

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

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

JAMES S. STARR,)

Petitioner,)

vs.)

LENORA JORDAN,)

Respondent.)

Case No. 98-CV-714-H (J) ✓

ENTERED ON DOCKET

DATE AUG 20 1999

ORDER

Before the Court is Respondent's motion to dismiss time barred petition (Docket #5). Petitioner, a state inmate appearing *pro se*, has filed a response to the motion to dismiss (#9). Respondent's motion 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 is not timely filed and Respondent's motion to dismiss should be granted.

BACKGROUND

On December 1, 1995, Petitioner was sentenced to sixty (60) years imprisonment after being found guilty by a jury of Sexual Abuse of a Child, After Former Conviction of Two Felonies, in Washington County District Court, Case No. CF-95-51. Petitioner appealed his conviction and sentence (see #6, Ex. G). On February 20, 1997, the Oklahoma Court of Criminal Appeals affirmed (see #6, Ex. A).

Both Petitioner and Respondent indicate that on May 14, 1997, Petitioner filed an application for post-conviction relief in the state trial court. (#6, Ex. B; #9 at 2). The trial court denied the requested relief in an order entered July 9, 1997. (#6, Ex. B). On August 8, 1997, Petitioner filed

a post-conviction appeal in the Oklahoma Court of Criminal Appeals (#6, Ex. I) where the denial of post-conviction relief was affirmed on August 28, 1997. (#6, Ex. C).

Petitioner filed a petition for writ of habeas corpus in the Oklahoma Supreme Court on October 9, 1997 (#6, Ex. D) requesting review of his post-conviction proceedings. On December 1, 1997, the petition was transferred to the Oklahoma Court of Criminal Appeals (#6, Ex. E) where the petition was denied on December 23, 1997 (#6, Ex. F).

This Court received Petitioner's federal petition for writ of habeas corpus for filing on September 16, 1998 (#1). Petitioner executed the declaration under penalty of perjury on September 9, 1998 (#1 at 10).

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). In general, the limitations period begins to run from the date on which a prisoner's conviction becomes final, but can be extended under the terms of § 2244(d)(1)(B), (C), and (D). Also, the limitations period is tolled or suspended during the pendency of a properly filed state application for post-conviction relief. § 2244(d)(2).

Application of the provisions of § 2244(d) to the instant case leads to the conclusion that this habeas petition was filed after the expiration of the one-year limitations period. Petitioner's conviction became final on or about May 21, 1997, after the 90 day time period for filing a petition for writ of *certiorari* in the United States Supreme Court had lapsed. See Caspari v. Bohlen, 510 U.S. 383, 390 (1994). Therefore, his conviction became final after enactment of the AEDPA. As a result, his one-year limitations clock began to run on May 21, 1997, and, absent a tolling event, a federal petition for writ of habeas corpus filed after May 21, 1998, would be untimely.

Although Petitioner did seek post-conviction relief during the one-year period, Respondent contends that Petitioner's limitations period was not tolled during the pendency of the post-conviction proceeding because Petitioner does not raise the state post-conviction issues in the instant federal petition for writ of habeas corpus. Respondent relies on language from § 2244(d)(2) providing that the limitations period is tolled during the time "a properly filed application for State post-conviction or other collateral review *with respect to the pertinent judgment or claim* is pending" (emphasis added). Respondent reasons that because none of the claims in the instant petition relate to the claims raised in the post-conviction action, § 2244(d)(2) does not apply to suspend the running of the limitations period. The Court disagrees. Because the relevant language of § 2244(d)(2) is written in the disjunctive, pendency of post-conviction or other collateral proceedings related to

either the pertinent judgment or the pertinent claim will serve to toll the limitations period. In his post-conviction application, Petitioner clearly challenged the same judgment he currently seeks to challenge in the instant habeas corpus petition, the judgment entered in Washington County District Court, Case No. CF-95-51. Therefore, pursuant to § 2244(d)(2), the limitations period was suspended during the time Petitioner's "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment" was pending in the state courts.

Petitioner filed his application for post-conviction relief on May 14, 1997, or seven days before his conviction became final. Therefore, the limitations period was suspended from May 21, 1997, the day Petitioner's conviction became final, until the conclusion of post-conviction proceedings on August 28, 1997. Once the Oklahoma Court of Criminal Appeals affirmed the denial of post-conviction relief, Petitioner's one-year limitations clock began to run.

