk, but that she had to use both of her hands and that she experienced pain. [R. at 562]. Plaintiff additionally stated that she had a problem hearing out of her left ear. [R. at 567].

Plaintiff's medical records do not indicate her progress reports with regard to her knee and ankle surgeries. At the hearing before the ALJ, Plaintiff's attorney noted that Plaintiff was going to her doctor "tomorrow for her six month check up on her knee replacement." [R. at 545]. Plaintiff's attorney requested additional time to submit the records from that doctor's visit. On December 16, 1996, Plaintiff's attorney wrote and indicated that Plaintiff was unable to see her doctor on the day after the hearing before the ALJ. The attorney indicated that he had discussed this situation with Plaintiff and they had agreed to submit the matter without additional medical records. [R. at 539].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims. 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. . . .

42 U.S.C. § 423(d)(2)(A).^{3/}

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.

^{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).

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 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 he uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

^{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."

III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff could perform the physical and mental demands of her past relevant work as a phlebotomist. The ALJ evaluated Plaintiff's complaints of pain but concluded that although Plaintiff did experience moderate to chronic pain she would nonetheless be able to carry out normal work assignments. [R. at 18].

IV. REVIEW

THE ALJ IGNORED TESTIMONY OF VE

Plaintiff notes that the ALJ found, based on the testimony of a vocational expert, that Plaintiff could return to her past relevant work as a phlebotomist. Plaintiff initially asserts that the vocational expert's response that Plaintiff would be capable of returning to her past relevant work was based solely on the first part of an "incomplete hypothetical." Plaintiff asserts that therefore the vocational expert's testimony that Plaintiff can return to her past relevant work is not supported by substantial evidence.

Plaintiff's argument is premised on the wording of the hypothetical question by the ALJ. The ALJ listed several restrictions in his hypothetical and noted "those are the primary restrictions." In answer to this hypothetical, the vocational expert concluded that Plaintiff could return to her past relevant work. Plaintiff asserts this is error because the ALJ stated that these restrictions were the "primary restrictions," and therefore the ALJ was acknowledging that Plaintiff had additional restrictions which were not included in the hypothetical question.

The Court disagrees with Plaintiff's premise. As noted by Defendant, an ALJ has no reason to pose a hypothetical question to a vocational expert if the ALJ is intentionally not including all of the claimant's limitations in the hypothetical. Such a process would simply be a waste of time. The Court cannot conclude, based on the record, that the ALJ intended to ask the vocational expert such a question.

Plaintiff additionally asserts that the hypothetical question to the vocational expert was incomplete. Plaintiff notes that she obviously had problems standing and walking because the record indicates that she had one ankle surgery, two knee arthroscopies (May 1995 and April 1996) and one knee replacement (June 1996). Plaintiff contends that the ALJ ignored her medical records related to these surgeries, or focused on isolated records indicating a favorable prognosis. Plaintiff suggests that nothing in the record supports the ALJ's finding that Plaintiff could walk or sit for six hours in an eight hour day.

A February 18, 1993 RFC indicated Plaintiff could occasionally lift 50 pounds, frequently lift 25 pounds, and stand or walk a total of six hours in an eight hour day. [R. at 37]. Plaintiff had arthroscopic surgery on her left knee in March 1995, and on her right ankle in August 1995. Plaintiff's medical records do not provide much detail with regard to Plaintiff's recovery from her knee and ankle surgeries.

In June 1995 Plaintiff reported that her knee was doing well. In August Plaintiff indicated that her right ankle was painful and perhaps worse. [R. at 410]. In September 1995 Plaintiff reported that she had "obtained considerable relief." Plaintiff's doctor noted that her prognosis remained guarded. [R. at 376]. Plaintiff

was seen in September 1995 for pain in both of her feet. Her range-of-motion of her ankles was reported as painful. Plaintiff additionally indicated that the pain in her feet did become "somewhat" better if she was "up and around some." [R. at 393, 395, 408]. Plaintiff's doctor noted "weight loss/exercise," physical therapy, and heel cups. In November 1995 Plaintiff reported difficulty when she was barefoot. [R. at 391]. Plaintiff also received orthotics for her "tarsal tunnel syndrome."^{5/} [R. at 391]. Plaintiff reported knee pain to Dr. Sorensen on April 8, 1996. [R. at 498]. On May 6, 1996, Plaintiff returned to her doctor three weeks after her knee arthroscopy. Plaintiff indicated her pain was as severe as prior to the surgery. [R. at 474]. The doctor discussed the possibility of a total knee arthroplasty with Plaintiff, and she elected to undergo the procedure. [R. at 474]. The records do not indicate that Plaintiff ever returned to this doctor following her surgery. In fact, Plaintiff's records after May 1996 are rather scant.

On June 22, 1996 Plaintiff complained that her mouth was sore and swollen. [R. at 509]. On July 12, 1996, Plaintiff complained of a white spot on the side of her tongue. [R. at 508]. Plaintiff complained of hot flashes on August 9, 1996. [R. at 506]. Plaintiff also noted that her knee was doing okay but that her ankle hurt and would swell "after sitting for a while." [R. at 506]. Plaintiff's doctor indicated she should rest her ankle and leg and continue non-weight bearing range-of-motion

^{5/} Taber's Cyclopedic Medical Dictionary 1949 (17th ed. 1993), defines "tarsal tunnel syndrome" as "neuropathy of the distal portion of the tibial nerve at the ankle due to chronic pressure on the nerve at the point it passes through the tarsal tunnel. It causes pain in and numbness of the sole of the foot and weakness of plantar flexion of the toes."

exercises for her knee and ankle. [R. at 506]. On August 15, 1996, Plaintiff complained of knots in the back of her neck and shoulder pain. Plaintiff's foot was noted as "better." [R. at 505]. Plaintiff again complained of knots in the back of her neck on August 29, 1996, and September 24, 1996. [R. at 504]. On October 14, 1996, Plaintiff stated that her hands and shoulders were hurting. [R. at 502]. At the December 1996 hearing before the ALJ, Plaintiff requested additional time to submit supplemental records regarding her progress because Plaintiff had an appointment to visit the doctor who performed her surgery the day after the hearing. However, Plaintiff informed the ALJ that she was unable to see her doctor for that appointment and requested that the ALJ decide her case based on the previously submitted records.

An RFC completed in October 1995 indicates Plaintiff could occasionally lift 20 pounds, frequently lift 10 pounds, and stand or walk six hours in an eight hour day. [R. at 216].

Plaintiff may very well suffer from a disabling impairment. However, that impairment must be supported by the medical records. As noted, the records following Plaintiff's surgeries are very limited. Plaintiff's knee arthroplasty was in May 1996. Plaintiff's hearing before the ALJ did not occur until December 19, 1996, and the record following Plaintiff's 1996 surgeries simply does not support Plaintiff's claims.^{6/} The ALJ observed that none of Plaintiff's treating physicians placed

^{6/} The record contains very few visits by Plaintiff to her doctor following her surgery. As noted, the ALJ agreed to hold the record open for the submission of additional records. However, Plaintiff's attorney wrote to the ALJ indicating that Plaintiff did not keep her appointment with her doctor and requested that Plaintiff's claim be determined on the submitted record.

restrictions on her as a result of her knee surgeries, that Plaintiff did not have any follow-up appointments with her physician following her 1996 surgery, that several of Plaintiff's comments to her doctors after her surgery indicated that the surgeries were successful, and that Plaintiff did not complain of significant problems related to her knees and ankles during her visits to her regular doctor.⁷¹ The ALJ's findings are supported by substantial evidence in the record, and the Court concludes that the ALJ did not err in concluding that Plaintiff suffered from a disabling condition as a result of her knee and ankle surgeries.

Plaintiff additionally asserts that in the second hypothetical question which was submitted to the vocational expert, the ALJ included a requirement that the individual must be permitted to alternate between sitting and standing every half hour. Plaintiff notes that the vocational expert concluded that such an individual would be unable to perform Plaintiff's past relevant work. Plaintiff further observes that the vocational expert concluded that Plaintiff would be unable to perform her past relevant work if Plaintiff's testimony was fully credible. Plaintiff argues that the ALJ therefore erred in concluding that Plaintiff could perform her past relevant work. Plaintiff's argument presumes that the ALJ found that Plaintiff suffered from the limitations outlined by Plaintiff, and that the ALJ accepted Plaintiff's testimony as fully credible. However,

⁷¹ Plaintiff complains that the ALJ improperly relied on the lack of complaints by Plaintiff to her general practitioner because the general practitioner was not treating Plaintiff for the ankle and knee condition. However, Plaintiff frequently voiced such complaints to her general practitioner on prior occasions, and Plaintiff did not see her treating surgeon for a period of at least six months. The Court concludes that the ALJ was not unreasonable in suggesting that Plaintiff would have, if the pain had been severe, voiced such complaints to her general practitioner.

the ALJ specifically found that Plaintiff's testimony was not fully credible, and credibility determinations by the trier of fact are given great deference on review. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992). In addition, an ALJ is not required to accept all of a plaintiff's limitations with respect to restrictions, but may pose such restrictions to the vocational expert which are accepted as true by the ALJ. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990). Plaintiff's argument ignores the fact that the ALJ concluded that Plaintiff did not have all of the limitations which Plaintiff claims she had. The Court concludes that the ALJ did not err by failing to include, in the hypothetical question to the vocational expert upon which the ALJ relied, a limitation that Plaintiff must alternate between sitting and standing each half hour.

Finally, Plaintiff refers the Court to Ragland v. Shalala, 922 F.2d 1056 (10th Cir. 1993), and asserts that the ALJ should not rely on the grids when considering a sit/stand option, but should consult a vocational expert at Step Five. Of course, in this case, the ALJ did not reach Step Five because the ALJ determined, at Step Four, that Plaintiff could return to her past relevant work. In addition, as mentioned, the ALJ did not find that Plaintiff had a sit/stand limitation, and the ALJ did consult a vocational expert.

ALJ'S PAIN ANALYSIS AND TREATING PHYSICIAN

Plaintiff asserts that the ALJ improperly concluded Plaintiff suffered from only "mild to moderate pain." Plaintiff contends that Plaintiff testified and Plaintiff's physicians supported her complaints of chronic, debilitating, and severe pain.

The legal standards for evaluating pain are outlined in 20 C.F.R. §§ 404.1529 and 416.929, and were addressed by the Tenth Circuit Court of Appeals in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). First, the asserted pain-producing impairment must be supported by objective medical evidence. Id. at 163. Second, assuming all the allegations of pain as true, a claimant must establish a nexus between the impairment and the alleged pain. "The impairment or abnormality must be one which 'could reasonably be expected to produce' the alleged pain." Id. Third, the decision maker, considering all of the medical data presented and any objective or subjective indications of the pain, must assess the claimant's credibility.

[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence.

Id. at 164. In assessing the credibility of a claimant's complaints of pain, the following factors may be considered.

[T]he levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses,

and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Hargis v. Sullivan, 945 F.2d 1482, 1488 (10th Cir. 1991). See also Luna, 834 F.2d at 165 ("For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication.").

The mere existence of pain is insufficient to support a finding of disability. The pain must be considered "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988) ("Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment.").

In Kepler v. Chater, 68 F.3d 387, (10th Cir. 1995), the Tenth Circuit determined that an ALJ must discuss a Plaintiff's complaints of pain, in accordance with Luna, and provide the reasoning which supports the decision as opposed to mere conclusions. Id. at 390-91.

Though the ALJ listed some of these [Luna] factors, he did not explain why the specific evidence relevant to each factor led him to conclude claimant's subjective complaints were not credible.

Id. at 391. The Court specifically noted that the ALJ should consider such factors as:

the levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Id. at 391. The Tenth Circuit remanded the case, requiring the Secretary to make "express findings in accordance with Luna, with reference to relevant evidence as appropriate, concerning claimant's claim of disabling pain." Id. at 10.

Plaintiff complains that the ALJ failed to explain why he discounted Plaintiff's complaints of disabling pain. The ALJ noted Plaintiff's ankle and knee surgeries, but observed that Plaintiff did not see her physician for follow-up for at least six months after her knee surgery and did not otherwise complain to her treating physician. [R. at 17]. The ALJ noted Plaintiff's light activities, including cleaning, cooking, driving, and crafts. [R. at 18]. The ALJ noted some limited contradictions in Plaintiff's testimony. The ALJ observed that Plaintiff indicated she had a 50% hearing loss, but that the record did not support that claim, and although Plaintiff claimed she suffered from memory loss, the examining doctor did not find substantiation for Plaintiff's claim. [R. at 18]. The ALJ wrote that medication and therapy had alleviated some of her symptoms and that the record did not indicate significant side effects from the medications. [R. at 18]. Plaintiff does not specifically address these findings of the ALJ in this section of her brief. The Court concludes that the ALJ's credibility findings are in accordance with the applicable case law.

Plaintiff asserts that pain is a non-exertional impairment which requires an ALJ to pose inquiries regarding the pain to a vocational expert. Plaintiff asserts that the ALJ erred by not permitting the vocational expert to determine whether or not Plaintiff's pain interfered with her ability to work.

Plaintiff's argument has two faulty premises. First, pain can be either exertional or non-exertional. Second, merely presenting "pain" to a vocational expert is ineffective; the vocational expert must be informed as to what, if any, exertional or non-exertional limitations are imposed on the individual as a result of the pain. The ALJ has the responsibility to determine an individual's limitations. The vocational expert is delegated the duty of determining whether or not an individual with the limitations, as described by the ALJ, may perform the requirements of substantial gainful activity.

First, the regulations clearly indicate that limitations resulting from an impairment such as pain can be either exertional or nonexertional.^{8/}

(a) General. Your impairment(s) and related symptoms, such as pain, may cause limitations of function or restrictions which limit your ability to meet certain demands of jobs. These limitations may be exertional, nonexertional, or a combination of both. Limitations are classified as exertional if they affect your ability to meet the strength demands of jobs. . . . Limitations or restrictions which affect your ability to meet the demands of jobs other than the strength demands, that is, demands other than sitting, standing, walking, lifting, carrying, pushing or pulling, are considered nonexertional. . . .

^{8/} The regulations provide that when an impairment affects only exertional limitations, the Grids may be applied. 20 C.F.R. § 404.1569(b). When an impairment affects nonexertional limitations, or exertional and nonexertional limitations, the regulations state that the Grids will not direct a conclusion. 20 C.F.R. § 404.1569(c) & (d).

(b) *Exertional limitations.* When the limitations and restrictions imposed by your impairment(s) and related symptoms, such as pain, affect only your ability to meet the strength demands of jobs (sitting, standing, walking, lifting, carrying, pushing, and pulling), we consider that you have only exertional limitations. When your impairment(s) and related symptoms only impose exertional limitations and your specific vocational profile is listed in a rule contained in Appendix 2 of this subpart, we will directly apply that rule to decide whether you are disabled.

(c) *Nonexertional limitations.* (1) When the limitations and restrictions imposed by your impairment(s) and related symptoms, such as pain, affect only your ability to meet the demands of jobs other than the strength demands, we consider that you have only nonexertional limitations or restrictions. Some examples of nonexertional limitations or restrictions include the following: (i) You have difficulty functioning because you are nervous, anxious, or depressed; (ii) You have difficulty maintaining attention or concentrating; (iii) You have difficulty understanding or remembering detailed instructions; (iv) You have difficulty in seeing or hearing; (v) You have difficulty tolerating some physical feature(s) of certain work settings, e.g. you cannot tolerate dust or fumes; or (vi) You have difficulty performing the manipulative or postural functions of some work such as reaching, handling, stooping, climbing, crawling, or crouching.

(2) If your impairment(s) and related symptoms, such as pain, only affect your ability to perform the nonexertional aspects of work-related activities, the rules in appendix 2 do not direct factual conclusions of disabled or not disabled. The determination as to whether disability exists will be based on the principles in the appropriate sections of the regulations giving consideration to the rules for specific case situations in appendix 2.

(d) *Combined exertional and nonexertional limitations.* When the limitations and restrictions imposed by your impairment(s) and related symptoms, such as pain, affect your ability to meet both the strength and demands of jobs other than the strength demands, we consider that you have a combination of exertional and nonexertional limitations and restrictions. If your impairment(s) and related symptoms, such as pain, affect your ability to meet

both the strength and demands of jobs other than the strength demands, we will not directly apply the rules in appendix 2 unless there is a rule that directs a conclusion that you are disabled based upon your strength limitations; otherwise the rules provide a framework to guide our decision.

20 C.F.R. § 404.1569 (*italics in original, underline added*). Therefore, pain can be classified as either an exertional or non-exertional limitation.

In addition, the ALJ has the duty of determining what additional limitations, if any, the pain imposed on the individual. Those limitations are then considered in determining whether or not the individual may return to his or her past relevant work, or may perform other substantial gainful activity in the national economy. In this case, although the ALJ concluded that Plaintiff did have pain, and that the pain would, at times be noticeable, the ALJ found that Plaintiff would be able to remain attentive and responsive in her work setting and would carry out normal work assignments satisfactorily. The ALJ did not further reduce Plaintiff's RFC based on his findings that Plaintiff suffered from pain.

Buried within Plaintiff's pain analysis is an assertion that the ALJ failed to appropriately follow the opinions of Plaintiff's treating physicians. Plaintiff asserts that the ALJ concluded she was capable of performing her past relevant work and that this conclusion ignores Plaintiff's treating physician opinions that Plaintiff suffered from pain which would interfere with her ability to work. Plaintiff additionally argues that a treating physician's opinion is entitled to great weight and that an ALJ must give reasons if the ALJ disregards the treating physician's opinion.