As recited above, Petitioner also filed a state petition for writ of habeas corpus in the Oklahoma Supreme Court during the one-year limitations period. However, the Court finds that the limitations period was not tolled during the pendency of the habeas corpus proceeding because it was not "properly filed" as required by § 2244(d)(2). A "properly filed application," within the meaning of § 2244(d)(2), is one submitted according to the state's procedural requirements, such as the state's rules governing time and place of filing. Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998). In this case, Petitioner, in an attempt to appeal the Oklahoma Court of Criminal Appeals's rejection of his post-conviction application, submitted his petition for writ of habeas corpus to the Oklahoma Supreme Court. Because the Oklahoma Court of Criminal Appeals has exclusive appellate jurisdiction in criminal cases in Oklahoma, Okla. Const. art. 7, § 4; Okla. Stat. tit. 22, § 1087, the Oklahoma Supreme Court lacked jurisdiction to consider the petition and transferred the matter to

the Oklahoma Court of Criminal Appeals. Thus, the habeas corpus petition was not filed in the proper place. After the petition was transferred to the Oklahoma Court of Criminal Appeals, it was promptly denied because Petitioner had improperly filed it as a vehicle to appeal further the denial of post-conviction relief. In filing his state habeas corpus petition, Petitioner failed to conform with state procedural requirements that would allow his petition for writ of habeas corpus to be accorded some level of judicial review. As a result, the Court concludes the state habeas corpus petition was not a "properly filed application" for state collateral review and the federal limitations period was not suspended during its pendency in the state courts.

Therefore, unless Petitioner is entitled to further statutory or equitable tolling, his federal petition had to be filed within 365 days of August 28, 1997, or by August 28, 1998, to be timely. The Court did not receive the petition for filing until September 16, 1998, or 19 days beyond the deadline. Even if Petitioner is given the benefit of the "mailbox rule," his petition is untimely. See Hoggro v. Boone, 150 F.3d 1223, 1226 n.3 (10th Cir. 1998) (recognizing that proof of date petition is placed in prison mail system is sufficient to establish date of "filing"). Although no prison mailing receipt or prison mail log is part of the record in this case, Petitioner executed the Declaration Under Penalty of Perjury on September 9, 1998 (#1 at 10). In the absence of a record demonstrating the date of mailing, September 9, 1998 would be the earliest possible date Petitioner could have mailed his petition. Because September 9, 1998 is twelve (12) days beyond the August 28, 1998 deadline, this petition is untimely and should be dismissed unless Petitioner demonstrates that the limitations period should be otherwise tolled.

In his objection to Respondent's motion to dismiss (#9), Petitioner cites Flanagan v. Johnson, 154 F.3d 196 (9th Cir. 1998), and appears to argue that because he, like the petitioner in Flanagan,

cannot establish a "factual predicate" for his claims until he is provided a copy of his trial transcript, then his habeas action is not time-barred and should be allowed to proceed under § 2244(d)(1)(D).¹ In Flanagan, the petitioner argued that a lawyer's affidavit was necessary to establish, by negative implication, a "factual predicate" of his due process claim. However, the Ninth Circuit Court of Appeals rejected the petitioner's argument finding that the petitioner had "confus[ed] his knowledge of the factual predicate of his claim with the time permitted for gathering evidence in support of that claim." Id. at 199. The Court went on to state that "[s]ection 2244(d)(1)(D) does not convey a statutory right to an extended delay . . . while a habeas petitioner gathers every possible scrap of evidence that might, by negative implication, support his claim." Id. Petitioner in the instant case never even indicates how the trial records are necessary to establish a "factual predicate" of his claim(s). The Court concludes, therefore, that Petitioner is not entitled to an extension of the limitations period under § 2244(d)(1)(D).

Petitioner also cites to Calderon v. United States District Court for Central District of California, 112 F.3d 386, 391 (9th Cir. 1997), and argues that he is entitled to equitable tolling of the limitations period due to the State of Oklahoma's refusal to provide transcripts to himself and other indigent defendants. Petitioner claims that because he is unable to recite trial proceedings, he is prohibited from filing a proper federal habeas corpus petition. (#9 at 7). Although § 2244(d) is not jurisdictional and as a limitation may be subject to equitable tolling, Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998) (indicating equitable tolling principles apply only where a prisoner has diligently pursued federal habeas claims), the Court is not persuaded by Petitioner's attempts to

¹Under § 2244(d)(1)(D), the limitations period may begin to run from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."

justify his late filing. After reviewing the petition filed by Petitioner, the Court finds that neither transcripts nor other trial records were necessary for preparation of the petition. Petitioner's first two claims, that he was denied a fair trial based on erroneous evidentiary rulings and that his sentence was excessive, were both raised on direct appeal and could be presented to this Court without the trial records. Similarly, although his third claim, that he was denied access to the state courts, is based on the state's failure to provide the requested records, possession of the records was not necessary for presentation of the claim to this Court. Therefore, the Court finds that the trial records were not required for preparation of this petition and that the alleged failure of the state to provide the requested records does not constitute "extraordinary circumstances" sufficient to justify equitable tolling of the limitations period. Id.; see also Osborne v. Boone, No. 99-7015, 1999 WL 203523 (10th Cir. April 12, 1999) (unpublished opinion) (refusing both to extend the limitations period under § 2244(d)(1)(B) and to equitably toll the limitations period based on petitioner's allegation that the state impeded his filing by not providing records and transcripts).

Furthermore, the Court notes that Petitioner offers no explanation for the nearly nine (9) month delay between the denial of his petition for writ of habeas corpus by the Oklahoma Court of Criminal Appeals on December 23, 1997 and the filing of the instant petition on September 16, 1998. The Court finds, therefore, that Petitioner did not diligently pursue his habeas corpus claims. As a result, the Court declines to excuse Petitioner's untimely filing and concludes Respondent's motion to dismiss should be granted.

CONCLUSION

Because Petitioner failed to file his petition for writ of habeas corpus within the one-year limitations period, Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations should be granted.

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 (#5) is **granted**.
2. The petition for writ of habeas corpus is **dismissed with prejudice**.

IT IS SO ORDERED.

This 18TH day of August, 1999.


Sven Erik Holmes
United States District Judge

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

EARL TILLERY and 469 others,)
individually and on behalf of all others)
similarly situated,)

Plaintiffs,)

v.)

TRANSAMERICA ASSURANCE)
COMPANY, a foreign insurance)
corporation, and FUTURE PLANNING)
ASSOCIATES, INC., a corporation,)

Defendants.)

ENTERED ON DOCKET
DATE AUG 20 1999

99-CV-269-H(M) ✓

FILED

AUG 20 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on Plaintiffs' Motion for Remand filed May 6, 1999 (Docket # 8). The Court heard argument on the motion on August 13, 1999, and at that time stated, based upon a review of the arguments and authorities presented by counsel in the original and supplemental briefs on the matter, that it is without subject matter jurisdiction over the instant case and Plaintiffs' Motion to Remand would be granted.

I

This suit was initially filed on March 19, 1999, in Tulsa County District Court.

Defendants in this case filed a Notice of Removal on April 14, 1999. Defendants' Notice of Removal provides in pertinent part:

2. The value of the matter in controversy in this case exceeds \$75,000, exclusive of interests and costs.
3. Transamerica Assurance Company is a Missouri corporation, with its principal place of business located in Los Angeles, California.
4. FPA is a New York corporation, with its principal place of business located in New York.
5. Plaintiffs are residents and citizens of the State of Oklahoma and no defendant is a

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citizen or resident of Oklahoma. The Defendants, therefore, are of complete diversity of citizenship from plaintiffs.

6. This Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332(a)(1), which provides that the district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different states. The entire action may therefore be removed pursuant to 28 U.S.C. § 1446(b).
7. In addition, this Court has federal question and subject matter jurisdiction over this action pursuant to 29 U.S.C. §§ 1001, et seq. (ERISA), in that plaintiffs' claims "relate to" an employee benefit plan. See Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987).

See Defendant's Notice of Removal at 2-3, ¶¶ 2-7. In support of their Notice of Removal, Defendants appended only a copy of Plaintiffs' state court petition. See id. at ex. A. Plaintiffs' state court petition, in part, alleges that Defendants "presented an insurance plan to members of the Transport Worker's Union of America, referred to as the "TWU Optional Term Life Insurance Plan" (OTP)[,]" and that in promoting the plan, Defendants made materially false representations "at numerous meetings of TWU workers." See Petition, at 2-3, ¶¶ 7, 9.

In response to Plaintiffs' Motion to Remand, Defendants respond that this Court may exercise jurisdiction over this matter because they have adequately alleged in their Notice of Removal sufficient facts to support a finding that diversity jurisdiction and federal question jurisdiction exist. The Court will address each of these matters in turn.

II

It is well-settled that federal courts are courts of limited jurisdiction. If at any time before final judgment it appears the court lacks subject matter jurisdiction, this Court must remand the matter to state court. See 28 U.S.C. § 1447(c). Initially, the Court notes that with respect to diversity jurisdiction, "[d]efendant's right to remove and plaintiff's right to choose his forum are not on equal footing; for example, unlike the rules applied when plaintiff has filed suit in federal

court with a claim that, on its face, satisfies the jurisdictional amount, removal statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand.” Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994).

In order for a federal court to have diversity jurisdiction, the amount in controversy must exceed \$75,000. 28 U.S.C. § 1332(a). The Tenth Circuit has clarified the analysis which a district court should undertake in determining whether an amount in controversy is greater than \$75,000. The Tenth Circuit stated:

[t]he amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal. The burden is on the party requesting removal to set forth, in the notice of removal itself, the “underlying facts supporting [the] assertion that the amount in controversy exceeds [\$75,000].” Moreover, there is a presumption against removal jurisdiction.

Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995) (citations omitted) (emphasis in original); e.g., Hughes v. E-Z Serve Petroleum Marketing Co., 932 F. Supp. 266 (N.D. Okla. 1996) (applying Laughlin and remanding case); Barber v. Albertson’s, Inc., 935 F. Supp. 1188 (N.D. Okla. 1996) (same); Martin v. Missouri Pacific R.R. Co. d/b/a Union Pacific R.R. Co., 932 F. Supp. 264 (N.D. Okla. 1996) (same); Herber v. Wal-Mart Stores, 886 F. Supp. 19, 20 (D. Wyo. 1995) (same); Homolka v. Hartford Ins.. Group, Individually and d/b/a Hartford Underwriters Ins.. Co., 953 F. Supp. 350 (N.D. Okla. 1995) (same); Johnson v. Wal-Mart Stores, Inc., 953 F. Supp. 351 (N.D. Okla. 1995) (same); Maxon v. Texaco Ref. & Marketing Inc., 905 F. Supp. 976 (N.D. Okla. 1995) (same).