A treating physician's opinion is entitled to great weight. See Williams, 844 F.2d at 757-58 (more weight will be given to evidence from a treating physician than to evidence from a consulting physician appointed by the Secretary or a physician who merely reviews medical records without examining the claimant); Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985). However, a treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). If an ALJ disregards a treating physician's opinion, he must set forth "specific, legitimate reasons" for doing so. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984). In Goatcher v. United States Dep't of Health & Human Services, 52 F.3d 288 (10th Cir. 1995), the Tenth Circuit outlined factors which the ALJ must consider in determining the appropriate weight to give a medical opinion.

(1) the length of the treatment relationship and the frequency of examination; (2) the nature and extent of the treatment relationship, including the treatment provided and the kind of examination or testing performed; (3) the degree to which the physician's opinion is supported by relevant evidence; (4) consistency between the opinion and the record as a whole; (5) whether or not the physician is a specialist in the area upon which an opinion is rendered; and (6) other factors brought to the ALJ's attention which tend to support or contradict the opinion.

Id. at 290; 20 C.F.R. § 404.1527(d)(2)-(6).

In this case, Dr. Keuchel noted that he had been Plaintiff's primary care physician for several years and that Plaintiff could not work primarily due to fibromyalgia. [R. at 101]. Plaintiff was referred to Dr. Sorensen, a pain specialist. Dr.

Sorensen wrote in Defendant 1992 that Plaintiff would have difficulty lifting objects greater than five or ten pounds, or performing activities which were repetitive in nature. [R. at 118]. In June of 1993 he wrote that Plaintiff would have difficulty being employed in any type of job situation, even a sedentary one, due to the severity of her pain. [R. at 150]. Plaintiff's general physician reviewed Dr. Sorensen's letter and wrote that he agreed with his conclusions and noted that Plaintiff was a "good candidate" for social security disability. [R. at 153].

As discussed, Plaintiff's argument that the ALJ failed to discuss the opinions of the treating physicians would appear adequate to require a reversal of the ALJ's decision. However, although the ALJ did not discuss the opinions of the treating physician in his 1996 opinion, the ALJ did discuss the treating physician's opinions in 1994.

The ALJ is aware that on June 14, 1993, Dr. Sorenson [sic] stated "I do not feel that she can be gainfully employed. . . ." The ALJ is also aware that on July 28, 1993, Dr. Keuchel stated "I . . . concur with [Dr. Sorensen's] medical judgement that she is unable to be gainfully employed." 20 C.F.R. 404.1527(d)(2) provides, in pertinent part, that the opinions of treating physicians are given controlling weight in determining disability when they are well-supported by medically acceptable clinical and laboratory diagnostic techniques and are not inconsistent with the other substantial evidence. Dr. Keuchel is a specialist in obstetrics and gynecology and has attended the claimant for treatment in that regard. Dr. Sorenson is listed in the Directory of Osteopathic Physicians as a specialist in anesthesiology. Although Dr. Sorenson stated on June 14, 1993, that the claimant was disabled, he stated on November 18, 1992, that claimant could perform work which was not physical in nature, did not require lifting of greater than 5 to 10 pounds, did not require activities that

were repetitive in nature, or did not require exposure to sudden extreme temperature changes. There is no mention in Dr. Sorenson's treatment records of his opinion that the claimant is disabled. Based on his physical examination on February 9, 1993, Dr. Zumwalt stated that the claimant should have no problem performing light work. The ALJ finds that there is no objective medical or clinical and laboratory diagnostic techniques to support Dr. Sorenson's and Dr. Keuchel's conclusions of disability. . . .

[R. at 173-74].

Plaintiff appealed the decision of the ALJ to the Appeals Counsel, and in that appeal asserted that Dr. Sorensen was, in addition to being an anesthesiologist, an expert in pain therapy. The Appeals Council affirmed the decision of the ALJ, and Plaintiff did not further appeal that decision. Plaintiff filed a subsequent application for social security benefits. In the 1996 decision, the ALJ noted the prior September 22, 1994 determination by the ALJ; the fact that that action had not been appealed, and concluded that all issues decided in that prior action were *res judicata*. Plaintiff does not challenge this finding. The finding by the ALJ in the September 22, 1994 decision is entitled to preclusive effect. The specific opinions of Plaintiff's treating physicians were therefore adequately addressed by the prior ALJ.

Plaintiff additionally states Dr. Morehead found Plaintiff to be in "constant pain." The record indicates that the doctor saw Plaintiff on September 28, 1995 for "complaints of constant pain in both feet." [R. at 395]. Plaintiff observes that Dr. Scholey "found" Plaintiff to be in "constant pain." Plaintiff refers to what appears to be a phone message where someone took a message from Plaintiff indicating that Plaintiff stated she was in a lot of pain and asked if she could take two pain pills. [R.

at 424]. This does not amount to a finding by a treating physician that the individual experiences severe pain. Plaintiff also refers to references in the record by Dr. Battenfield, prior to Plaintiff's surgery,^{9/} in which the doctor refers to persistent pain and disabling pain. However, as noted by the ALJ, Plaintiff had several surgeries for her complaints of knee and ankle pain and did not return to her doctor for at least six months following the surgeries. Furthermore, although Plaintiff refers to several references by Plaintiff's physicians to Plaintiff's pain, the references do not require that the ALJ find Plaintiff disabled based on the opinions of Plaintiff's treating physicians. Rather, if medical evidence supports a claimant's complaints of pain, the ALJ is required to conduct a "Luna analysis." As discussed above, the ALJ conducted such an analysis and evaluated Plaintiff's complaints of pain. The Court concludes that the ALJ adequately addressed the opinions of Plaintiff's treating physicians.

TESTIMONY OF VOCATIONAL EXPERT

Plaintiff asserts that the vocational expert testified that no jobs existed in the economy that Plaintiff could perform based on her testimony of "significant pain," combined with the requirement that Plaintiff must alternate between sitting and standing, the fact that Plaintiff had numbness in her feet and hands, and the fact that Plaintiff needed to lie down. Plaintiff does not further develop this argument. As noted above, the ALJ did not find that Plaintiff had an impairment which required alternating between sitting and standing and did not find that Plaintiff needed to lie

^{9/} Dr. Battenfield is an orthopedic surgeon and saw Plaintiff for her complaints of knee and ankle pain.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DAVID L. BELDEN,
SSN: 444-64-8233

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

JUL 07 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-454-J

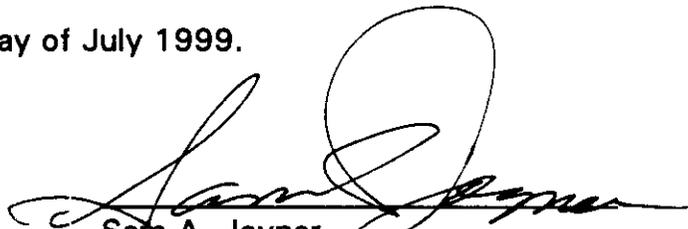
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DATE JUL 8 1999

JUDGMENT

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

It is so ordered this 7th day of July 1999.


Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 07 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVID L. BELDEN,
SSN: 444-64-8233

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

No. 98-CV-454-J ✓

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ORDER^{1/}

Plaintiff, David L. Belden, 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 in not granting benefits to Plaintiff because the Plaintiff's treating physician and the Social Security medical expert both stated that Plaintiff could not work. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND

Plaintiff testified that he was born June 18, 1957, and completed high school. [R. at 204]. Plaintiff additionally completed welding classes, mechanic classes, and

^{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 May 9, 1996. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on April 28, 1998. [R. at 4].

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worked as a computer programmer. Plaintiff testified that he stopped working May 30, 1994 because he could no longer do the work. [R. at 204-206].

According to Plaintiff his drivers license was suspended in 1991 for excessive tickets. Plaintiff was still able to drive although he did not have a license. [R. at 207].

Plaintiff testified that he could not work because he was unable to stand for longer than thirty minutes; he could sit for only about 45 minutes; he could walk only approximately 300 feet, and he could lift only 25 pounds. [R. at 213]. According to Plaintiff he was able to do some cleaning and a little laundry. [R. at 217].

A Residual Functional Capacity Assessment completed by Paul Woodcock, M.D. on September 14, 1994, indicated Plaintiff could occasionally lift 50 pounds, frequently lift 25 pounds, stand a total of six hours out of an eight hour day, and sit a total of six hours in an eight hour day. [R. at 50].

Plaintiff was diagnosed with diabetes and hepatitis C. [R. at 102]. Plaintiff underwent interferon treatment for his liver and experienced some stabilizing of his condition. [R. at 104, 173-182].

In April of 1994 Plaintiff acknowledged that he consumed approximately one six pack each day and had done so for approximately ten years. [R. at 145]. Plaintiff was encourage to stop drinking, but Plaintiff's records indicate that he did not follow his doctor's advice. [R. at 157, 185]. Plaintiff testified that his doctors did not tell him to do anything specifically. [R. at 215].

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. . . .

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

^{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).

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 is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

^{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."

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 he 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 had the residual functional capacity to lift or carry 25 pounds occasionally and 10 pounds frequently, to stand or walk for one half hour continuously, and to sit for periods of up to 15 minutes. [R. at 20]. The ALJ concluded at Step Five that numerous jobs existed in the national and local economies which Plaintiff was capable of performing. [R. at 20].

IV. REVIEW

Plaintiff asserts that Plaintiff's treating physician, Kent Farish, M.D., supports Plaintiff's claim that he is disabled. The case law provides that a treating physician's opinion is entitled to great weight. See Williams, 844 F.2d at 757-58 (more weight will be given to evidence from a treating physician than to evidence from a consulting physician appointed by the Secretary or a physician who merely reviews medical records without examining the claimant); Turner v. Heckler, 754 F.2d 326, 329 (10th Cir. 1985).

In this case, however, the treating physician's opinion could be interpreted as supporting the ALJ's findings. Dr. Farish's July 18, 1995 record provides:

Here for disability statement to pay for his life insurance due to fatigue, legs giving way, and unable to work in a hot machine shop for the past one year due to hepatitis C, cirrhosis, diabetes and neuropathy. Forms submitted stating he is not totally and permanently disabled from doing his current job but would be eligible to begin training for clerical work immediately.

[R. at 189]. In completing interrogatories submitted by the social security commission, Dr. Farish noted that Plaintiff would be unable to complete an eight hour work day, five days per week in a "normal work environment," unless he avoided "walking, running, climbing, or prolonged sitting without [a] break." [R. at 194].

Dr. Farish did place some restrictions on Plaintiff, and did seem to be of the opinion that Plaintiff could not return to his past relevant work. However, Dr. Farish's records support the ALJ's conclusion that Plaintiff could perform some work activities. Dr. Farish appears to believe Plaintiff could perform "clerical type work," or work that did not involve walking, climbing, running, or prolonged sitting with no break.

Plaintiff additionally refers to the medical expert who testified at the hearing before the ALJ. Plaintiff asserts that the medical expert testified that Plaintiff was not capable of working for a full eight hour day. Plaintiff argues that the ALJ had a duty to consider all of the medical opinions in evaluating a disability claim.

Plaintiff is correct in several respects. An ALJ should consider the opinions of the medical doctors, and the medical expert, who was called by the ALJ, could be interpreted as testifying that Plaintiff could not work a full eight hour day. The Court has fully reviewed the testimony of the vocational expert, however, and finds it confusing. First, as noted above, the treating physician's opinions, and the supporting

medical evidence supports the ALJ's conclusion as to Plaintiff's RFC. Second, the questions upon which the Plaintiff relies to support his claim that the medical expert agreed that Plaintiff could not work a full eight hour job are very general and include no limitations.^{5/} Third, the medical expert seems to have testified that he really needed additional information before he could render an appropriate opinion.^{6/} Fourth, the medical expert appears to have fully accepted Plaintiff's testimony in making his observations.^{7/} Finally, the testimony is simply confusing.

Q: Doctor, the judge's original question, do you feel you base on medical records, that the claimant could perform a full 8 hour work day?

A: The - he may not be able to perform 8 hour work, but how much he could do, the records does not reflect that much, the objective (INAUDIBLE) does not reflect how much he could do, really - His symptoms are there you know from, heard the testimony, he says he's been tired and weak and all but the medical record does not say that or I'm not able to find and lack of information totally and he has a liver function test and those things are all not really elevated so that doesn't really speak for, you know, too much (INAUDIBLE) but without, without even these things, he may not be able to do a full 8 hour job, but I think he may be able to do 4 or 6 hours, but I think I really need more information to say, -

^{5/} Plaintiff's attorney asked the medical expert, "do you feel you base [sic] on medical records, that the claimant could perform a full 8 hour work day?" [R. at 222]. This question contains nothing in regard to the type of work that would be performed for eight hours - whether heavy, exertional, sedentary, etc.

^{6/} He states at one point, in answer to a question of "we just don't know how severe it is," he seems to agree with the statement and further states that "how severe it is, how much it is causing this problem." [R. at 221]. And, in answer to a question of whether the expert had sufficient information to determine if Plaintiff met a listing, the expert answered "no." [R. at 218]. He additionally states, in answer to a question regarding whether Plaintiff could work a full eight hour day that "he may not be able to perform 8 hour work, but how much he could do, the records does not reflect that much [and] I think I really need more information to say" [R. at 222].

^{7/} The expert noted that he could "go from the story" [R. at 220].

Q: Okay.

A: I don't think he would do 8 hour job.

[R. at 222-23]. The Court concludes that the ALJ did not err in declining to accept the testimony of the medical expert as conclusive evidence that Plaintiff was disabled. Further, as noted, the question for this Court is whether the conclusion of the ALJ was supported by substantial evidence. In this case, the Court concludes that it was.

The ALJ presented the following hypothetical to the vocational expert.

I want you to assume a hypothetical person the same age, education, sex, background, training and experience as the claimant. I first want you to assume that such a hypothetical person can walk a maximum of 300 feet at a time, stand 30 minutes, maximum, at a time, sit 45 minutes, maximum, at a time and lift 25 pounds maximum at a time.

[R. at 228]. The vocational expert identified the jobs of: self-service gas attendant, grading clerk, taxi starter, parking lot attendant, and gate tender. [R. at 229-230]. The limitations in the hypothetical come, predominantly, from Plaintiff's own testimony. The Court concludes that the hypothetical adequately presented Plaintiff's limitations to the vocational expert. The ALJ's decision is supported by substantial evidence.

V. CONCLUSION

The Court concludes that the decision of the Commissioner is supported by the record.

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

Dated this 7th day of July 1999.


Sam A. Joyner
United States Magistrate Judge

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

FILED

JUL - 8 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BILLY JACK JENKINS,)
)
 Petitioner,)
)
 vs.)
)
 RITA MAXWELL, Warden,)
)
 Respondent.)

Case No. 97-CV-554-B

ENTERED ON DOCKET
DATE JUL 08 1999

JUDGMENT

This matter came before the Court upon Petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus. The Court duly considered the issues and rendered a decision herein.

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

SO ORDERED THIS 8th day of July, 1999.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

15

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

FILED
JUL - 8 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BILLY JACK JENKINS,)
)
 Petitioner,)
)
 vs.)
)
 RITA MAXWELL, Warden,)
)
 Respondent.)

Case No. 97-CV-554-B

ENTERED ON DOCKET

DATE JUL 08 1999

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges his conviction in Tulsa County District Court, Case No. CF-94-2485. Respondent has filed a Rule 5 response (#11) to which Petitioner has replied (#12). Petitioner has also filed a "request to advance cause and issue order" (#13). As more fully set out below the Court concludes that this petition should be denied. As a result, Petitioner's request to advance cause and issue order has been rendered moot.

BACKGROUND

On December 5, 1994, Petitioner pled guilty to the crime of Lewd Molestation in Tulsa County District Court, Case No. CF-94-2485. The victim in this case was a three (3) year old girl. Pursuant to a plea agreement, Petitioner was sentenced to fifteen (15) years imprisonment. Petitioner did not move to withdraw his guilty plea and did not otherwise perfect a direct appeal.

Petitioner filed an application for post-conviction relief in the state district court. According to the order denying relief, Petitioner raised the following grounds of error:

1. Ineffective assistance of counsel in that:
 - a. his attorney advised him to waive his preliminary hearing, thus petitioner gave up his right to cross-examine the state's witnesses;
 - b. his attorney failed to adequately move the court to suppress petitioner's statement to the police; and
 - c. his attorney failed to object or complain to the court or the Oklahoma Bar about the prosecutor's alleged ridicule of the petitioner.
2. That the trial court abandoned its duties as a fair and impartial judge when the court increased the petitioner's bond after petitioner demanded a trial by jury, thus forcing the Petitioner to plead guilty.
3. That the trial court erred in failing to fully inform petitioner of the consequences of his plea of guilty in that petitioner alleges he would have to register as a convicted sex offender for the remainder of his life. Thus his guilty plea was not intelligently and voluntarily entered.
4. Petitioner finally alleges that he was denied a fair trial when the prosecutor failed in his duties by failing to expose the unprofessionalism of the trial judge.
5. Petitioner finally alleges he did not timely appeal his case because he was in fear of retaliation, including the possibility of death, from the trial judge if he exercised his appeal rights.

See #11, Ex. A. Petitioner also requested that the trial court judge voluntarily recuse or be disqualified due to the nature of the post-conviction allegations. On August 4, 1995, the district court denied post-conviction relief (#11, Ex. A). Petitioner appealed and on December 21, 1995, the Oklahoma Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief (#11, Ex. B).

On November 12, 1996, Petitioner filed a petition for writ of habeas corpus in this district court. In that case, assigned Case No. 96-CV-1040-B, Petitioner raised eleven (11) grounds of error. On February 28, 1997, after finding that 5 of the 11 grounds had never been presented to the

Oklahoma Court of Criminal Appeals, the Court granted the respondent's motion to dismiss for failure to exhaust state remedies and dismissed the petition without prejudice for failure to exhaust.