Further, “both the requisite amount in controversy and the existence of diversity must be affirmatively established on the face of either the petition or the removal notice.” Laughlin, 50 F.3d at 873. See Asociacion Nacional de Pescadores a Pequena Escala o Artesanales de

Colombia (Anpac) v. Dow Quimica de Colombia S.A., 988 F.2d 559, 565 (5th Cir. 1993)

(finding defendant's conclusory statement that "the matter in controversy exceeds [\$75,000] exclusive of interest and costs" did not establish that removal jurisdiction was proper); Gaus v. Miles, Inc., 980 F.2d 564 (9th Cir. 1992) (mere recitation that the amount in controversy exceeds \$75,000 is not sufficient to establish removal jurisdiction).

Where the face of the complaint does not affirmatively establish the requisite amount in controversy, the plain language of Laughlin requires a removing defendant to set forth, in the removal documents, not only the defendant's good faith belief that the amount in controversy exceeds \$75,000, but also facts underlying defendant's assertion. In other words, a removing defendant must set forth specific facts which form the basis of its belief that there is more than \$75,000 at issue in the case. The removing defendant bears the burden of establishing federal court jurisdiction at the time of removal, and not by supplemental submission. Laughlin, 50 F.3d at 873. See Herber, 886 F. Supp. at 20 (holding that the jurisdictional allegation is determined as of the time of the filing of the Notice of Removal). And the Tenth Circuit has clearly stated what is required to satisfy that burden. As set out in Johnson v. Wal-Mart Stores, Inc., 953 F. Supp. 351 (N.D. Okla. 1995), if the face of the petition does not affirmatively establish that the amount in controversy exceeds \$75,000.00, then the rationale of Laughlin contemplates that the removing party will undertake to perform an economic analysis of the alleged damages with underlying facts.

In its notice of removal, Defendants failed to set forth any specific facts that demonstrate the federal amount in controversy has been met. Neither Plaintiff's Petition or Defendants' Notice of Removal indicate that the amount in controversy here exceeds \$75,000. Indeed,

Defendant Future Planning Associates, Inc. admits in its response brief that “the relevant allegations as to the amount in controversy may not be in strict compliance with . . . Laughlin[.]” Combined Reply to Defendants’ Motions to Dismiss and Response in Opposition to Plaintiffs’ Motion to Remand. at 1-2 n.1. Accordingly, the Court finds that Defendants’ conclusory assertions contained in their Notice of Removal do not satisfy the standards set forth by the Tenth Circuit in Laughlin, and concludes that removal is improper on the basis of diversity jurisdiction.

III

Defendants further allege that removal is proper in this case on the basis of federal question jurisdiction. It is settled law that a suit arises under federal law, and is thus removable to federal court, only where the plaintiff’s statement of his or her own cause of action shows that it is based on federal law. See Schmeling v. Nordam, 97 F.3d 1336, 1339 (10th Cir. 1996).

Defendants assert that the claims contained in Plaintiffs’ Petition relate to an employee benefit plan and are thus subject to, and are preempted by, ERISA. See generally 29 U.S.C. §§ 1001, et seq. Plaintiffs respond that the Petition may be read to state a claim under Woodworker’s Supply, Inc. v. Principal Mutual Life Ins., 170 F.3d 985 (10th Cir. 1999). At the hearing, Defendants’ counsel admitted that the Petition could be so construed, but sought to distinguish this action from Woodworker’s Supply based on statements by the attorneys at the hearing relating to the nature of the plan at issue and the role of the union in offering the plan to Plaintiffs. Such statements, however, were neither supported by affidavit or other admissible evidence nor made part of the record at the time Defendants filed the Notice of Removal in this Court. Thus, Defendants have failed to set forth any specific facts that demonstrate the unsupported assertion in their motion that the claim set forth in Plaintiffs’ Petition relates to an

employee welfare benefit plan. Since Plaintiffs' Petition may be read to state a cause of action under Oklahoma law of the kind permitted to proceed in state court under Woodworker's Supply, the Court concludes that Defendants have not met their burden of establishing that jurisdiction is proper in federal court. Accordingly, the Court is without subject matter jurisdiction over this case and this matter is hereby remanded to the Oklahoma District Court for the District of Tulsa pursuant to 28 U.S.C. § 1447(c).