On June 6, 1997, Petitioner filed the instant petition raising the following grounds of error:

1. Denied the effective assistance of counsel when counsel advised to waive preliminary hearing.
2. Denied the effective assistance of counsel when counsel failed to follow through with the motion to suppress the illegally obtained confession.
3. Denied the effective assistance of counsel when counsel allowed the prosecutor unfettered access to hound and ridicule the Plaintiff.
4. Plaintiff was denied a fair trial where the Honorable Judge Clifford Hopper judicially over-reached his duties as triar (sic) of fact and joined the prosecution in psychologically coercing the Plaintiff into pleading guilty to a crime in which he did not commit.
5. Denied adequate hearing on post-conviction application in violation of due process when Judge Clifford Hopper failed to recuse even though he had a definite (sic) interest in the outcome.
6. Subjected to Outragious (sic) Governmental Conduct.

(#1). In her response, Respondent argues that Petitioner's ineffective assistance of counsel claims (claims 1-3) are without merit and that the claims related to the alleged bias of the trial judge (claims 4-6) are procedurally barred from this Court's review. In his reply, Petitioner contests Respondent's arguments and incorporates the exhibits, including transcripts, audio tapes and video tapes made a part of the record in Case No. 96-CV-1040-B.

ANALYSIS

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982).

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

The Court also finds that an evidentiary hearing is not necessary because Petitioner did not seek an evidentiary hearing in state court and has not demonstrated that the claims now before the Court rely on either a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable, or a factual predicate that could not have been previously discovered through the exercise of due diligence. 28 U.S.C. § 2254(e)(2)(A). Petitioner has also failed to demonstrate that the facts underlying the claims would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found Petitioner guilty of the underlying offense. 28 U.S.C. § 2254(e)(2)(B).

A. Ineffective Assistance of Counsel

In affirming the state district court's denial of post-conviction relief, the Oklahoma Court of Criminal Appeals considered and rejected Petitioner's claims of ineffective assistance of counsel

claims on the merits. The state appellate court wrote, "[a]fter a thorough consideration of the entire record before us, we find Petitioner has not established that the District Court erred in its findings and conclusions." (#11, Ex. B at 3). Pursuant to 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), this Court cannot grant habeas corpus relief on Petitioner's ineffective assistance of counsel claims unless the adjudication of the claim –

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Although Petitioner argues in his reply that the Oklahoma Court of Criminal Appeals imposed a procedural bar on his ineffective assistance of counsel claims, the Court finds that the state appellate court considered the claims on the merits and affirmed the trial court's denial of post-conviction relief as to those claims. (#11, Ex. B). As a result, unless the Court of Criminal Appeals's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," this Court must deny the requested habeas relief as to Petitioner's ineffective assistance of counsel claims. 28 U.S.C. § 2254(d).

In Strickland v. Washington, 466 U.S. 668, 687 (1984), the United States Supreme Court established the standard for reviewing claims of ineffective assistance of counsel. The Strickland test, acknowledged by the state court as the "proper standard" for evaluating ineffective assistance of counsel claims, requires a showing of both deficient performance by counsel and prejudice to Petitioner as a result of the deficient performance. 466 U.S. at 687. To satisfy the deficient performance prong of the test, Petitioner must overcome a strong presumption that counsel's conduct

fell within the "wide range of reasonable professional assistance [that] . . . might be considered sound trial strategy." Brecheen v. Reynolds, 41 F.3d 1343, 1365 (10th Cir. 1994) (citations omitted). "A claim of ineffective assistance must be reviewed from the perspective of counsel at the time and therefore may not be predicated on the distorting effects of hindsight." Id. (citations omitted). Finally, the focus of the first prong is "not what is prudent or appropriate, but only what is constitutionally compelled." Id. To establish the prejudice prong of the test, Petitioner must show that the allegedly deficient performance prejudiced the defense; namely, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland, 466 U.S. at 694. When a conviction is the result of a guilty plea, a petitioner must allege that but for counsel's deficient performance, he would have pled not guilty and proceeded to trial. Id.; Hill v. Lockhart, 474 U.S. 52, 57 (1985). Failure to establish either prong of the Strickland standard will result in denial of relief. Strickland, 466 U.S. at 696.

In the instant case, Petitioner alleges his counsel provided ineffective assistance of counsel when (1) he advised Petitioner to waive the preliminary hearing, (2) he failed to pursue a motion to suppress Petitioner's allegedly illegal confession, and (3) he allowed the prosecutor "unfettered access to hound and ridicule the Plaintiff." Applying the Strickland standard to these allegations, the Court finds counsel's performance was not deficient. As to his claim concerning waiver of the preliminary hearing, Petitioner offers nothing to support his conclusory allegation that his case would have been strengthened had a preliminary hearing been held. Counsel's conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness. Garland v. Maggio, 717 F.2d 199, 206 (5th Cir. 1983).

Similarly, Petitioner's allegation that his counsel provided ineffective assistance when he failed to pursue a motion to suppress his confession is without merit. After reviewing the transcripts of Petitioner's pre-arrest interviews conducted by a detective with the Sex Crimes Unit of the Tulsa Police Department, the Court finds the confession was not obtained in violation of Petitioner's constitutional rights. The detective advised Petitioner that he was not under arrest and that he could leave the interview at any time. Petitioner indicated he understood. Petitioner was not in custody when he confessed; in fact, he had voluntarily arranged to meet with the detective for the second interview at which he confessed. The detective was not legally obligated to give a Miranda warning under the circumstances present in this case. See United States v. Bautista, 145 F.3d 1140 (10th Cir. 1998). There was no Miranda violation so no motion to suppress was required and counsel did not provide ineffective assistance on that basis. Boag v. Raines, 769 F.2d 1341, 1344 (9th Cir.1985) (failure to raise a meritless argument is not ineffectiveness).

Petitioner's third allegation of ineffective assistance, that counsel "allowed the prosecutor unfettered access to hound and ridicule the Plaintiff," is unsupported by the record before the Court. Conclusory allegations are insufficient to justify issuance of the writ. Furthermore, even if the prosecutor did engage in questionable tactics, Petitioner has failed to demonstrate how his counsel's failure to bring a halt to the conduct prejudiced him. Although Petitioner claims the prosecutor's conduct biased the trial judge, the Court finds no evidence of bias in the transcript from the guilty plea hearing (#11, Ex. C). Because Petitioner has failed to satisfy the second prong of the Strickland standard, i.e., that he was prejudiced by his counsel's allegedly deficient performance, his claim of ineffective assistance of counsel fails.

The Court concludes that Petitioner has failed to demonstrate either deficient performance

or prejudice as to his ineffective assistance of counsel claims and has therefore failed to satisfy the Strickland standard. As a result, the Court finds that the Oklahoma Court of Criminal Appeals's resolution of Petitioner's ineffective assistance of counsel claims was entirely consistent with Supreme Court precedent and habeas corpus relief on this basis should be denied.

B. Procedural Bar

The alleged procedural default in this case results from Petitioner's failure to pursue his claims concerning the alleged bias of the trial court judge (claims 4-6) via a direct appeal.

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "'in the vast majority of cases.'" Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991)).

Applying these principles to the instant case, the Court concludes Petitioner's claims are barred by the procedural default doctrine. Citing Okla. Stat. tit. 22, § 1086 and Maines v. State, 597 P.2d 774 (Okla. Crim. App. 1979), the Oklahoma Court of Criminal Appeals found that Petitioner had waived his claims as a result of his failure to pursue a direct appeal. The state court's procedural

bar as applied to Petitioner's claims was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently declined to review claims which were not but could have been raised on direct appeal. Okla. Stat. tit. 22, § 1086.

Because of his procedural default, this Court may not consider Petitioner's claims numbered 4-6 unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 510 U.S. at 750. The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner attempts to show cause by alleging that the trial court judge failed to inform him fully of his right to appeal. However, it is well established that a state court is not constitutionally required to inform a petitioner of his right to appeal a guilty plea. Woolridge v. Kaiser, No. 91-6027, 1991 WL 132438 *2 (10th Cir. 1991) (unpublished opinion) (holding that trial court's failure to inform petitioner of his right to appeal a plea of guilty did not state a claim for habeas relief); see also Barber v. United States, 427 F.2d 70, 71 (10th Cir. 1970); Crow v. United States, 397 F.2d 284,

285 (10th Cir. 1968). In fact, by pleading guilty, a defendant indicates that he wishes to waive his appellate right. Laycock v. State of New Mexico, 880 F.2d 1184, 1188 (10th Cir. 1989). Nonetheless, the transcript from Petitioner's plea hearing indicates the state trial court did inform Petitioner that he could move to withdraw his guilty plea and petition the Oklahoma Court of Criminal Appeals for certiorari review (see #11, Ex. C at 13).

Petitioner also asserts that his counsel failed to comply with the requirements outlined in Baker v. Kaiser, 929 F.2d 1495 (10th Cir. 1991). However, Petitioner's reliance on Baker is misplaced. The defendant in Baker, unlike Petitioner in the instant case, did not plead guilty. Because Petitioner pled guilty, his counsel had no absolute duty to file a motion to withdraw the guilty plea or to ask Petitioner whether he wanted to withdraw his guilty plea. Only "if a claim of error is made on constitutional grounds, which could result in setting aside the plea, or if the defendant inquires about an appeal right," does counsel have a duty to inform the defendant of his limited right to appeal a guilty plea. Laycock, 880 F.2d at 1188. In this case, the transcript demonstrates that Petitioner informed the trial court that he understood his appeal rights but never affirmatively indicated a desire to appeal to either the trial court or his attorney. (#11, Ex. C). Therefore, Petitioner's counsel was not obligated to meet with him to ask whether he wanted to withdraw his plea. The Court concludes Petitioner's arguments are without merit and cannot constitute "cause" sufficient to overcome the procedural bar.

Petitioner's only other means of gaining federal habeas review of these procedurally barred claims is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 113 S.Ct. 853, 862 (1993); Sawyer v. Whitley, 112 S.Ct. 2514, 2519-20 (1992). Although Petitioner does state that he did not commit the crime for which he was convicted,

Petitioner's voluntary testimony at the plea hearing contradicts any claim of actual innocence now asserted. Furthermore, nothing in the transcript supports Petitioner's contention that he was coerced into pleading guilty. To the contrary, during the plea hearing Petitioner denied that anyone had promised him anything, other than the plea bargain agreement, in exchange for a guilty plea or that anyone forced him to plead guilty against his will. (#11, Ex. C at 2-3). Therefore, the Court finds that Petitioner has failed to make a colorable showing of actual innocence sufficient to fall within the fundamental miscarriage of justice exception.

Having failed to show either "cause and prejudice" or a "fundamental miscarriage of justice" sufficient to overcome the procedural bar, Petitioner's claims numbered 4-6 should be denied as procedurally barred.

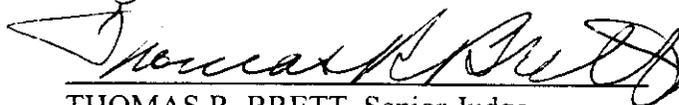
CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The petition for a writ of habeas corpus is **denied**.
2. Petitioner's request to advance cause and issue order (#13) is **moot**.

SO ORDERED THIS 8th day of July, 1999.



THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

FILED
JUL - 6 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

I.D.G., INC.,)
)
Plaintiff,)
)
vs.)
)
THE ST. PAUL FIRE AND MARINE)
INSURANCE COMPANY,)
)
Defendant,)
)
vs.)
)
DARRELL BURSON,)
)
Third-Party Defendant.)

No. 97-C-799-B(W) ✓

ENTERED ON DOCKET
DATE JUL 07 1999

ORDER

Before the Court is the Motion for Attorney Fees filed by defendant The St. Paul Fire and Marine Insurance Company ("St. Paul") (Docket No. 55). Plaintiff IDG, Inc. ("IDG") brought this action claiming that St. Paul breached the terms of its insurance contract with IDG by failing to defend IDG and Rupert Brent Johnson ("Johnson"), an officer, director and majority shareholder of IDG, in litigation brought by Darrell Burson ("Burson"), a minority shareholder of IDG. On March 1, 1999, the Court granted summary judgment in favor of defendant St. Paul on its declaratory judgment counterclaim.

St. Paul asserts it is entitled to its attorney fees in the amount of \$8,266.00 as the prevailing party in this case, pursuant to 36 O.S. §3629(B). Although IDG does not contest the

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reasonableness of the requested fee award,¹ IDG objects to St. Paul's entitlement to fees under §3629(B). IDG contends §3629(B) is applicable only when (1) the insured submits a proof of loss form as provided by the insurer; (2) the insurer makes a written settlement offer; and (3) the insured's recovery is less than the written settlement offer. Thus, because St. Paul did not provide a proof of loss or make a written settlement offer, St. Paul is not entitled to attorney fees under the statute. St. Paul responds that it had no duty to submit a written offer of settlement because IDG did not submit a proof of loss; and therefore, if a sanction is imposed preventing the chance to recover attorney fees, it should be against IDG, not St. Paul.

Oklahoma adopts the "American rule" that attorney fees are not recoverable as damages unless specifically provided for by contract or statute. *An-Son Corp. v. Holland-America Ins. Co.*, 767 F.2d 700, 703 (10th Cir. 1985); *Magnum Foods, Inc. v. Continental Casualty Co.*, 36 F.3d 1491, 1509 (10th Cir. 1994). St. Paul relies on 36 O.S. §3629(B) as the basis of its recovery of attorney fees in this action. Section 3629 states the following:

§3629. Forms of proof of loss; offer of settlement or rejection of claim

A. An insurer shall furnish, upon written request of any insured claiming to have a loss under an insurance contract issued by such insurer, forms of proof of loss for completion by such person, but such insurer shall not, by reason of the requirement so to furnish forms, have any responsibility for or with reference to the completion of such proof or the manner of any such completion or attempted completion.

B. 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 purpose of this section, the prevailing party is the insurer in those cases where judgment does not

¹ Although IDG initially objected to the reasonableness of the attorney fees requested, the objection was predicated on St. Paul's submission of its time records *in camera* and therefore IDG's inability to determine whether the fees were reasonable. On March 15, 1999, the Court ordered St. Paul to furnish IDG with its time records in a redacted form. Once it received St. Paul's redacted time records, IDG did not object to the reasonableness of the requested fee.

exceed written offer of settlement. In all other judgment the insured shall be the prevailing party. If the insured is the prevailing party, the court in rendering judgment shall add interest on the verdict at the rate of fifteen percent (15%) per year from the date the loss was payable pursuant to the provisions of the contract to the date of the verdict. This provision shall not apply to uninsured motorist coverage.

Although the statute's reference to "proof of loss" and "written offer of settlement or rejection of the claim to the insured within ninety (90) days of receipt of that proof of loss" suggests legislative intent to provide for the recovery of attorney fees to the prevailing party in "first-party" actions where the insured has sustained a loss and the insurer offers a settlement of or rejects a claim made under the policy, the Tenth Circuit has held the statute also applies to "actions seeking indemnity or a declaratory judgment" as to coverage of the insured's liability to a third party. *An-Son Corp. v. Holland-America Ins. Co.*, 767 F.2d 700, 703-04 (10th Cir. 1985). In *An-Son*, the insured brought a breach of contract claim against its insurer for costs and attorney fees incurred in defending against a personal injury action brought by its employee as a result of an accident of Lake Maracaibo, Venezuela. The insurer refused to defend the insured in that action based on policy language which excluded coverage for operations performed on "oceans, gulfs or bays." It was the insurer's position Lake Maracaibo was a bay and not a lake. The trial court entered judgment in favor of the insured, awarding damages in the amount of the insured's expenditures in defending and settling the underlying action, plus (pursuant to 36 O.S. §3629(B)) attorney fees incurred in bringing the breach of contract action.

On appeal, the insurer argued the attorney fee award should be reversed as §3629(B) pertained only to "first-party" actions. Recognizing there was no Oklahoma decision on the

issue,² the Tenth Circuit reviewed the Oklahoma cases which had interpreted the statute:

Those Oklahoma cases which have interpreted §3629(B)--all "first-party" actions--appear to have given the statute a broad reading. In *McCorkle v. Great Atlantic Insurance Co.*, 637 P.2d 583, 586 (Okla.1981), the Supreme Court of Oklahoma simply stated that the "award of attorney fees to the prevailing party in a suit by an insured against the insurer is provided for by statute in Oklahoma." In *Shinault v. Mid-Century Insurance Co.*, 654 P.2d 618, 619 (Okla.1982), the court interpreted §3629(B) as qualifying those conditions under which an insurer may recover attorneys fees, i.e., where the insurer is the prevailing party. The insurer is the prevailing party where the judgment is for less than any settlement offer that was tendered to the insured, or where the insured³ rejects the claim and no judgment is awarded. Such a reading is consistent with the language of §3629(B), which goes on to state that "[i]n all other judgments the insured shall be the prevailing party." (emphasis added).

Id. at 703 (footnote added). Finding the insured was the prevailing party, the Tenth Circuit then

² Post *An-son*, the question of whether §3629(B) is applicable to indemnity and declaratory judgment actions has still not been addressed by Oklahoma courts. The following interpretations of §3629(B), however, have been decided: (1) the insurer's failure to respond to insured's proof of loss with ninety days waives the insurer's chance to receive attorney fees as prevailing party under §3629(B), *Shinault v. Mid-Century Ins. Co.*, 654 P.2d 618, 619(Okla. 1982); (2) the award of attorney fees to the prevailing party under §3629(B) is not discretionary, *Shadoan v. Liberty Mutual Fire Ins. Co.*, 894 P.2d 1140, 1144 (Okla.Ct.App. 1994); (3) to determine whether the insured is the "prevailing party" under §3629(B), the court compares the insured's ultimate recovery to each settlement offer made by an insurer, even if those offers are beyond the 90-day period after the insurer receives the insured's proof of loss, *Id.*; (4) the prevailing party in an action to reform an insurance contract based on constructive fraud is entitled to attorneys' fees under §3629(B), *L.Z.Gentry v. American Motorist Ins. Co.*, 867 P.2d 468 (Okla. 1994); (5) insured who is prevailing party in an action to recover on a fire insurance policy and bad faith refusal to honor contractual obligation can recover attorney fees under §3629(B), *Oliver's Sports Center, Inc. v. National Standard Ins. Co.*, 615 P.2d 291 (Okla. 1980); (6) "[c]ounsel-fee award under §3629 depends not on the theory of liability imposed but on the recovery of the insured loss as the prevailing party's core element of reparations," *Taylor v. State Farm Fire and Casualty Co.*, 1999 WL 318496 at *3 (Okla. 1999)(answering in the negative certified question from the Tenth Circuit as to whether party must prevail on contract theory to recover attorney fees in a bad faith action).

³ The Tenth Circuit was paraphrasing the following statement in *Shinault*:
36 O.S.1981 §3629 states that the only way the insurer can get attorney fees is to be the prevailing party. The insurer is the prevailing party only when the judgment is less than any settlement offer that was tendered to the insured, or when the insured rejects the claim and no judgment is awarded. The insured, on the other hand, is the prevailing party when the judgment is more than any settlement offer that was made, or when the insured receives a judgment when the insurer has rejected the claim.

Shinault, 654 P.2d at 619 (emphasis added). The reference to "insured" underlined above is obviously a typographical error and should be "insurer." See *Shadoan v. Liberty Mutual Fire Ins. Co.*, 894 P.2d 1140, 1144 (Okla.Ct.App. 1994)

looked at whether an insured could recover attorney fees in a declaratory judgment or indemnity action. The circuit court noted there was a split of authority on the question. However, the court found persuasive the following criticism set forth in 7C Appleman, Insurance Law and Practice (1979):

"After all, the insurer had contracted to defend the insured, and it failed to do so. It guessed wrong as to its duty, and should be compelled to bear the consequences thereof. If the rule laid down by these courts [which have denied recovery] should be followed by other authorities, it would actually amount to permitting the insurer to do by indirection that which it could not do directly. That is, the insured has a contract right to have actions against him defended by the insurer, at its expense. If the insurer can force him into a declaratory judgment proceeding and, even though it loses such action, compel him to bear the expense of such litigation, the insured is actually no better off financially then [sic] if he had never had the contract right mentioned above."

Id. at § 4691, p. 283. In light of its view that the decisions denying recovery to an insured in declaratory judgment actions were unfair, the Tenth Circuit affirmed the trial court, holding that the insured, as the prevailing party pursuant to 36 O.S. § 3629(B), was entitled to recover its attorney fees in the indemnity action.⁴

In so holding, the Tenth Circuit in *An-son* did not address the "statutory scheme" set forth in § 3629 and what, if any, requirements must be met before the insured or insurer can recover attorney fees. As *An-son* was an indemnity action, no proof of loss was requested or submitted. Further, there was no written settlement offer as the insurer simply rejected the insured's tender of its defense. Contrary to IDG's position, the Tenth Circuit in *An-son* seems to have determined the statute does not require the insured to submit a proof of loss or a written settlement offer as prerequisite(s) to recovering attorney fees under § 3629(B). The *An-son* court apparently

⁴ As the insured prevailed, the *An-son* court did not address any reason for departing from the American rule when the insurer is the prevailing party.

considered the insured's tender of its defense in the underlying action as equivalent to the submission of a completed "proof of loss" form to the insurer and the insurer's refusal to defend as a "rejection of the claim." What is not addressed in *An-son* is whether the insurer's rejection of the tender (1) must be in writing and (2) within ninety days of the insured's tender for the insurer to recover attorney fees as the prevailing party in an indemnity/declaratory judgment action.

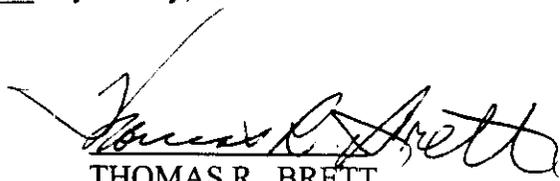
The Court, however, need not reach this issue in this case as St. Paul's rejection of the tender was in writing and within ninety days of the tender.⁵ Although the record is unclear as to when IDG tendered its defense to St. Paul, the record does reflect the initial action brought by Burson against IDG and Johnson was filed on March 11, 1994 and St. Paul rejected the tender on or about May 4, 1994. The rejection of the claim was set forth in the May 4, 1994 letter from Kenneth G. Custer, a St. Paul Claim Representative, to Johnson reciting the reasons for St. Paul's position that it was not obligated to defend IDG or Johnson, pay defense costs or provide indemnification for any judgment or settlement with respect to Burson's claims. *See Ex. A to St. Paul's Response (Docket No. 46)*. Following *An-son*, if the insured's tender is analogous to a

⁵ The decisions in *Shinault*, and *Driver Music Co., Inc. v. Commercial Union Ins. Co.*, 94 F.3d 1428 (10th Cir. 1996) as well as the language of the statute suggest both would be required. Although a first-party action, *Shinault* expressly states "§3629 imposes the loss of any chance for attorney fees on the insurer as a sanction for the failure to respond within ninety days of its receipt of Proof of Loss." *Shinault*, 654 P.2d at 619. Therefore, if the insured's tender of defense in an indemnity/declaratory judgment action is analogous to the insured's submission of a proof of loss in a first-party action, the insurer should also be precluded from recovering attorney fees if it rejects the tender outside the ninety-day period. Further, in *Driver* the Tenth Circuit held that insurer's oral offer transcribed by the court reporter did not meet the statutory requirement of a "written offer of settlement" under §3629(B). Consequently, the circuit court affirmed the trial court's finding that the insured was the "prevailing party" although the judgment in his favor did not exceed the insurer's oral offer of settlement because the insurer is a prevailing party under §3629(B) only "where judgment does not exceed *written* offer of settlement." *Id.* at 1432-33 (emphasis added); *see also Ballinger v. Security Connecticut Life Ins. Co.*, 982 P.2d 68, 71 (Okla. 1993). As "written" appears to modify both an "offer of settlement" and "rejection of a claim" in the language of the statute, the Tenth Circuit (interpreting Oklahoma law) would also likely require the prevailing-party insurer's rejection of the tender to be in writing to recover attorney fees under §3629(B).

proof of loss, St. Paul's written rejection of the claim was timely as it was within the ninety-day statutory period. Accordingly, St. Paul is entitled to attorney fees under §3629(B) as the prevailing party in this action as it "reject[ed] the claim and no judgment [was] awarded" IDG. *Shinault*, 654 P.2d at 619; *Shadoan*, 894 P.2d at 1144.

As the reasonableness of St. Paul's attorney fees is not contested, the Court grants St. Paul's motion (Docket No. 55) and awards attorney fees in the amount of \$8,266.00.

IT IS SO ORDERED, this 6th day of July, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT COURT

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

F I L E D

JUL - 6 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

I.D.G., INC.,)

Plaintiff,)

vs.)

THE ST. PAUL FIRE AND MARINE)
INSURANCE COMPANY,)

Defendant,)

vs.)

DARRELL BURSON,)

Third-Party Defendant.)

No. 97-C-799-B(W)

ENTERED ON DOCKET

DATE JUL 07 1999

JUDGMENT

In accordance with the Order entered simultaneously herein, IT IS ORDERED AND ADJUDGED that Defendant The St. Paul Fire and Marine Insurance Company recover judgment for its attorney fees in the amount of \$8,266.00 plus post-judgment interest at the rate of 5.163% per annum against Plaintiff IDG, Inc.

DATED this 6th day of July, 1999.



THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED
JUL 6 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARK ALLEN ABBETT,)
)
 Petitioner,)
)
 vs.)
)
 RAY LITTLE, Warden,)
)
 Respondent.)

Case No. 97-CV-669-E

ENTERED ON DOCKET
DATE JUL 07 1999

ORDER

Now before the Court is the application for a writ of habeas corpus pursuant to 28 U.S.C. §2254 (Docket #1) of the Petitioner, Mark Allen Abbett.

Factual Background

Petitioner, Mark Allen Abbett was charged in Tulsa county District Court case number CF-95-4359 with Possession of a Firearm After Former Conviction of a Felony, Unlawful Possession of Marijuana and two counts of Possession of a Stolen Vehicle. On October 17, 1995 the petitioner pled guilty to Possession of a Firearm After Former Conviction of a Felony in exchange for the state dropping the other three counts as well as two prior felony convictions from 1993. Petitioner was sentenced to ten years in prison on the charge to which he pled guilty.

Although Petitioner failed to appeal, he sought post conviction relief in state court, which was denied. He argues in his petition that he received ineffective assistance of counsel and that he received an excessive sentence. The practical result to which he objects is that the Judgment and Sentence reflect that he pled guilty to possession of a firearm after former conviction of felony, after former conviction of felony. Although the enhancement of the second "after former conviction of

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felony" did not directly affect the length of the sentence, it did prevent Petitioner from receiving the emergency time credits given by the Department of Corrections whenever total prison population exceeds 95% of capacity.

The state argues that Petitioner's failure to comply with a state procedural rule bars federal review of the instant petition. The state argues that the Petitioner had an opportunity to withdraw his guilty plea by making an application within ten days of the pronouncement of the judgment and sentence, that he was advised of his right to request withdrawal of his guilty plea and that he filed to request withdrawal of the plea within the ten day period. The State points out that Abbett's petition was denied by the Oklahoma Courts based on a procedural bar.

On habeas review, a federal court generally does not "address issues that have been defaulted in state court on an independent and adequate state procedural ground, unless cause and prejudice of a fundamental miscarriage of justice is shown." Steele v. Young, 11 F.3d 1518 (10th Cir. 1993)(citing Coleman v. Thompson, 501 U.S. 722, 11 S.Ct. 2546, 115 L.Ed. 2d 640 (1991)). In Steele, the Court found that state procedural bar was an adequate state decision because in Oklahoma, post conviction relief was "strictly limited" to claims which could not have been raised on direct appeal. Steele, 11 F.3d at 1522 (citing Johnson v. State, 823 P.2d 370, 372 (Okla. Crim.App. 1991)).

Therefore, finding that Petitioner has defaulted his federal claims pursuant to an independent and adequate state procedural rule, "federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Gilbert v. Scott, 941 F.2d 1065, 1067 (10th Cir. 1991). The Court notes at

the outset that fundamental miscarriage of justice requires a "colorable showing of factual innocence," and is a standard not met under the facts of this case. Steele, 11 F.3d at 1522.

Petitioner's claim must be analyzed under the cause and prejudice standard. It is well settled that petitioner was entitled to effective assistance of counsel concerning his decision not to appeal. Gilbert, 941 F.2d at 1068 (citations omitted). Moreover, "[i]neffective assistance of counsel may constitute cause for state procedural default where counsel's performance falls below the minimum required by Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L Ed. 2d 674 (1984). Gilbert, 941 F.2d at 1068 (citations omitted). Here, petitioner argues that his counsel improperly allowed enhancement of his sentence and that his counsel failed to give him correct advice about the collateral consequences of his guilty plea. The Court simply does not conclude that counsel's performance in failing to anticipate the second "after former conviction of felony" and advise Petitioner on this point causes his advice to be "outside the wide range of professionally competent assistance." See Strickland, 466 U.S. at 690 ; Gilbert, 941 F.2d at 1068. According to the record at sentencing, Petitioner was advised of his right to appeal and the consequences of his guilty plea, and did not express any desire to appeal.

Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. §2254 (Docket #1) is denied.

IT IS SO ORDERED THIS 30TH DAY OF JUNE, 1999.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

FILED

JUL 6 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARK ALLEN ABBETT,)
)
 Petitioner,)
)
 vs.)
)
 RAY LITTLE,)
)
 Respondent.)

Case No. 97-CV-669-E ✓

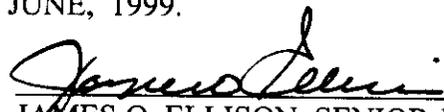
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DATE JUL 07 1999

JUDGMENT

This matter came before the Court upon the Application for a writ of habeas corpus pursuant to 28 U.S.C. §2254 (Docket #1) of the Petitioner, Mark Allen Abbett. The Court duly considered the issues and rendered a decision herein.

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

IT IS SO ORDERED THIS 30th DAY OF JUNE, 1999.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT

FOR THE PRODUCTION OF ALL INFORMATION CONTAINED HEREIN

117T

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

FILED

JUL 7 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BIZJET INTERNATIONAL SALES &)
SUPPORT INC., an Oklahoma corporation,)

Plaintiff,)

vs.)

Case No. 99-CV-0138-B (J) ✓

RCN CORPORATION,)
a Delaware corporation,)
and TEC AIR, INC.,)
a Delaware corporation,)

Defendants.)

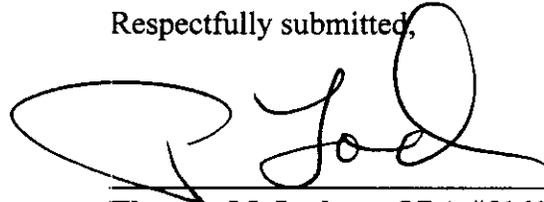
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DATE **JUL 7 1999**

STIPULATION OF DISMISSAL

Plaintiff, BizJet International Sales & Support, Inc., and defendant, Tec Air, Inc., pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby dismiss this proceeding with prejudice to the refile of same.

Respectfully submitted,



Thomas M. Ladner, OBA #5161
NORMAN WOHLGEMUTH CHANDLER & DOWDELL
2900 Mid-Continent Tower
Tulsa, Oklahoma 74103
918/583-7571

ATTORNEYS FOR PLAINTIFF, BIZJET
INTERNATIONAL SALES & SUPPORT, INC.

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C

Charles J. Vinicombe, CV 0617
DRINKER BIDDLE & REATH LLP
A Pennsylvania Limited Liability Partnership
105 College Road East, Suite 300
Princeton, NJ 08542
609/716-6500

-and-

T. Lane Wilson, OBA #16343
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.
320 South Boston Avenue, Suite 400
Tulsa, OK 74103
918/594-0400

ATTORNEYS FOR DEFENDANT,
TEC AIR, INC.

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

FILED

JUL 7 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BURLINGTON NORTHERN AND SANTA)
FE RAILWAY COMPANY,)
)
Plaintiff,)
)
vs.)
)
BINGHAM SAND AND GRAVEL, INC.)
and BINGHAM TRANSPORTATION, INC.,)
)
Defendant.)

Case No. 98 CV 0248-EA
(Base File)

ENTERED ON DOCKET
DATE JUL 7 1999

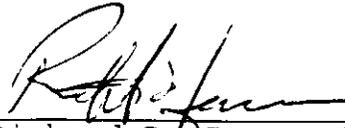
DISMISSAL WITH PREJUDICE

COME NOW the Defendants, Bingham Transportation, Inc., d/b/a Bingham Sand & Gravel, and Gary Dean McMackin, and dismiss with prejudice to the refiling of same their claims against Burlington Northern and Santa Fe Railway Company and James O. Davidson.

DATED this 24th day of June, 1999.

McGIVERN, GILLIARD & CURTHOYS

By: 
John B. DesBarres, OBA #12263
1515 South Boulder Avenue
P. O. Box 2619
Tulsa, Oklahoma 74119-2619
(918) 584-3391
FAX # (918) 592-2416



Richard D. James, OBA #4017
P. O. Box 1168
Miami, Oklahoma 74355
(918) 542-5501

**ATTORNEY FOR DEFENDANT, Gary Dean
McMackin**

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

FILED

JUL 7 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BURLINGTON NORTHERN AND)
SANTA FE RAILWAY COMPANY)

Plaintiff,)

vs.)

BINGHAM SAND AND GRAVEL, INC.,)
and BINGHAM TRANSPORTATION, INC.)

Defendant.)

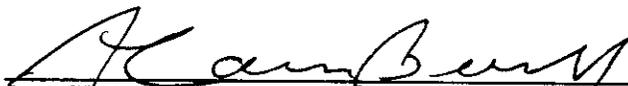
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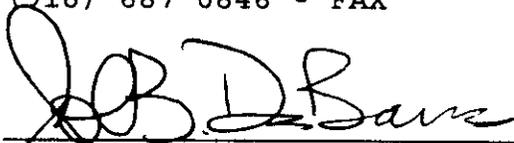
ENTERED ON DOCKET

DATE JUL 7 1999

STIPULATION OF DISMISSAL

Come now Gary McMackin and Bingham Transportation, by and through their attorney, John DesBarres and Burlington Northern Railroad and John O. Davidson, by and through their attorney, A. Camp Bonds, Jr., and stipulate to the mutual dismissal with prejudice of all claims each party has against the other.


A. CAMP BONDS, JR. OBA # 944
BONDS, MATTHEWS, BONDS & HAYES
P. O. BOX 1906
MUSKOGEE, OK 74402-1906
(918) 683-2911 - PHONE
(918) 687 0846 - FAX


JOHN B. DESBARRES OBA #12263
P. O. BOX 2619
TULSA, OK 74101-2619





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

FILED

JUL 7 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BURLINGTON NORTHERN AND SANTA)
FE RAILWAY COMPANY,)

Plaintiff,)

vs.)

BINGHAM SAND AND GRAVEL, INC.)
and BINGHAM TRANSPORTATION, INC.,)

Defendant.)

Case No. 98 CV 0248 -EA ✓
(Base File)

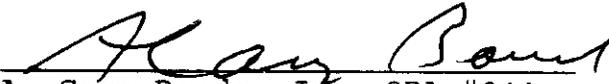
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DATE JUL 7 1999

DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Burlington Northern and Santa Fe
Railway Company, and dismisses with prejudice to the refiling of
same its claims against Defendants, Bingham Transportation, Inc.,
d/b/a Bingham Sand & Gravel, and Gary Dean McMackin.