IV

At the hearing, Defendants requested leave to file a request that the order granting remand in this case be entered in such a way as to be appealable. Subsequently, Defendants filed Motions for Leave to Amend the Notice of Removal or in the Alternative, to Request that Any Remand Order Clarify that it is a Non-§1447(c) Order. With respect to the former request, the Court finds that there is no authority which supports an amendment of the Notice of Removal under the circumstances here, as the Court must look to the record supporting the Court's jurisdiction at the time of filing such Notice of Removal. See Laughlin, 50 F.3d at 873.¹ With regard to the alternative request, the Court concludes that there is no legal basis upon which this Court's order of remand due to lack of subject matter jurisdiction may be made appealable. See 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not

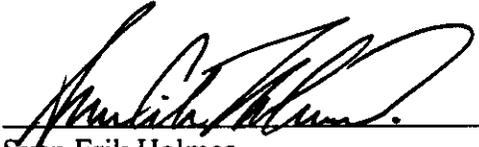
¹In support of their request, Defendants point to 28 U.S.C. § 1653, which provides that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." However, the Court finds that nothing in § 1653 or the controlling authorities which construe it alters the requirements of Laughlin, see, e.g., Hendrix v. New Amsterdam Casualty Co., 390 F.2d 299, 300 (10th Cir. 1968), and thus this statute cannot serve as a basis for supplementing the fact record after a court states at a motion for remand hearing that the record is insufficient to support federal question jurisdiction and an order will be entered forthwith granting the subject motion.

reviewable on appeal or otherwise.”). Therefore, Defendants’ Motions for Leave to Amend the Notice of Removal or in the Alternative, to Request that Any Remand Order Clarify that it is a Non-§1447(c) Order filed August 17, 1999 are hereby denied.

Based on the above, the Clerk of the Court is hereby directed to remand this matter to the Tulsa County District Court for the State of Oklahoma.

IT IS SO ORDERED.

This 20TH day of August, 1999.



Sven Erik Holmes
United States District Judge

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

MICHAEL RAY READ,)
)
Petitioner,)
)
vs.)
)
STANLEY GLANZ, Sheriff of Tulsa)
County, Oklahoma, and)
STATE OF OKLAHOMA,)
)
Respondents.)

ENTERED ON DOCKET
DATE AUG 20 1999

Case No. 99-CV-527-H (M) ✓

FILED

AUG 18 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court in this 28 U.S.C. § 2254 habeas corpus proceeding are the motion to intervene filed by Shawna K. Dunn (Docket #8), the motion to dismiss the State of Oklahoma (#9), Respondent Stanley Glanz's response to the Court's show cause order (#7), Petitioner's motion to summarily strike the motion to intervene filed by Shawna K. Dunn (#10), and Petitioner's motion to grant writ of habeas corpus forthwith (#11).

At the time Petitioner filed his petition for writ of habeas corpus, he was incarcerated at the Tulsa County Jail pursuant to a finding of indirect contempt of court for willful failure to pay child support, entered in Tulsa County District Court, Case No. FD-90-1416. See #2, Appendix Item 1, Order of Commitment for Punishment. Petitioner is presently in the custody of Tulsa County Sheriff Stanley Glanz.

This Court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The primary function of the writ is to release from unlawful imprisonment. Black's Law Dictionary 709

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(6th ed. 1990). It is a legal contest between the jailer and the jailed. The formal parties to habeas corpus proceeding brought by a party seeking immediate release based on an allegedly unconstitutional detention are the petitioner prisoner and the respondent custodian. See Rule 2, *Rules Governing Section 2254 Cases*.

In the instant case, the appropriate parties are Petitioner, Michael Ray Read, and his custodian, Respondent Stanley Glanz. Although Shawna K. Dunn, Petitioner's former wife, may be a real party in interest in the underlying divorce proceedings in Tulsa County District Court, she has no legally protectable interest in this federal habeas corpus matter where the sole inquiry of this Court concerns the constitutionality of Petitioner's incarceration. As a result, the Court finds the motion to intervene should be denied. The denial of the motion to intervene renders moot Petitioner's motion to summarily strike the motion to intervene.

As to the motion to dismiss filed by the Attorney General of the State of Oklahoma, Respondent State of Oklahoma does not have present custody of Petitioner and is not, therefore, a proper party to this proceeding. As a result, the Court finds the motion to dismiss the State of Oklahoma should be granted.

Lastly, the Court finds that because Sheriff Glanz retains physical custody of Petitioner pursuant to a Tulsa County District Court order, he is the proper Respondent in this matter. Although Respondent Glanz claims he has no personal or independent knowledge of the facts of the underlying case, FD-90-1416, and therefore "neither objects to nor lends support to the issuance of a Writ of Habeas Corpus in this case," the Court nonetheless finds that Respondent Glanz, as Petitioner's jailer, is responsible for filing a proper response to the claims raised in the petition for writ of habeas corpus. As stated in the Court's previous show cause order entered in this matter on

July 19, 1999, Respondent Glanz shall prepare his response pursuant to Rule 5, *Rules Governing Section 2254 Habeas Corpus Cases*. That rule states:

The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding. The answer shall indicate what transcripts...are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcript as the answering party deems relevant. The court may on its own motion or upon request of the petitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.

As an alternative to filing a Rule 5 answer, Respondent Glanz may file a motion to dismiss based upon alleged nonexhaustion of state remedies (see 28 U.S.C. § 2254(b)), abuse of the writ pursuant to 28 U.S.C. § 2244, failure to comply with the 1-year limitations period, or lack of jurisdiction. If Respondent files a motion to dismiss based upon alleged nonexhaustion, and if Petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of Petitioner's brief on appeal and of the opinion of the appellate court, if any, should be filed by Respondent with the motion to dismiss. If Respondent files a motion to dismiss based upon alleged untimeliness, Respondent should file with the motion copies of all documents demonstrating relevant dates of any state court proceedings pursued by Petitioner.