DATED this 14th day of June, 1999.


A. Camp Bonds, Jr., OBA #944
Bonds, Matthews, Bonds & Hayes
444 Court
P.O. Box 1906
Muskogee, Oklahoma 74402-1906
(918) 683-2911

ATTORNEY FOR BURLINGTON NORTHERN
AND SANTA FE RAILWAY COMPANY

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C/m

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

DEANA L. WINTER,

Plaintiff,

vs.

CHARLES DOWNUM, WAYNE
STINNETT and MICHAEL
MUNDAY,

Defendants.

FILED

JUL 6 1999

Case No. 98CV898 K (E) Phil Lombardi, Clerk
U.S. DISTRICT COURT

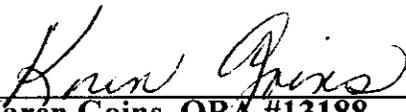
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DATE JUL 07 1999

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

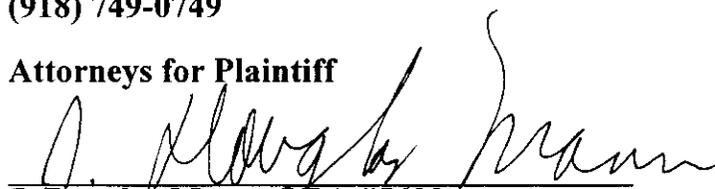
The plaintiff, Deana L. Winter, and the defendants, Charles Downum, Wayne Stinnett and Scott Williams¹, pursuant to Rule 41(a)(1)(ii), FED. R. Civ. P., jointly stipulate that the plaintiff's action against the defendants, Charles Downum, Wayne Stinnett and Scott Williams, be dismissed with prejudice, the parties to bear their respective costs, including all attorney's fees and expenses of this litigation.

Dated this 2nd day of July, 1999.



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(918) 749-0749

Attorneys for Plaintiff



J. Douglas Mann, OBA #5633
ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 700
Tulsa, OK 74103
(918) 585-9211

Attorneys for Charles Downum, Wayne
Stinnett and Scott Williams

¹By order of this court on April 28, 1999, Scott Williams was added as an additional party defendant to this action although his name does not appear in the case caption.

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C/5

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

UNITED STATES OF AMERICA,)
ex rel., WILLIAM I. KOCH and)
WILLIAM A. PRESLEY,)
)
Plaintiffs,)
)
vs.)
)
KOCH INDUSTRIES, INC, et al.,)
)
Defendants.)

ENTERED ON DOCKET

DATE JUL 7 1999

No. 91-CV-763-K

F I L E D

JUL 06 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

O R D E R

Now before the Court are the objections of both parties to the Magistrate Judge's Report and Recommendation filed April 7, 1999. The Court has undertaken a de novo review, pursuant to Rule 72(b) F.R.Cv.P. This is an action brought pursuant to the qui tam provisions of the False Claims Act ("FCA"), 31 U.S.C. §3730(b)-(f). These provisions "authorize private individuals, acting on behalf of the United States, to bring a civil action against those who defraud the government." United States ex rel. Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1517 (10th Cir.1996).

The Precision Company ("Precision"), acting as such a private party or "relator" under the FCA, filed a complaint in this court on May 25, 1989. Plaintiff alleged that the defendants, Koch Industries, Inc. and numerous subsidiaries, "by deliberate and systematic mismeasurement, had understated to the United States the quantity of crude oil and natural gas produced from Federal and Indian lands." United States ex rel. Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 550 (10th Cir.1992), cert. denied, 507 U.S. 951

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(1993) (Koch I). The complaint (case no. 89-C-437) was assigned to the Honorable H. Dale Cook, who dismissed the action for lack of subject matter jurisdiction, finding that Precision as relator did not meet the jurisdictional requirements of 31 U.S.C. §3730(e)(4). The Tenth Circuit affirmed the decision in Koch I.

Judge Cook's order of dismissal was entered November 27, 1990. While the decision was on appeal, Precision filed a second qui tam action on September 30, 1991. The complaint was assigned the present case number, 91-CV-763. The allegations were virtually identical, but in the interim Precision had apparently undertaken to remove the jurisdictional infirmity identified by Judge Cook. The infirmity involved the relator failing to provide information upon which the alleged wrongdoing was based to the government. The decision in Koch I was rendered July 27, 1992. In affirming, the Tenth Circuit relied upon an alternative ground and effectively ruled that Precision could never be a qui tam relator as to these allegations. See 971 F.2d at 554.

Plaintiffs then filed an amended complaint on August 3, 1992. Again, the allegations were identical to the previous complaints, but the amended complaint added William I. Koch and William A. Presley, the two sole shareholders of Precision, as plaintiffs. The Honorable Thomas R. Brett of this court dismissed the amended complaint, ruling that the two individual plaintiffs had been improperly added. Another appeal followed, and the Tenth Circuit reversed and remanded. United States ex rel. Precision Co. v. Koch Indus., Inc., 31 F.3d 1015 (10th Cir.1994) (Koch II). Precision was

subsequently dismissed as a plaintiff on October 26, 1994. The action has since been transferred to the undersigned¹.

Both sides have filed motions for partial summary judgment relating to the application of the FCA's statute of limitations and the effect of the first amended complaint upon it. The Magistrate Judge recommended that this Court find that the first amended complaint relates back to the original complaint in this case (91-CV-763), but does not relate back to the complaint filed in the original case (89-C-437). Further, the Magistrate Judge recommended that a six-year statute of limitation was applicable to the claims in this case.

Rule 15(c) F.R.Cv.P. provides that "an amendment of a pleading relates back to the date of the original pleading when. . . the claim or defense asserted in the amended complaint arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. . . ." The rationale of the rule is that, "once litigation involving particular conduct or a given transaction has been instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment of defenses or claims that arose out of the same conduct, transaction or occurrence as set forth in the

¹Plaintiffs (with leave of court) filed a second amended complaint on October 29, 1998, after briefing was already completed on these cross-motions for partial summary judgment. The parties agree that the only additional relation-back issue raised by the second amended complaint is whether the new FCA violations asserted arise out of the same transaction or occurrence set forth in the original and first amended complaints. Defendants will file a separate motion on this issue. See Report and Recommendation at 14 n.7.

original pleading." 6A Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure §1496 at 64 (2d ed.1990) (hereafter "Wright & Miller").

First, plaintiffs object to the Magistrate Judge's conclusion that the first amended complaint should not relate back to the original complaint in 89-C-437. The Magistrate Judge correctly found that the issue is governed by Tenth Circuit precedent. In Benge v. United States, 17 F.3d 1286, 1288 (10th Cir.1994), the court stated "a separately filed claim, as opposed to an amendment or a supplementary pleading, does not relate back to a previously filed claim." In their objection, plaintiffs contend that the Court should invoke the doctrine of equitable tolling and find the statute of limitations was tolled while the parties "argued" over who was the correct relator in 89-C-437.

As an initial matter, defendants protest that plaintiffs are improperly raising the equitable tolling argument for the first time, and did not address it before the Magistrate Judge. Plaintiffs respond that the issue was implicitly present in the presentation before the Magistrate Judge. The Court elects to consider the issue.

A federal statute of limitations may be equitably tolled in a narrow range of situations. Benge, 17 F.3d at 1288. The doctrine is implied in every federal statute of limitations where its application is consistent with congressional intent, and called for by the facts of the case. Ebrahimi v. E.F. Hutton & Co. Inc., 852 F.2d 516, 521 (10th Cir.1988). The Court sees nothing in the

language of §3731(b) which indicates congressional preclusion of equitable tolling. Therefore, the Court declines to adopt defendants' argument that the FCA has completely "displaced" equitable tolling with statutory tolling.

Turning to the application itself, plaintiffs contend that the Magistrate Judge's recommendation renders the government "the loser". The government is the real party in interest, plaintiffs state, and "should not lose its right to recover damages by virtue of the dispute over who should be its champion. . . ." This argument quickly runs aground on statutory language. The FCA grants the government the right to intervene in a qui tam action and become a party plaintiff. 31 U.S.C. §3730(b)(2). The government has declined to exercise its intervention right in this action. Any wound to the government in this regard is self-inflicted.

Plaintiffs finally argue for equitable tolling based upon the "technical defect" in the identity of the relator and the fact that plaintiffs "offered" before Magistrate Judge Wolfe and Judge Cook to intervene in 89-C-437. The FCA does not consider a proper relator a mere technicality, but as a prerequisite to subject matter jurisdiction. 31 U.S.C. §3730(e)(4)(A). Judge Cook ruled that Precision was not an "original source" for the material, thus was not a proper relator, and thus the court lacked jurisdiction. The Tenth Circuit affirmed on that basis. Plaintiffs state that the Tenth Circuit rejected Judge Cook's ground for dismissal and affirmed on a different ground. This view differs from that of the

Tenth Circuit that the Koch II decision "agreed" with Judge Cook's holding, but "amplified" the ruling in another aspect. Koch II, 31 F.3d at 1016.

The distinction has significance, in view of plaintiffs' contention that they "offered" to intervene in 89-C-437. Plaintiffs have made no citation to the record where this offer took place. The use of the colloquial term is somewhat vague. Litigants do not usually "offer" to a Court to do something. Litigants usually file motions and receive rulings. Defendants have responded that "plaintiffs never moved to intervene in [89-C-437]. . . until the Tenth Circuit ruled in the appeal in that case. . . ." The Court need not attempt to resolve the dispute for the following reason. Judge Cook dismissed 89-C-437 based upon one prong of the "original source" test (failure of William Presley as Precision's president to turn over all information to the government) and the Tenth Circuit affirmed and added a finding as to the second prong (Precision did not have "direct and independent" knowledge of the information). Under the "mandate rule" governing appellate decisions, both prongs now stand established in 89-C-437. Even if the present plaintiffs, as individuals, had requested intervention in the original case, they did not qualify as "original sources" at that time according to Judge Cook's ruling. Apparently, the plaintiffs have acted to remove any impediment in the interim, but that does not affect the correctness of Judge Cook's ruling and the Tenth Circuit's affirmance thereof.

In sum, plaintiffs have not shown the balance of equities to be in its favor, certainly not to the extent that the Court would find an equitable exception to an unqualified ruling by the Tenth Circuit in Benge regarding the inapplicability of "relation back" to a separate action. Again, the equitable tolling doctrine is narrow and not to be lightly expanded. See Ebrahimi, 852 F.2d at 522 n.9. The Court affirms that portion of the Report and Recommendation which finds that the first amended complaint in this case does not relate back to the complaint filed in 89-C-437. The Court declines plaintiffs' alternative suggestion that the time-barred (in the Court's view) claims be submitted to the jury anyway, in case the Tenth Circuit reverses on this point. Such a procedure ensures a lengthier trial, and risks introduction of irrelevant or prejudicial material unnecessarily.

The defendants' objection focuses upon a single aspect of the Report and Recommendation, the conclusion that the first amended complaint in 91-CV-763 (i.e., the case at bar) does relate back to the original complaint in 91-CV-763. Rule 15(c) F.R.Cv.P. governs the relation back of amendments. By its terms, the Rule only addresses the relation back of amendments adding defendants. However, the advisory committee notes to the 1966 amendment to the Rule state that "the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs." One requirement for relation back to apply under Rule 15(c) is that there must be a mistake in the original pleading as to the proper party. The issue between the parties is whether the

committee note means that all provisions of Rule 15(c), including the "mistake" requirement, apply to all amendments adding or substituting plaintiffs.

Arguing that this is the proper interpretation, defendants contend that plaintiffs cannot show there was a "mistake" in originally naming Precision as plaintiff, but rather that it was a deliberate strategic decision. Plaintiffs argue that the "mistake" provision results in a "windfall" under these facts and should not apply in this context, because plaintiffs were merely substituted with no change in the claims asserted. In the alternative, plaintiffs argue that naming Precision as relator-plaintiff proved to be a "mistake of law" cognizable under Rule 15(c).

Defendants fire all guns, but are unable to sink the authority relied upon by the Magistrate Judge. "As long as a defendant is fully apprised of a claim arising from specified conduct and has prepared to defend the action, his ability to protect himself will not be prejudicially affected if a new plaintiff is added, and he should not be permitted to invoke a limitations defense." 6A Wright & Miller, §1501 at 154-55 (2d ed.1990) (footnote omitted). This principle is supported by case authority cited within the treatise. The authority upon which defendants rely, such as Nelson v. County of Allegheny, 60 F.3d 1010 (3d Cir.1995), is distinguishable. As the Magistrate Judge noted, these cases involve the addition of new claims in which the policy behind statutes of limitations is implicated.

In the alternative, defendants assert that an amended

complaint does not relate back to a complaint over which the Court lacked subject matter jurisdiction. Essentially, defendants contend that because Precision was not a proper relator, the original complaint was a nullity to which no relation back may take place. Defendants raised the same argument before the Tenth Circuit in Koch II relating to the amendment itself, and that court rejected it.

Defendants contend that the Tenth Circuit ruled only as to permitting the amendment under Rule 15(a), not relation back under Rule 15(c). While an accurate statement, this Court finds the reasoning expressed by the Tenth Circuit leads to the same result. The appellate court found the amendment proper because, by the time the non-correctable lack of standing of Precision was pronounced by the Tenth Circuit, "the second complaint, ostensibly viable, was before the district court." 31 F.3d at 1019.

In the cases cited by defendants, the district court had dismissed an original complaint for lack of subject matter jurisdiction. Plaintiff then filed an amended complaint seeking to correct the defect and also sought to relate the amended complaint back to the original complaint. In the case at bar, by contrast, a district court case was still in esse at the time the amended complaint was filed. Substituting one relator for another under the FCA is the functional equivalent of an amendment to properly assert subject matter jurisdiction. It is established that "[a]mendments curing a defective statement of subject matter jurisdiction. . . will relate back. . . ." 6A Wright & Miller,

§1497 at 80 (2d ed.1990) (footnote omitted). Again, the Court agrees with the Magistrate Judge's recommendation.

The final issue before the Court is the appropriate interpretation of the FCA's statute of limitations. Only the plaintiffs have objected to the Report and Recommendation in this regard. 31 U.S.C. §3731(b) provides as follows:

A civil action under section 3730 may not be brought-

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

Before the 1986 amendments, the FCA had a six-year statute of limitations from the date the violation was committed. Congress added §3731(b) (2) in those amendments. Not for the first time, it has been left to the courts to decipher unclear congressional language.

As the Magistrate Judge noted, two interpretations have largely occupied the field. The first is that §3731(b) (2) only applies to the government, not to a private relator. This view has been adopted in United States ex rel. Thistlethwaite v. Polymer, 6 F.Supp.2d 263 (S.D.N.Y.1998) and United States ex rel. El Amin v. George Washington Univ., 26 F.Supp.2d 162 (D.D.C.1998). This interpretation is based upon the statute's reference to an

"official of the United States" and legislative history which indicates that Congress was concerned about the government not being able to bring an FCA action because of difficulties in detecting fraud.

The other predominant interpretation is represented by United States ex rel. Hyatt v. Northrop Corp., 91 F.3d 1211 (9th Cir.1996). In Hyatt, the Ninth Circuit ruled that (1) the tolling provision of 31 U.S.C. §33731(b)(2) applies both to the government and to qui tam plaintiffs and (2) as to qui tam plaintiffs, the statute of limitations begins to run when the plaintiff knew or should have discovered the facts underlying the alleged fraud. This interpretation was based on the Ninth Circuit's view of the "plain language" of the statute, which does not expressly limit §3731(b)(2) to the government, and what the court found to be ambiguous legislative history on the point.

A third interpretation of the statute has been made, and it is this interpretation which plaintiffs herein promote. In United States ex rel. Colunga v. Hercules, Inc., 1998 WL 310481 (D.Utah 1998), the District Court of Utah held that §3731(b)(2) applied to both the government and to relators, but that the three year limitation does not begin to run until the Department of Justice received information as to the violation.

The Magistrate Judge declined to adopt the Colunga interpretation and reasoned that he need not choose between the other two possible interpretations. This conclusion was based upon a factual finding that plaintiffs had the relevant knowledge of

alleged fraud more than three years before this action was filed. Accordingly, the Magistrate Judge concluded the six year limitation of §3731(b)(1) applied.

Upon review, the Court agrees that the Colunga analysis is consistent with the "plain language" of the statute only when "[c]onsidered in isolation and superficially examined." United States ex rel. Bidani v. Lewis, 1999 WL 163053 (N.D.Ill.1999). If forced to choose between the two predominant interpretations, the Court finds more persuasive the reasoning of Thistlethwaite and El Amin, i.e., that the three-year knowledge requirement in §3731(b)(2) only applies to cases in which the government intervenes. However, the Court agrees with the Magistrate Judge that such a choice need not be made under the facts of this case.

Regarding the Magistrate Judge's detailed discussion of evidence demonstrating that plaintiffs had knowledge of the alleged fraud more than three years before the filing of this action, plaintiffs have devoted only a footnote, stating that they incorporate "previous briefing". It is doubtful that such an effort rises to the level of an objection to the Report and Recommendation. In the absence of objection, a party waives appellate review of both factual and legal questions. Talley v. Hesse, 91 F.3d 1411, 1412 (10th Cir.1996). Further, plaintiffs state in the footnote that the Magistrate Judge erred in concluding that Koch and Presley each had sufficient knowledge. (Plaintiffs' objection at 11 n.2). As defendants point out, this cannot be the test. Sufficient knowledge by either Koch or Pressley would

trigger the statute of limitations. (Defendants' response at 18). In any event, the Court has reviewed the previous briefing, and concludes the Magistrate Judge's factual finding as to plaintiffs' knowledge should also be affirmed.

The Report and Recommendation is a model of thoroughness on difficult issues. The parties have eloquently presented their objections, but the Court finds the Magistrate Judge's recommendations to be sound.