Petitioner's "motion to grant writ of habeas corpus forthwith" is premised on Respondent Glanz's contention that he is not a "real party in interest" in this matter. However, because Sheriff

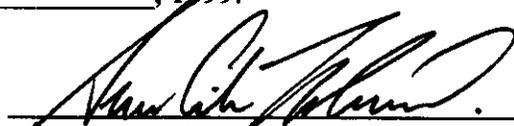
Glanz is in fact the proper Respondent in this action, the Court finds Petitioner's motion to grant the writ forthwith should be denied at this time.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The motion to intervene filed by Shawna K. Dunn (#8) is **denied**.
2. The motion to dismiss the State of Oklahoma (#9) is **granted** and the State of Oklahoma is dismissed from this action.
3. Petitioner's motion to summarily strike the motion to intervene (#10) is **moot**.
4. Petitioner's motion to grant the writ of habeas corpus forthwith (#11) is **denied**.
5. Respondent Glanz Respondent shall **show cause** why the writ should not issue and **file a** response to the petition for a writ of habeas corpus within fifteen (15) days from the date of entry of this order. Extensions of time will be granted for good cause only. See Rule 4, Rules Governing § 2254 Cases.
6. Petitioner may file a **reply brief** within thirty (30) days after the filing of Respondent's response. If Respondent files a motion to dismiss, Petitioner has fifteen (15) days from the filing date of the motion to respond. Failure to respond may result in the automatic dismissal of this action. See Local Rule 7.1 for the Northern District of Oklahoma.

IT IS SO ORDERED.

This 18TH day of August, 1999.


Sven Erik Holmes
United States District Judge

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

TED EZELL,)
)
Petitioner,)
)
vs.)
)
BOBBY BOONE,)
)
Respondent.)

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Case No. 98-CV-334-H (J)

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

ORDER

Before the Court is Respondent's motion to dismiss petition for writ of habeas corpus due to expiration of the limitations period (Docket #6). Petitioner has filed a response to the motion (#8). Respondent's motion to dismiss is premised on the allegation that Petitioner, a state inmate appearing *pro se*, failed to file this petition for writ of habeas corpus within the one-year limitations period prescribed by 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). For the reasons discussed below, the Court finds that the petition is untimely filed and Respondent's motion to dismiss should be granted.

BACKGROUND

Petitioner was convicted by a jury of First Degree Rape (Count 1) and Lewd Molestation (Count 2) in Tulsa County District Court, Case No. CRF-88-3173. He was sentenced to 200 years imprisonment on Count 1 and to 20 years imprisonment on Count 2. Petitioner appealed his judgment and sentence to the Oklahoma Court of Criminal Appeals where, on December 8, 1995, his convictions were affirmed (#7, Ex. A). Nothing in the record indicates Petitioner sought *certiorari* review in the United States Supreme Court.

Petitioner sought post-conviction relief in the state district court on January 2, 1997 (see #7,

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Ex. B). According to the petition in error, the state district court denied post-conviction relief on January 15, 1997¹ (#7, Ex. B). On February 21, 1997, Petitioner appealed the denial of post-conviction relief (#7, attachment to Ex. B). On March 4, 1997, the Oklahoma Court of Criminal Appeals declined jurisdiction because Petitioner failed to attach a copy of the district court's order as required by the procedural rules (id.). Petitioner requested reconsideration of the order declining jurisdiction. On March 28, 1997, the state appellate court again declined jurisdiction citing both Petitioner's failure to attach the district court's order as well as the untimeliness of the February 21, 1997 petition in error (id.).

On May 20, 1997, Petitioner filed an application for appeal out of time in the state district court. Upon the issuance of a writ of mandamus by the Oklahoma Court of Criminal Appeals on February 10, 1998 (#8, Ex. A), the district court entered a ruling on February 24, 1998, recommending that an appeal out of time be denied (#8, Ex. B). It does not appear that Petitioner appealed the district court's order. However, Petitioner did file an application for post-conviction relief directly in the Oklahoma Court of Criminal Appeals on November 17, 1997, during the pendency of his application for an appeal out of time in the state district court (#7, attachment to Ex. B).

Petitioner filed the instant petition for writ of habeas corpus in the United States District Court for the Eastern District of Oklahoma on March 31, 1998 (#1).

¹The Court notes that the handwritten date on the state district court's order denying post-conviction relief is January 15, 1996. However, the entry of the year as "1996" appears to be an error because the year indicated on the district court's file stamp is "1997." Furthermore, Petitioner states in his petition in error that the district court denied relief on "January 15, 1997."

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, were afforded a one-year grace period within which to file for federal habeas corpus relief.

In addition, the tolling provision of 28 U.S.C. § 2244(d)(2) applies in § 2254 cases 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 while pursuing state post-conviction proceedings properly filed during the grace period.