It is the Order of the Court that the objection of the defendants (#478) and the objection of the plaintiffs (#477) to the Report and Recommendation (#473) filed April 7, 1999 are hereby DENIED in all respects.

In accordance with the Report and Recommendation, the motion of the defendants for partial summary judgment (#280) and the motion of the plaintiffs for partial summary judgment (#260) are hereby GRANTED in part and DENIED in part.

Specifically, pursuant to Rule 15(c) F.R.Cv.P., the first amended complaint filed in this action relates back to the filing of the original complaint filed in this action September 30, 1991, but does not relate back to the original complaint filed in 89-C-437. Further, the statute of limitations applicable to the FCA claims in the first amended complaint is the six-year limitation contained in 31 U.S.C. §3731(b)(1), not the ten-year limitation contained in 31 U.S.C. §3731(b)(2). Plaintiffs may, therefore,

pursue any FCA claim that accrued after September 30, 1985. All parties agree that the FCA claims in the first amended complaint accrue when defendants submit a monthly royalty report to the federal government or to an Indian tribe or when defendants submit a monthly accounting to a 100% division order purchaser.

ORDERED this 2 day of July, 1999.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 06 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WILLIAM J. PENNINGTON,)
)
 Plaintiff,)
)
 v.)
)
 KENNETH S. APFEL, Commissioner)
 of Social Security Administration,)
)
 Defendant.)

No. 93-CV-1135-J ✓

ENTERED ON DOCKET
DATE JUL 7 1999

ORDER

Now before the Court is Plaintiff's Motion for an award of attorney's fees and other expenses under 42 U.S.C. § 406(b)(1). [Doc. No. 29-1]. Defendant filed a response on June 1, 1999 [Doc. No. 32-1], stating that he has no objection to Plaintiff's motion for attorney fees. The Court therefore GRANTS Plaintiff's motion [Doc. No. 29-1] and awards Plaintiff's counsel \$8,883.00 in attorney fees and costs.

Plaintiff's attorney was previously granted attorney fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412. Plaintiff's counsel shall refund the smaller attorney fee award to Plaintiff pursuant to Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir. 1986).

Dated this 6 day of ~~June~~ ^{July} 1999.



Sam A. Joyner
United States Magistrate Judge

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

FILED

JUL 6 1999

RICHARD C. FALKENSTEN,
Plaintiff,

v.

ATLANTIS PLASTIC FILMS, INC.,
Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99CV339H (E)

ENTERED ON DOCKET

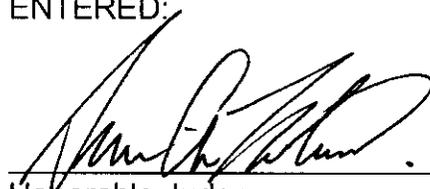
DATE JUL 07 1999

ORDER OF DISMISSAL

IT IS HEREBY ORDERED that, pursuant to the Joint Stipulation For Dismissal With Prejudice filed by the parties hereto, the above-captioned matter is dismissed in its entirety with prejudice and without costs or attorneys' fees assessed to any party.

DATED: July 2, 1999

ENTERED:



Honorable Judge

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

TERRY DEAN BATES,)
)
Petitioner,)
)
vs.)
)
BOBBY BOONE, Warden,)
)
Respondent.)

ENTERED ON DOCKET
DATE JUL 6 1999
Case No. 98-CV-973-H (E)

FILED
JUL 2 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Respondent's motion to dismiss petition for writ of habeas corpus as barred by statute of limitation (Docket #3). Petitioner has filed a response to the motion to dismiss (#6) as well as an amended brief in support of his petition (#9). Petitioner has also filed a "petition to set matters for cause" (#10) and an "application for uniform certification of questions of Oklahoma state law" (#11).

Respondent's motion to dismiss is premised on 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which imposes a one-year limitations period on habeas corpus petitions. For the reasons discussed below, the Court finds that the petition was not timely filed and Respondent's motion to dismiss should be granted. The dismissal of the petition for writ of habeas corpus renders moot Petitioner's "petition to set matters for cause" and "application for uniform certification of questions of Oklahoma state law."

BACKGROUND

On October 19, 1992, Petitioner, while represented by experienced counsel, pled guilty to Attempted Rape, Sexual Battery, First Degree Rape and Oral Sodomy, After Former Conviction of a Felony, in Pawnee County District Court, Case No. CRF-92-2. He was sentenced to twenty (20)

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years, ten (10) years, life, and twenty (20) years imprisonment on each conviction, respectively, with the sentences to be served concurrently. (#1). According to the trial court's order denying post-conviction relief (#4, Ex. B at ¶ 11), Petitioner's wife filed a letter with the trial court judge on October 27, 1992, requesting "to file a motion to withdraw [Petitioner's] plea of guilty . . . to file a motion for the transcripts at the State's expense . . . [and to] request [the trial court judge] to appoint a public defender" On November 2, 1992, Petitioner filed his own handwritten letter to the trial court judge requesting that he be allowed to withdraw his pleas and requesting appointment of counsel. (#4, Ex. B at ¶ 12). After construing Petitioner's November 2, 1992 letter as a motion to withdraw guilty plea, the trial court summarily denied the motion by order filed November 30, 1992. Petitioner took no further steps to perfect a direct appeal.

On July 18, 1995, almost three (3) years after his conviction, Petitioner filed an application for post conviction relief seeking an appeal out of time. On January 27, 1997, after a holding a hearing on Petitioner's application, the trial court entered an extremely thorough order denying the requested relief (#4, Ex. B). Petitioner appealed and the Oklahoma Court of Criminal Appeals affirmed the denial of post-conviction relief on May 8, 1997 (#4, Ex. D).

Petitioner filed a second application for post-conviction relief on May 28, 1998. That application was summarily denied by the trial court on June 15, 1998 (#4, Ex. E). Petitioner appealed and the Oklahoma Court of Criminal Appeals affirmed the trial court's second denial of post-conviction relief on August 21, 1998 (#4, Ex. G).

Petitioner filed the instant petition for writ of habeas corpus on October 7, 1998 in the United States District Court for the Western District of Oklahoma (#1). The petition was transferred to this Court on November 3, 1998 but was not received by the Clerk of Court until December 28, 1998.

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 perfect a direct appeal following the denial of his motion to withdraw guilty plea, his conviction became final ten (10) days after the trial court denied his motion to withdraw guilty plea, or on December 10, 1992. See Rule 4.2(D), *Rules of the Court of Criminal Appeals* (requiring the defendant to file a notice of intent to appeal, together with the designation of record, in the trial court within ten (10) days from the date the application to withdraw the plea of guilty is denied). Therefore, Petitioner's conviction became final before enactment of the AEDPA. As a result, his one-year limitations clock began to run on April 24, 1996, when the AEDPA went into effect. Absent a tolling event, Petitioner had until April 23, 1997, to submit a timely petition for writ of habeas corpus. Simmonds, 111 F.3d at 746.

However, pursuant to § 2244(d)(2), the running of the limitations period was tolled or suspended during the pendency of post-conviction proceedings properly filed or pending during the grace period. Hoggro, 150 F.3d at 1226. Petitioner's first application for post-conviction relief, filed July 18, 1995, before enactment of the AEDPA, was denied by the Pawnee County District Court on January 27, 1997, and affirmed by the Oklahoma Court of Criminal Appeals on May 8, 1997. In other words, the post-conviction application was pending during the entire grace period thereby

tolling the limitations period for a full year. Accordingly, Petitioner had one year from May 8, 1997, or until May 8, 1998, within which to file his federal petition for writ of habeas corpus. Petitioner filed his petition on October 7, 1998, well past the May 8, 1998 deadline. Although Petitioner filed a second application for post-conviction relief, that action does not serve to toll the limitations period because it was filed on May 28, 1998, *after* the May 8, 1998 deadline. Therefore, absent a tolling event, this action is time-barred.

In his response to the motion to dismiss, Petitioner cites Caspari v. Bohlen, 510 U.S. 383, 390 (1994), and argues that his limitations period began to run August 8, 1997, or 90 days after the Oklahoma Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief when the time period for petitioning the Supreme Court for certiorari review had expired. Petitioner further argues that his second application for post-conviction relief, filed May 28, 1998 and pending in the state courts until August 21, 1998, would then serve to further toll the limitations period making the October 7, 1998 filing of the instant petition timely. However, the Court does not agree that Petitioner is entitled to count the additional 90 days for seeking certiorari review in determining when his one year period began to run again after conclusion of post-conviction proceedings in the state courts. Although it is appropriate to include the 90 day period in determining when a conviction becomes final for purposes of 28 U.S.C. § 2244(d)(1)(A), the tolling period under § 2244(d)(2) does not apply to the time during which a petitioner could seek Supreme Court review of the denial of post-conviction relief. See Hoggro v. Boone, 150 F.3d 1223, 1226 (10th Cir.1998) (noting that the time period to be tolled under § 2244(d)(2) is the time "spent in state court"); see also Harris v. Champion, No. 98-6318, 1999 WL 84476, *1 (10th Cir. Feb. 22, 1999) ("[O]nce the Oklahoma Court of Criminal Appeals affirmed the denial of [the] application [for post-conviction

relief], ... the one-year limitations period once again began to run."); Thompson v. Simmons, No. 98-3270, 1999 WL 339697, *3 (10th Cir. May 31, 1999) ("[O]nce the Kansas Supreme Court denied his state habeas petition ... the clock began to run on [the petitioner's] one-year federal habeas time limitation period."). Therefore, the Court rejects Petitioner's argument that the one year limitations period began to run on August 8, 1997.

Also, in his response to the motion to dismiss, Petitioner emphasizes that his failure to perfect a direct appeal from his conviction was the result of ineffective assistance of counsel. However, Petitioner does not indicate how his allegation of ineffective assistance of counsel impacts his failure to file this petition within the one year limitations period.

Liberalizing Petitioner's response, see Haines v. Kerner, 404 U.S. 519 (1972), it appears that Petitioner attributes his failure to file a timely petition to the lack of a "functional Law Library" and "adequately trained legal research assistants." See #6. However, Petitioner fails to identify with specificity the steps he took to pursue his federal claims diligently. See Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998). Specifically, Petitioner offers no explanation for either his nearly three (3) year delay in seeking an appeal out-of-time or his more than one year delay in filing his second application for post-conviction relief. The Court finds that Petitioner's conclusory allegations concerning the availability of legal materials are insufficient to justify equitable tolling. See id. Further, because there is no legal right to counsel in collateral proceedings, see Pennsylvania v. Finley, 481 U.S. 551, 555 (1987), Petitioner's lack of access to "adequately trained legal research assistants" cannot constitute sufficient cause for his failure to file his petition timely. See Gregory v. Palino, No. 98-1372, 1999 WL 92272, at *3 (10th Cir. Feb. 24, 1999). Therefore, Petitioner's argument related to the quality of available legal materials must be rejected. Due to Petitioner's lack

of diligence, this Court cannot equitably toll the limitations period and the petition should be dismissed as time-barred

CONCLUSION

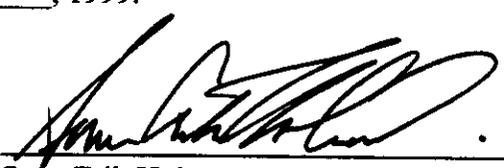
Because Petitioner failed to file his petition for writ of habeas corpus within the one-year grace period as defined in United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997), Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations should be 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**.
3. Petitioner's "petition to set matters for cause" (#10) and "application for uniform certification of questions of Oklahoma state law" (#11) are **denied as moot**.

IT IS SO ORDERED.

This 2ND day of July, 1999.


Sven Erik Holmes
United States District Judge

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

FILED

JUL 2 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TERRY DEAN BATES,)
)
 Petitioner,)
)
 vs.)
)
 BOBBY BOONE, Warden,)
)
 Respondent.)

Case No. 98-CV-973-H (E) ✓

ENTERED ON DOCKET
DATE JUL 6 1999

JUDGMENT

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

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Petitioner's action herein is dismissed with prejudice as barred by the statute of limitations.

IT IS SO ORDERED.

This 2ND day of JULY, 1999.



Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JUL -2 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

SILVERADO FOODS, INC.,)
)
Plaintiff,)
)
v.)
)
GOURMET SPECIALTY BAKERS, INC.,)
)
Defendant.)

Case No. 99-CV-0118-H (E) ✓

ENTERED ON DOCKET
JUL 6 1999
DATE _____

REPORT AND RECOMMENDATION

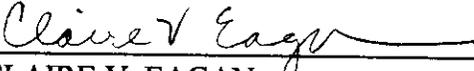
The Court has referred to the undersigned the "Application for Order Requiring Barry Hermanson and GSB to Appear and Show Cause re Contempt; Brief in Support" (Docket #37). The basis for the Application is plaintiff's assertion that the filing of a lawsuit in Superior Court, Orange County, California, by Mr. Bitts, Inc. against various defendants, including Gourmet Specialty Bakers, Inc. and Silverado Foods, Inc., violates this Court's Preliminary Injunction Restraining Disposition of Property (Docket #12). Plaintiff asserts that the California lawsuit seeks to obtain a transfer of a portion of the assets protected by the Preliminary Injunction. The undersigned recommends that the Court deny the Application for two reasons: 1) Mr. Bitts, Inc. is not a party restrained by the Preliminary Injunction; and 2) the filing of a lawsuit does not *per se* transfer, conceal, damage, or destroy the assets protected by the Preliminary Injunction.

OBJECTIONS

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

must file them with the Clerk of the District Court within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). **The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court.** See Thomas v. Arn, 474 U.S. 140 (1985); Haney v. Addison, Case No. 98-6255, 1999 WL 288295 (10th Cir. May 10, 1999).

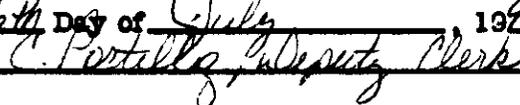
DATED this 2nd day of July, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

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

10th Day of July, 1999.


C. Portello, Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 2 1999 *AS*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 JOHNNIE NORMAN,)
)
 Defendant.)

CASE NO. 99CV0069H(J) ✓

ENTERED ON DOCKET

DATE JUL 06 1999

O R D E R

Upon the motion of the plaintiff, United States of America, to which there is no objection, it is hereby ORDERED that all claims against defendant Johnnie Norman, be dismissed with prejudice, the parties to bear their own costs and attorneys' fees.

Dated this 2nd day of July, 1999.

Ann C. Williams
UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

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

LFR/11f

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 6 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FELICIA CHAPPELL, an individual,)
)
Plaintiff,)
)
vs.)
)
TULSA COMMUNITY COLLEGE, and)
the governing body of TULSA)
COMMUNITY COLLEGE, and DEAN)
D. VANTREASE, as President of)
TULSA COMMUNITY COLLEGE, and)
CHRISTY LYN LARSON, an individual,)
)
Defendants.)

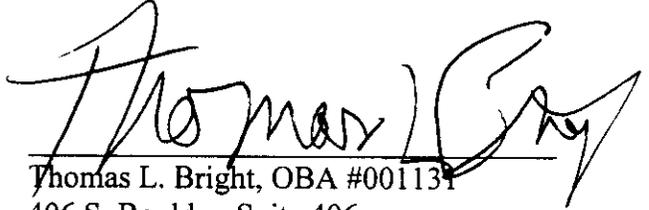
Case No. 98-CV-0685B(J) ✓

ENTERED ON DOCKET

DATE JUL 6 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1), Fed. R. Civ. P., the parties hereby stipulate to dismissal of this case with prejudice to refiling.



Thomas L. Bright, OBA #001131
406 S. Boulder, Suite 406
Tulsa, OK 74103

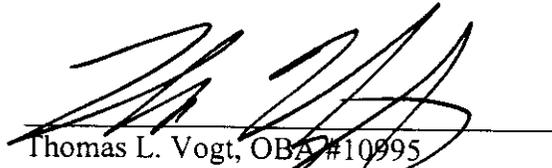


David W. Davis, OBA #015067
406 S. Boulder, Suite 416
Tulsa, OK 74103

ATTORNEYS FOR PLAINTIFF

28

CIT



Thomas L. Vogt, OBA #10995
JONES, GIVENS, GOTCHER & BOGAN, P.C.
15 E. 5th Street, #3800
Tulsa, OK 74103
(918) 581-8200

ATTORNEYS FOR DEFENDANTS

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

JESSICA A. MOORE,
Plaintiff,

vs.

BARRETT RESOURCES CORPORATION,
ASSOCIATED RESOURCES, INC., and
BRIAN L. RICE,

Defendants.

ENTERED ON DOCKET

DATE JUL 6 1999

Case No. 99-CV-0017 H (J) ✓

FILED

JUL 2 1999

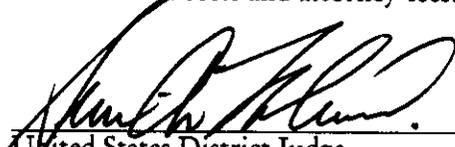
Phil Lombardi, Clerk
U.S. DISTRICT COURT

**ORDER OF DISMISSAL WITH PREJUDICE OF ALL CLAIMS BY AND BETWEEN
JESSICA A.A. MOORE AND BARRETT RESOURCES CORPORATION**

NOW before the Court is the Stipulation of Dismissal With Prejudice of all Claims by and between the Plaintiff, Jessica A.A. Moore, and Defendant, Barrett Resources Corporation, advising that this matter has been fully compromised and settled as between Plaintiff and Defendant, Barrett Resources Corporation. Upon review of such Stipulation of Dismissal with Prejudice, this court finds that an Order of Dismissal with Prejudice of All Claims by and between Jessica A.A. Moore and Barrett Resources Corporation should be entered.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that any and all claims and causes of action by and between Plaintiff, Jessica A.A. Moore and Defendant, Barrett Resources Corporation, be, and hereby are, dismissed with prejudice pursuant to the Stipulation of Dismissal with Prejudice of All Claims by and between Plaintiff, Jessica A.A. Moore, and Defendant, Barrett Resources Corporation. Plaintiff and Defendant, Barrett Resources Corporation, are each to bear their own costs and attorney fees.

DONE this 2ND day of July, 1999.


United States District Judge

Randall J. Snapp
CROWE & DUNLEVY
321 South Boston, Suite 500
Tulsa, OK 74103-3313
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(918) 599-6335 - Fax
ATTORNEYS FOR DEFENDANT,
BARRETT RESOURCES CORPORATION

31

100
IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JUL 2 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

1. DELORA A. THOMPSON , by and through)
her Guardian, CARL D. YORK,)

Plaintiff,)

v.)

1. HILLDALE NURSING FACILITY, INC.,)
an Oklahoma corporation, d/b/a COWETA)
MANOR NURSING HOME,)

Defendant.)

Case No. 99 CV 0312BU(E)

ENTERED ON DOCKET

DATE JUL 2 1999

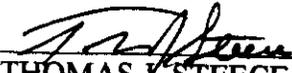
JOINT STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, DELORA A. THOMPSON , by and through her Guardian, CARL D. YORK, and Defendant, Coweta Manor Nursing Home, and pursuant to Rule 41 (a)(1) of the Federal Rules of Civil Procedure hereby file this Joint Stipulation of Dismissal Without Prejudice. The parties all agree and stipulate that all causes of action herein by Plaintiff are dismissed, **without prejudice** to the re-filing thereof. The parties further agree and stipulate that each shall bear their own attorneys fees and costs incurred in the above captioned lawsuit.

This Joint Stipulation of Dismissal is signed by counsel for the parties who have appeared in this action after each party has been fully informed of the effects of such dismissal.

4
CJ

Respectfully Submitted,



THOMAS J. STEECE - OBA #11531
STEECE & MATHEWS, P.C.
2629 N.W. 39th, Suite 110
P.O. Box 12992
Oklahoma City, Oklahoma 73157-2992
Telephone: 405-943-8300
Facsimile: 405-942-2661
ATTORNEY FOR PLAINTIFF



W. MICHAEL HILL - OBA #4213
JOHN J. BOWLING - OBA #16811
SECRET, HILL & FOLLUO
7134 S. Yale, Suite 900
Tulsa, Oklahoma 74136
Telephone: 918-494-5905
Facsimile: 918-494-2847
ATTORNEYS FOR DEFENDANT

MT

FILED

JUL 2 1999

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

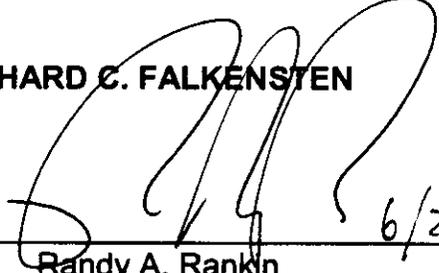
Phil Lombardi, Clerk
U.S. DISTRICT COURT

RICHARD C. FALKENSTEN,)	
)	
Plaintiff,)	
)	
v.)	Case No. 99CV339H (E) ✓
)	
ATLANTIS PLASTIC FILMS, INC.,)	ENTERED ON DOCKET
)	
Defendant.)	DATE <u>JUL 2 1999</u>

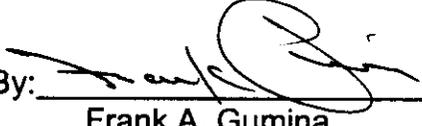
JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective counsel, that the above-captioned action be dismissed with prejudice, without costs or attorney's fees to any party.

RICHARD C. FALKENSTEN

By:  6/28/99
Randy A. Rankin

ATLANTIS PLASTIC FILMS, INC.

By:  6/25/99
Frank A. Gumina

1515 South Denver
Tulsa, OK 74119
(918) 599-8118

Wessels & Pautsch, P.C.
330 East Kilbourn Avenue
Suite 1475
Milwaukee, WI 53202
(414) 291-0600

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

ASSOCIATES COMMERCIAL
CORPORATION,

Plaintiff,

vs.

UNIONAMERICA INSURANCE
COMPANY, LTD., a foreign
insurance company, and
TERRA NOVA INSURANCE
COMPANY, LTD., a
foreign insurance company,

Defendants.

ENTERED ON DOCKET
DATE **JUL 2 1999**

Case No. 99-CV-335-BU(E) ✓

FILED

JUL 1 - 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter came before the Court for case management conference on July 1, 1999. Based upon the stipulation of the parties that the amount in controversy does not exceed \$75,000.00 and diversity jurisdiction pursuant to 28 U.S.C. § 1332 does not exist, the Court **ORDERS** that the above-entitled matter be remanded to the District Court of Tulsa County, State of Oklahoma pursuant to 28 U.S.C. § 1447(c). The Clerk of the Court is directed to effect the remand of this matter to the District Court of Tulsa County, State of Oklahoma.

ENTERED this 1st day of July, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUL -1 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOANN RILEY,)
)
 Plaintiff,)
)
 v.)
)
 KENNETH S. APFEL,)
 Commissioner of the Social)
 Security Administration,)
)
 Defendant.)

Case No. 98-CV-707-EA

ENTERED ON DOCKET

DATE JUL 2 1999

ORDER

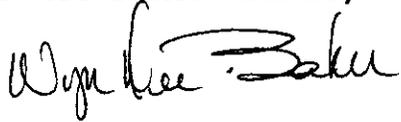
Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Wyn Dee Baker, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 4 of section 205(g) of the Social Security Act, 42 U.S.C. 405(g).

DATED this 1st day of July 1999.

Claire V Eagan
CLAIRE V. EAGAN
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in cursive script that reads "Wyn Dee Baker". The signature is written in black ink and is positioned below the typed name of the signatory.

WYN DEE BAKER, OBA #465
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUL -1 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOANN RILEY,

Plaintiff,

v.

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

Defendant.

Case No. 98-CV-0707-EA

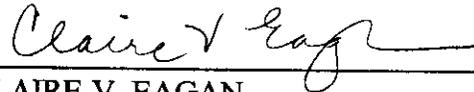
ENTERED ON DOCKET

DATE **JUL 2 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 1st day of July, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

TEAM TIRES PLUS, LTD.,
a Minnesota Corporation,

Plaintiff,

vs.

TIRE PLUS, INC.,
d/b/a, TIRE PLUS+,
an Oklahoma Corporation

Defendant.

Case No. 98-CV-⁴⁴⁹~~489~~ K(E) ✓

ENTERED ON DOCKET
DATE JUL 02 1999

F I L E D

JUL 02 1999 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

The above-entitled action having been fully, finally and completely compromised and settled between the parties for a valuable consideration, the receipt and sufficiency of which are hereby acknowledged by Plaintiff, Team Tires Plus, Ltd., and Defendant, Tire Plus, Inc., d/b/a Tire Plus+,

IT IS HEREBY ORDERED, that the action, including any and all claims and counterclaims, be, and hereby is, dismissed with prejudice and on its merits, with each party bearing its respective costs and attorneys' fees.

Dated: June 29, 1999.


UNITED STATES DISTRICT JUDGE

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

F I L E D

JUL 1 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CLARK BURBANK,)
)
 Plaintiff,)
)
 v.)
)
 WORLDCONNECT)
 TELECOMMUNICATIONS, INC.,)
)
 Defendant.)

Case No. 98-CV-0926E(J)

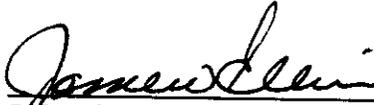
ENTERED ON DOCKET

DATE JUL 02 1999

J U D G M E N T

In accord with the Order filed this date sustaining the Defendant's Motions for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, WorldConnect Telecommunications, Inc., and against Plaintiff, Clark Burbank. Plaintiffs shall take nothing of their claim.

DATED, THIS 1st DAY OF JULY, 1999.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

13

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

FILED

JUL 1 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CLARK BURBANK,)
)
Plaintiff,)
)
v.)
)
WORLDCONNECT)
TELECOMMUNICATIONS, INC.,)
)
Defendant.)

Case No. 98-CV-0926E(J) ✓

ENTERED ON DOCKET

DATE JUL 02 1999

ORDER

Now before the Court is the Motion for Summary Judgment (Docket #5) of the Defendant WorldConnect Telecommunication, Inc. ("WorldConnect").

Background

Plaintiff, Clark Burbank, was employed as the Human Resource Director for Defendant, WorldConnect, in September of 1996. The parties never signed an employment agreement or drafted a formal contract. In October 1998, a WorldConnect employee, Mrs. Dawn Douglas, took allegations of sexual harassment violations by Plaintiff to Mr. Ryan Hausher, Vice President of Business Development. At a meeting on October 19, 1998, Plaintiff was confronted about these allegations by WorldConnect's Executive Vice President, Mr. Robert Haefner and Senior Vice President and General Counsel, Mr. Thomas R. Klenda. Plaintiff admitted that he had made certain comments toward Mrs. Douglas which could be construed to be sexually inappropriate, thus violating WorldConnect's Policy and Procedures manual. Haefner and Klenda informed Plaintiff that, because he was the Director of Human Resources and the author of the Policy and

Procedures manual, his conduct would not be tolerated. Subsequently, Plaintiff formally resigned from his position at WorldConnect Telecommunications, Inc., as acting Director of Human Resources¹.

Plaintiff Burbank brought this action for (1) age discrimination pursuant to the Age Discrimination in Employment Act, 29 U.S.C.A. § 621 ("ADEA"), (2) breach of contract for wrongful discharge, and (3) breach of contract under a variety of alternative theories. Defendant seeks Summary Judgment, pursuant to Fed.R.Civ.P. 56, arguing that its termination of Plaintiff was legitimate and nondiscriminatory, and not a pretext for age discrimination. Secondly, WorldConnect contends that Plaintiff's employment was "at will" and could be terminated by either party, and therefore, Defendant cannot be liable for breach of contract under any theory.

Legal Analysis

Summary Judgment Standard

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

¹The Court recognizes there is a question of fact remaining as to whether the resignation was voluntary or coerced under the threat of termination. However, in light of the Courts ultimate holding, this is not a material fact.

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).

A recent Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

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.)

Id. at 1521.

ADEA Claim

Plaintiff Burbank's ADEA claim can be reviewed using the framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-804 (1973). Plaintiff must first establish a prima facie case of age discrimination by proving that: (1) Plaintiff was within the protected age group; (2) he was doing satisfactory work; (3) he was discharged despite adequacy of work; and (4) he was replaced by a younger person. 29 U.S.C.A. §§ 621-634. The burden then shifts to the employer to show a legitimate, nondiscriminatory reason motivated the decision to terminate Plaintiff. Plaintiff then has the burden to rebut Defendant's showing by demonstrating that proffered justification is pretext. McDonnell Douglas Corp., 411 U.S. at 802.

The Court assumes without deciding that Plaintiff has met the burden of proving a prima facie case for the purpose of Defendant's Motion for Summary Judgment. The Court also finds that Defendant WorldConnect has come forward with a legitimate reason for the termination of Burbank's employment, namely that Plaintiff made sexually inappropriate comments to a subordinate female employee while serving as the acting Director of Human Resources.

The burden returns to Plaintiff, who must either provide direct evidence of discrimination or demonstrate that Defendant's reason for terminating his employment was a pretext for age discrimination. Beaird v. Seagate Technology, Inc., 145 F.3d 1159 (10th Cir. 1998). "Pretext can be shown by such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employers proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." Hardy v. S.F. Phosphates Ltd. Co., 1999 WL 401722, -- F.3d -- (10th Cir. 1999), (internal quotation marks and citation omitted)(quoting

Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997)). Even after demonstrating pretext, Plaintiff has the ultimate burden of establishing that age was the “determining factor” in Defendants decision to terminate the employment². Lucas v. Dover Corp., Norris Div., 857 F.2d 1397 (10th Cir. 1988).

Mr. Burbank presented no direct evidence that WorldConnect discriminated against him on the basis of his age. Rather, he argues that his treatment of past employees Mark Pettyjohn and Daniel Curry, both under the age of forty, set precedent that WorldConnect would not terminate employees for sexual off-color jokes or other sexually inappropriate comments. Plaintiff contends that a jury could infer from these facts that Defendant’s true intention was to discriminate against Burbank on the basis of his age. However, neither of these employees was serving Defendant WorldConnect as the Human Resources Director. Therefore these employees are not similarly situated to Plaintiff and treatment of these employees is not persuasive evidence of pretext. Defendants Motion for Summary Judgment as to the age discrimination claim is granted.

Breach of Contract Claims

Plaintiff Burbank brings alternative claims for breach of contract against Defendant. First, Plaintiff contends Defendant made a contractual agreement to not terminate him without progressive discipline, as described in the WorldConnect’s Policy and Procedure Manual. In the alternative, Plaintiff alleges that Defendant made a contractual obligation to investigate all alleged

²The Court assumes arguendo that the termination of employment was the achieved through acts of the Defendant, rather than resignation by Plaintiff.

sexual harassment complaints, and that there was no such investigation into the allegations by Ms. Douglas.

Under Oklahoma law, employment must be considered terminable at-will unless the employee can prove substantive restrictions on the employer's power to discharge. Vice v. Conoco, Inc., 150 F.3d 1286, 1289 (10th Cir. 1999). Furthermore, employer's manuals which provide suggestions to aid supervisors in employee discipline matters do not restrict the employer's power to terminate employee unless the manual expressly alters the at-will employment status of a particular employee. Vice, 150F.3d at 1290.

Plaintiff argues that a oral contract was created with Defendant WorldConnect, citing Langdon v. Saga Corp., 569 P.2d 524(Okla. App. 1976). Defendant contends that there was no such contract, express or implied, between the two parties. While the Court is willing to accept for the purpose of this argument that a contract was entered into between the parties, Plaintiff's argument misperceives the essence of the employer-employee relationship where either party may terminate the relationship at will. Plaintiff's own authority states that where "employment was under an oral contract which provided for periodic compensation but which had no fixed term. . . . [e]ssentially this was an employment contract terminable at will by either party." Langdon, 569 P.2d at 526.

Plaintiff contends that the terms of the policy and procedure manual alter the nature of the employment and assure progressive discipline for sexual harassment cases. The Court is not so persuaded. Employer manuals which do not mandate specific termination procedures will not be construed to restrict employer's power to terminate an at-will employee. Vice, 150F.3d at 1288; see also Williams v. Maremont Corp., 875 F.2d 1476 (10th Cir. 1989). Furthermore, Defendants

own policy manual, as drafted by Plaintiff, states that all employment is on "at will" basis and nothing in the manual shall be construed to modify this relationship. The Court finds that the employment between Plaintiff and Defendant was at-will and that Defendant had no legal duty to implement progressive discipline or investigate the sexual harassment allegations.

The Defendant's Motion for Summary Judgment (Docket #5) is GRANTED.

IT IS SO ORDERED THIS 12th DAY OF ~~JUNE~~, 1999.

A handwritten signature in cursive script, reading "James O. Ellison", written over a horizontal line.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

TEAM TIRES PLUS, LTD.,
a Minnesota Corporation,

Plaintiff,

vs.

TIRE PLUS, INC.,
d/b/a, TIRE PLUS+,
an Oklahoma Corporation

Defendant.

449
Case No. 98-CV-499 K(E) ✓

ENTERED ON DOCKET
DATE JUL 02 1999

F I L E D

JUL 02 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

The above-entitled action having been fully, finally and completely compromised and settled between the parties for a valuable consideration, the receipt and sufficiency of which are hereby acknowledged by Plaintiff, Team Tires Plus, Ltd., and Defendant, Tire Plus, Inc., d/b/a Tire Plus+,

IT IS HEREBY ORDERED, that the action, including any and all claims and counterclaims, be, and hereby is, dismissed with prejudice and on its merits, with each party bearing its respective costs and attorneys' fees.

Dated: June 29, 1999.


UNITED STATES DISTRICT JUDGE

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

TEAM TIRES PLUS, LTD.,
a Minnesota Corporation,

Plaintiff,

vs.

TIRE PLUS, INC.,
d/b/a, TIRE PLUS+,
an Oklahoma Corporation

Defendant.

449
Case No. 98-CV-499 K(E)

STIPULATION AND ORDER
FOR DISMISSAL

ENTERED ON DOCKET

DATE **JUL 02 1999**

FILED

JUN 28 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

STIPULATION

The above-entitled action having been fully, finally, and completely compromised and settled between the parties,

IT IS HEREBY STIPULATED AND AGREED by and between the parties through their respective counsel that the same may be and hereby is dismissed, including any and all claims and counterclaims, on the merits and without costs and disbursements to any party, and that the Court, pursuant to this Stipulation, enter an Order directing judgment of dismissal with prejudice as set forth below.

Dated: June 24, 1999

MACKALL, CROUNSE & MOORE, PLC

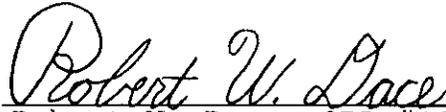
By: 

Lawrence R. Commers
Michael R. Gray
Mackall, Crouse & Moore
1400 AT&T Tower
901 Marquette Avenue
Minneapolis, MN 55402
Telephone: (612) 305-1400

And

NICHOLS, WOLFE, STAMPER, NALLY,
FALLIS & ROBERTSON, INC.
David E. O'Meilia
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124 East Fourth Street
Tulsa, OK 74103-5010

ATTORNEYS FOR PLAINTIFF



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McAfee & Taft
A Professional Corporation
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And

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Craig Fitzgerald, OBA #15233
Tilly & Associates
Two West Second St., Suite 2220
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Tulsa, OK 74101-3645
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And

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Wilson, Cain & Acquaviva
1516 South Boston, Suite 315
Tulsa, OK 74119
Telephone: (918) 583-4777
Fax: (918) 583-1466

And

Eugene Robinson, OBA #10119
The Robinson Law Firm
15 West Sixth Street, Suite 1850
Tulsa, OK 74119
Telephone: (918) 587-2311
Fax: (918) 587-2317

ATTORNEYS FOR DEFENDANT

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

CHARLES WHITESIDE,)
)
Plaintiff,)
)
v.)
)
FLINT INDUSTRIES, INC.;)
LOCAL 580 INTERNATIONAL)
BROTHERHOOD OF BOILERMAKERS,)
IRON SHIPBUILDERS, BLACKSMITHS,)
FORGERS & HELPERS,)
)
Defendants.)