Application of these principles to the instant case leads to the conclusion that this habeas petition fails to meet the one-year limitations period. Petitioner's conviction became final on or about March 6, 1996, after the 90 day time period for filing a petition for writ of *certiorari* in the United States Supreme Court had lapsed. See Caspari v. Bohlen, 510 U.S. 383, 390 (1994). Therefore, his conviction became final before enactment of the AEDPA and, as a result, his limitations clock began to run on April 24, 1996, when the AEDPA went into effect. Petitioner had one year, or until April 23, 1997, to file his petition for writ of habeas corpus.

However, as discussed above, the limitations period is tolled during the grace period when Petitioner had "a properly filed application for State post-conviction or other collateral review" pending in the state courts. 28 U.S.C. § 2244(d)(2). In this case, Petitioner had an application for post-conviction relief pending in the district court for thirteen (13) days, from January 2, 1997 to January 15, 1997. The time Petitioner spent pursuing his post-conviction appeal does not serve to toll the limitations period because the appeal was dismissed as improperly filed. See § 2244(d)(2); Hoggro, 150 F.3d at 1226-27 n. 4. Thus, the limitations period in this case was extended only thirteen (13) days beyond April 23, 1997, or until May 6, 1997. None of Petitioner's other state collateral proceedings, including his application for an appeal out of time, tolls the limitations period

because each was filed after expiration of the grace period as extended. A collateral petition filed in state court after the limitations period has expired no longer serves to toll the statute of limitations. Rashad v. Khulmann, 991 F. Supp. 254, 259 (S.D. N.Y. 1998). Therefore, unless Petitioner can demonstrate that he is entitled to other statutory or equitable tolling of the limitations period, his petition filed March 31, 1998 is clearly untimely.

In his response to the motion to dismiss (#8), Petitioner relies on Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998), and argues only that his petition is timely because the limitations period was tolled during all of the time spent pursuing collateral relief in the state courts. However, as discussed above, Petitioner's limitations period was tolled for only the 13 days his application for post-conviction relief was pending in the state district court. See § 2244(d)(2); Hoggro, 150 F.3d at 1226-27 n. 4. Petitioner does not suggest that the limitations period should be equitably tolled. Therefore, because the limitations period should not be extended beyond May 6, 1997 or equitably tolled in this case, the Court concludes that the petition filed March 31, 1998 is untimely. Respondent's motion to dismiss should be granted and the petition for writ of habeas corpus should be dismissed with prejudice.

CONCLUSION

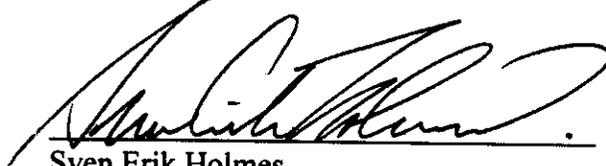
Petitioner failed to file his petition for writ of habeas corpus within the one-year limitations period. Therefore, Respondent's motion to dismiss petition for writ of habeas corpus as barred by the statute of limitations should be granted. The petition for writ of habeas corpus should be dismissed with prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss petition for writ of habeas corpus (#6) is **granted**.
2. The petition for writ of habeas corpus is **dismissed with prejudice**.

IT IS SO ORDERED.

This 18TH day of August, 1999.



Sven Erik Holmes
United States District Judge

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

F I L E D

AUG 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRYAN R. RAMER,

Petitioner,

vs.

RITA MAXWELL,

Respondent.

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Case No. 97-CV-383-B ✓

ENTERED ON DOCKET

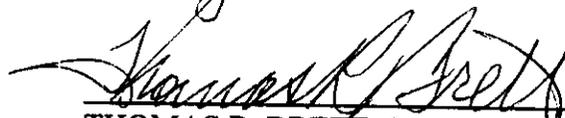
DATE AUG 20 1999

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 without prejudice to refile same, for failure to exhaust state remedies.

SO ORDERED THIS 19th day of Aug, 1999.


THOMAS R. BRETT, Senior Judge
UNITED STATES DISTRICT COURT

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

F I L E D

AUG 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BRYAN R. RAMER,)
)
Petitioner,)
)
vs.)
)
RITA MAXWELL,)
)
Respondent.)

Case No. 97-CV-383-B

ENTERED ON DOCKET
AUG 20 1999
DATE _____

ORDER

Before the Court are Petitioner's motions to vacate judgment (#13), for ruling on the motion to vacate judgment (#s 14 and 25), and to supplement and amend the petition for writ of habeas corpus (#24).

Petitioner seeks vacation of this Court's Order (#11) and Judgment (#12), both entered September 4, 1998, by which the Court granted Respondent's motion to dismiss this "mixed petition" for failure to exhaust state remedies and dismissed the petition for writ of habeas corpus without prejudice. As the basis for his motion to vacate judgment, Petitioner argues that he has no available state remedy for his claims and this Court's Order finding an available state remedy was "based solely on a case that has been overruled by a later case." (#13 at 2).