ENTERED ON DOCKET
DATE JUL 1 1999

Case No. 98-CV-513-H ✓

FILED
JUN 30 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

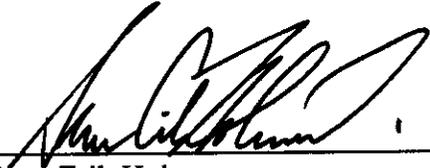
ADMINISTRATIVE CLOSING ORDER

Plaintiff Charles Whiteside and Defendant Flint Industries, Inc. having entered into a settlement agreement, and Plaintiff having failed to serve the remaining Defendant, 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 from the file date of this order 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 30th day of June, 1999.



Sven Erik Holmes
United States District Judge

10

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

ENTERED ON DOCKET

DATE JUL 1 1999

AMWAY CORPORATION,

Plaintiff,

v.

The PROCTOR & GAMBLE COMPANY
HARRIS, Tulsa County District Attorney;
and THE PROCTOR & GAMBLE
DISTRIBUTING COMPANY,

Defendants.

Western District of Michigan
Case No. 1:98CV726

Case No. 99-MC-004-H(E) ✓

FILED

JUN 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on non-party Kenneth L. Lowndes' Appeal of Denial of Motion to Quash (Docket # 9), filed March 24, 1999. The underlying litigation is a civil case, pending in the United States District Court for the Western District of Michigan, between Plaintiff Amway Corporation ("Amway") and Defendant Procter & Gamble Company ("Procter & Gamble").

Mr. Lowndes, a resident of the Northern District of Oklahoma, was served with a subpoena duces tecum by Plaintiff Amway on March 1, 1999, ordering him to appear in the Tulsa offices of Amway counsel on March 8, 1999 and to bring documents related to the subject litigation. Mr. Lowndes filed his Motion to Quash Subpoena (Docket # 3) in open court on March 10, 1999, during a hearing before Magistrate Judge Claire V. Eagan on this motion and Amway's Emergency Motion to Compel Production and Preserve Evidence (Docket # 1). At this hearing, the Court denied Mr. Lowndes' Motion to Quash and granted Amway's Emergency Motion to Compel Production and Preserve Evidence.

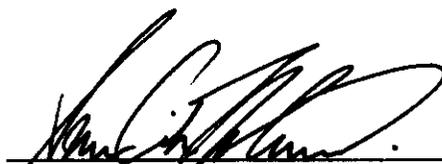
Federal Rule of Civil Procedure 72(a) outlines the procedure by which a party may file objections to a magistrate judge's order on non-dispositive matters. Discovery is a non-

dispositive matter falling under Rule 72(a). See Hutchinson v. Pfeil, 105 F.3d 562, 566 (10th Cir. 1997). A district judge shall modify or set aside the magistrate judge's order on a non-dispositive pretrial matter only if clearly erroneous or contrary to law. See Hutchinson at 566; Fed.R.Civ.P. 72(a). Here, the order of the magistrate judge denying Mr. Lowndes' motion to quash subpoena is neither clearly erroneous nor contrary to law.

Accordingly, Mr. Lowndes' appeal of the denial of his motion to quash is hereby denied.

IT IS SO ORDERED.

This 7th day of July, 1999.



Sven Erik Holmes
United States District Judge

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

JUN 30 1999

FEDERAL DEPOSIT)
INSURANCE CORPORATION,)
)
Plaintiff,)
)
vs.)
)
JOSEPH A. FRATES, *et al.*,)
)
Defendants.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 93-CV-123-H(J) ✓

ENTERED ON DOCKET

DATE JUL 1 1999

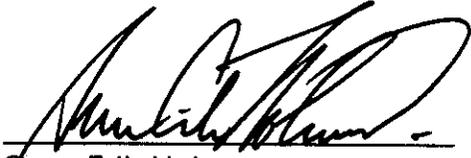
JUDGMENT

The Court has previously granted summary judgment on claims I and II in the Third Amended Complaint. Because claims III-VIII in the Third Amended Complaint were not affected by the Court's prior grant of summary judgment, the Court has not previously entered a final judgment on claims I and II. See Fed. R. Civ. P. 54(b).

Claims III-VIII in the Third Amended Complaint have now been dismissed. For the reasons stated in the Court's prior orders granting summary judgment, the Court now enters final judgment for the Defendant, Joseph A. Frates, and against Plaintiff on claims I and II of the Third Amended Complaint. See Doc. Nos. 392 and 398.

IT IS SO ORDERED.

Dated this 30TH day of June 1999.


Sven Erik Holmes
United States District Judge

4302

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 93-CV-123-H(J) ✓

ENTERED ON DOCKET
DATE JUL 1 1999

FEDERAL DEPOSIT)
INSURANCE CORPORATION,)
)
Plaintiff,)
)
vs.)
)
JOSEPH A. FRATES, *et al.*,)
)
Defendants.)

ORDER

Now before the Court are three motions filed by the Federal Deposit Insurance Corporation ("FDIC") for dismissal with prejudice of claims III-VIII in the Third Amended Complaint as to the remaining Defendants. See Doc. Nos. 427, 428 and 430. The FDIC seeks dismissal with prejudice of claims III-VIII in the Third Amended Complaint due to a settlement reached with the remaining Defendants. The FDIC's three motions to dismiss are GRANTED.

IT IS HEREBY ORDERED that claims III-VIII (Three through Eight) in the Third Amended Complaint be dismissed with prejudice.

Judgment has been entered on claims I and II in the Third Amended Complaint and claims III-VIII have now been dismissed. Consequently, the Court Clerk is directed to show this action as terminated.

Dated this 30TH day of June 1999.



Sven Erik Holmes
United States District Judge

431

MT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JUN 30 1999

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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
PATRICIA RUCKER,)
)
Defendant.)

Case No. 99CV0280E (E)

ENTERED ON DOCKET
DATE JUL 01 1999

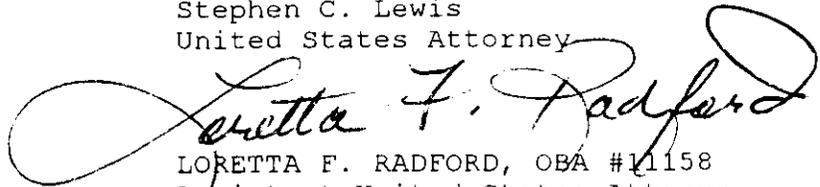
NOTICE OF DISMISSAL

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

Dated this 30th day of June, 1999.

UNITED STATES OF AMERICA

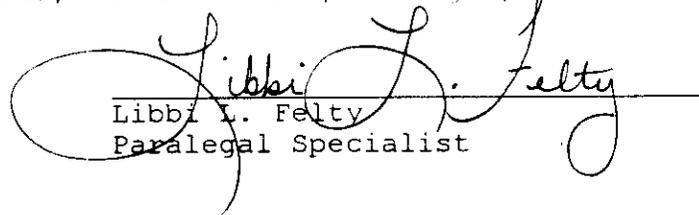
Stephen C. Lewis
United States Attorney



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

CERTIFICATE OF SERVICE

This is to certify that on the 30th day of June, 1999, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Patricia Rucker, 707 S. 7th St., Muskogee, OK 74401-7620.



Libbi L. Felty
Paralegal Specialist

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

F I L E D

JUN 30 1999 *SA*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHRISTOPHER A. COSPER,
443-80-5713

Plaintiff,

vs.

Case No. 98-CV-525-M ✓

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

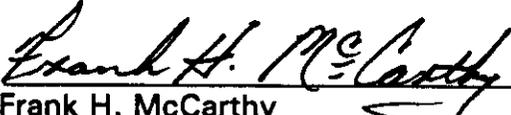
Defendant.

ENTERED ON DOCKET
DATE JUL 01 1999

JUDGMENT

Judgment is hereby entered for the Defendant and against Plaintiff. Dated this

30th Day of June, 1999.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

JUN 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHRISTOPHER A. COSPER,
443-80-5713

Plaintiff,

vs.

Case No. 98-CV-525-M

KENNETH S. APFEL,
Commissioner,
Social Security Administration,

Defendant.

ENTERED ON DOCKET
DATE JUL 01 1999

ORDER

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

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

¹ Plaintiff's August 23, 1995, and September 27, 1995, applications for disability benefits were denied. The denials were affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held October 16, 1996. By decision dated November 21, 1996, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on May 13, 1998. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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

Plaintiff was born June 9, 1965, and was 31 years old at the time of the hearing. He has a 9th grade education and formerly worked as an auto mechanic, tire repairer, equipment cleaner, stocker, motor rewinder, in small engine repair, as a fast food cook, dishwasher, janitor and hand grinder. He claims to have been unable to work since March 29, 1995, as a result of ankle and low back pain.

The ALJ determined that Plaintiff has the residual functional capacity (RFC) to perform a wide range of sedentary work, subject to: no repetitive pushing or pulling of leg controls with the right leg; only occasional stooping, crouching, and bending; no kneeling, crawling, or balancing; only occasional climbing of ramps and stairs; no climbing ladders ropes or scaffolds; no work around unprotected heights; no more than infrequent work on hard or uneven surfaces; and no repetitive overhead reaching. Based on the testimony of the vocational expert, the ALJ determined that there are a significant number of jobs in the national economy that Plaintiff could perform with these limitations. The case was thus decided at step five of the five-step evaluative

sequence for determining whether a claimant is disabled. See *Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the Commissioner failed to meet his burden to prove that he had the educational abilities to perform the work cited by the vocational expert. The Commissioner argues that pursuant to *James v. Chater*, 96 F.3d 1341, 1344 (10th Cir. 1996), Plaintiff is precluded from asserting that he lacks the education to perform unskilled work because he did not adequately raise the issue before the Appeals Council. Plaintiff "concedes that the particular argument presented to this Court was not presented to the Appeals Council by the plaintiff's previous counsel," [Dkt. 15], but argues that he raised the general issue regarding the impact of his educational level sufficiently to preserve the issue.

In *James* the Tenth Circuit announced the rule that "[h]enceforth, issues not brought to the attention of the Appeals Council on administrative review may, given sufficient notice to the claimant, be deemed waived on subsequent judicial review." *Id.* at 1343. After *James*, claimants are required to apprise the Appeals Council of the particularized points of error they intend to argue in the courts. *Id.* Having been decided after the *James* decision, this case is subject to its waiver rule.

In *James*, the Tenth Circuit criticized a summary request for Appeals Council review which did not address the ALJ's decision but merely stated in conclusory terms: "I am disabled and entitled to benefits." *James*, 96 F.3d at 1343. The Court

admonished that "this kind of request for administrative review, which does not identify the issues with any particularity, effectively sandbags the Appeals Council," thereby depriving the court of its informed views on those issues. *Id.* [emphasis supplied]. The *James* Court did not delineate what degree of particularity would be required to avoid a waiver. Plaintiff urges adoption of the Fifth Circuit approach which permits Plaintiff, on appeal to the district court, to expand the general rationale offered in support of the appeal presented to the Appeals Council. See *Paul v. Shalala*, 29 F.3d 208, 210 (5th Cir. 1994). Under this standard, the inquiry is whether the issue asserted in the district court may be viewed as an expansion of the "general rationale" proffered in support of the appeal to the Appeals Council, or a different issue altogether. Assuming, without deciding, that permitting expansion of the "general rationale" would comport with the particularity required by *James*, the court finds that Plaintiff presented a different issue altogether on appeal in this case.

On appeal to the Appeals Council, Plaintiff's previous attorney submitted a two-page letter raising a number of issues. Concerning his educational level, Plaintiff stated "he has only a limited (9th grade) education" and therefore, under the regulations is not considered to have enough education to do semiskilled or skilled jobs, which eliminates an entire category of work. [R. 12] [emphasis supplied]. On appeal to this court, Plaintiff asserts that the finding that he has a "limited" education is infirm. Plaintiff argues that even though he technically has a 9th grade education, the record indicates his actual skills are at a lower grade level which, according to the regulations, 20 C.F.R. § 404.1564, would place him in the "marginal" rather than

"limited" educational category. Plaintiff asks for a remand for a proper determination of his actual educational level and vocational testimony which takes it into account. [Dkt. 7].

Although Plaintiff mentioned his educational level before the Appeals Council, he did not suggest that his true abilities were below the 9th grade level. Rather, his statement that he had "only a limited (9th grade) education" evinces agreement with that finding. Thus, the Appeals Council was not apprised that it should conduct a specific review of Plaintiff's educational achievement. The court finds that Plaintiff failed to raise the error asserted to this court before the Appeals Council, and that Plaintiff's argument to this court is not a mere expansion of the general rationale presented to the Appeals Council. Therefore, pursuant to *James* the error was waived.

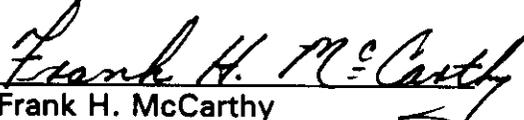
The court rejects Plaintiff's argument that application of *James* would be unfair. Although Plaintiff has changed attorneys, he has been represented by counsel throughout the appeal process. Specifically mentioning the need to satisfy the *James* requirements, Plaintiff's previous counsel requested an additional 30 days in which to submit a brief to the Appeals Council. [R. 14]. Application of *James* to this case serves the goals of preserving the separate roles of the administrative agency and court; eliminating repetitive administrative and judicial proceedings; fostering efficient and effective judicial review; and eliminating delay in resolution of claims.

The court declines Plaintiff's invitation to either stay proceedings pending the Commissioner's resolution of his request to reopen or to remand pursuant to sentence six of 42 U.S.C. § 405(g). Reopening a decision under 20 CFR 404.987 is a

discretionary decision for the Commissioner, and one which is not subject to judicial review. *Brown v. Sullivan*, 912 F.2d 1194, 1196 (10th Cir. 1990). Further, Plaintiff's case does not meet the statutory criteria for a sentence six remand.

Based on the foregoing, the decision of the Commissioner is AFFIRMED.

SO ORDERED this 30th Day of June, 1999.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

ROBERT RASKA,)
)
 Plaintiff,)
)
 vs.)
)
 COMMERICAL FINANCIAL SERVICES,)
 et al.,)
)
 Defendants.)

ENTERED ON DOCKET
DATE JUL 01 1999

No. 98-CV-693-K

F I L E D

JUN 30 1999 *AL*

ADMINISTRATIVE CLOSING ORDER

Phil Lombardi, Clerk
U.S. DISTRICT COURT

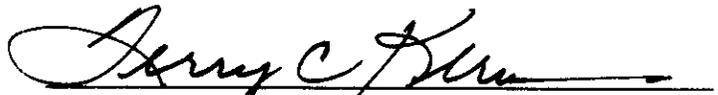
The Court has been advised that Commercial Financial Services, one of the defendants in this action, has filed for bankruptcy. While two individual defendants remain, it has been represented to the Court that there is no objection by either plaintiff's or defendants' counsel to an administrative closing order until the bankruptcy proceedings are resolved. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records without prejudice pending the bankruptcy proceedings involving defendant, Commercial Financial Services, Inc.

The parties are directed to notify the Court of the resolution of the bankruptcy proceedings, within ten (10) days thereafter, so

that the Court may re-open this matter, if necessary, to obtain a final determination of this litigation.

ORDERED this 30 day of June, 1999.

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

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

PAULA RAE POWERS,)
)
Plaintiff,)
)
vs.)
)
MICHAUD, HUTTON, FISHER, and)
ANDERSEN; MARK HUTTON,)
Individually, ANDREW HUTTON,)
Individually, RANDALL FISHER,)
Individually, DONALD ANDERSEN,)
Individually, and GERALD MICHAUD,)
Individually,)
Defendants.)

ENTERED ON DOCKET

DATE JUL 01 1999

No. 98-CV-192 H (E) ✓

FILED

JUN 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 30TH day of JUNE, 1999, it appearing to
the Court that this matter has been resolved, this case is herewith
dismissed with prejudice to the refiling of a future action.



United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JUL 1 1999

GLENN W. LEGGETT,

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Plaintiff,

vs.

Case No. 98-CV-143-J

SINCLAIR OIL CORPORATION,
a Wyoming corporation,

ENTERED ON DOCKET

Defendant.

DATE JUL 1 1999

STIPULATION OF DISMISSAL

Plaintiff, Glen W. Leggett ("Leggett") and Defendant, Sinclair Oil Corporation ("Sinclair"), pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, hereby stipulate and agree that Leggett's claims in this case should be dismissed in their entirety with prejudice as to future refileing.

Respectfully submitted,

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

MOYERS, MARTIN, SANTEE,
IMEL & TETRICK

By: Ronald A. White

Ronald A. White, OBA #12037
Marshall J. Wells, OBA #17162
320 S. Boston Avenue, Suite 400
Tulsa, Oklahoma 74103
(918) 594-0630
(918) 594-0505 (fax)

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James Maupin, OBA # 14966
320 S. Boston, Suite 920
Tulsa, Oklahoma 74103
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ATTORNEYS FOR DEFENDANT
SINCLAIR OIL CORPORATION

ATTORNEYS FOR PLAINTIFF
GLENN W. LEGGETT

C/SAS