On November 5, 1998, the Court directed Respondent to file a response to Petitioner's motion to vacate. Respondent complied, filing her "amended response to petition for habeas corpus" on December 28, 1998. Respondent asserts that under Canady v. State, 880 P.2d 391 (Okla. Crim. App. 1994), Petitioner has the state remedy of mandamus available if he is claiming that his entitlement to accrue credits was not discretionary. Respondent also asserts that even if Petitioner has no

available state remedy for his unexhausted claims, Petitioner is "simply not entitled to relief in federal habeas corpus" and his petition should be denied.

In the response to Petitioner's motion to vacate, counsel for Respondent indicates that, at his request, the Oklahoma Department of Corrections ("ODOC") audited Petitioner's accrued credits to assure Petitioner that he was accruing all the credits that he was due. Respondent states that the results of that audit, attached to Respondent's supplemental response (#18, Ex. 1), revealed that Petitioner had accrued 391 credits to which he was not entitled. As a result of the audit, ODOC added 391 days of time to be served to Petitioner's record. That action by ODOC prompted Petitioner to file his motion to supplement and amend petition for writ of habeas corpus (#24) to allege that ODOC's "revocation" of previously earned credits was yet another *ex post facto* violation.

BACKGROUND

In December, 1978, Petitioner pleaded guilty in Tulsa County District Court, Case Nos. CRF-78-1025, -1026, -1027 and -1028, and was convicted of robbery and kidnaping. He was sentenced to two 25 year terms and two 10 year terms of imprisonment, to run concurrently. He did not appeal his convictions.

On November 25, 1983, Petitioner failed to return to the Lawton Community Treatment Center from a pass. The next day, November 26, 1983, he was stopped by New Mexico State Police. During the stop, Petitioner shot two officers, one of whom returned fire, striking Petitioner. Petitioner was incarcerated in New Mexico until July, 1992, as a result of those events. Petitioner was returned to the Comanche County Jail on July 4, 1992. On July 10, 1992 a copy of a misconduct report related to the 1983 escape, was served on Petitioner. A disciplinary hearing was held before

a three-member committee on July 15, 1992. Petitioner was present and allowed to present his defense. At the conclusion of the hearing, the committee unanimously found Petitioner guilty of administrative misconduct and imposed a sentence of 15 days in the disciplinary unit, loss of designated privileges (canteen) for 45 days and loss of all accrued earned credits, totaling approximately 1,489 days.

On December 30, 1993, after exhausting his administrative remedies, Petitioner filed a petition for writ of habeas corpus, construed as a petition for writ of mandamus, in Alfalfa County District Court. (#6, Ex. A). Petitioner raised three (3) grounds for relief all arising from the misconduct proceedings: (1) he was not given timely notice of the charges against him (2) the committee failed to consider his defense and mitigating evidence; and (3) a change in DOC policy which allowed for the forfeiture of all good time credits constituted an *ex post facto* violation. On August 23, 1994, the state district court denied relief. (#6, Ex. B). Petitioner appealed to the Oklahoma Court of Criminal Appeals where, on May 15, 1995, his appeal was dismissed because Petitioner failed to file a brief in support of his petition as required by Rule 10.1, *Rules for the Court of Criminal Appeals*. (#6, Ex. C).

In the instant habeas corpus action, filed April 22, 1997, Petitioner raises six (6) challenges to the administration of his sentence by Oklahoma Department of Corrections officials. He claims that (1) he was denied notice and an impartial tribunal at the 1992 disciplinary hearing in violation of the due process clause, and revocation of all earned credits constituted *ex post facto* violation; (2) DOC's earned credit policy concerning blood donation constitutes due process and *ex post facto* violations; (3) DOC's failure to credit Petitioner for nine (9) days of incarceration at Comanche County Jail in 1992 constitutes due process and *ex post facto* violations; (4) DOC classification

policy denied Petitioner the opportunity to work and earn good time credits constituting due process and *ex post facto* violations; (5) DOC's policy prohibiting restoration of revoked credits for violent offenders constitutes due process and *ex post facto* violations; and (6) Petitioner's ineligibility for public works program as a result of the 1992 issuance of misconduct for 1983 escape constitutes due process and *ex post facto* violations.

ANALYSIS

A. Petitioner's motion to vacate judgment should be granted

In the September 4, 1998 Order, the Court found that, pursuant to Waldon v. Evans, 861 P.2d 311 (Okla. Crim. App. 1993),¹ Petitioner had an available remedy, a petition for writ of mandamus, by which he could challenge the constitutionality of the application of the earned credit statute even if he could not demonstrate entitlement to immediate release. (#11). The Court's ruling was premised on Petitioner's ongoing contention that the ODOC had violated his right to due process by refusing either to award certain earned credits or to provide opportunity to earn certain credits. See #1 at 5, 7, 9, 11, and 12; #23 at 2. However, Petitioner's references to "due process" in his petition are vague and conclusory. Pursuant to Canady v. Reynolds, 880 P.2d 391, 400 (Okla. Crim. App. 1994), a case Petitioner claims is "crystal clear," the Oklahoma Court of Criminal Appeals recognizes the use of the writ of mandamus "to force prison officials to provide . . . constitutional procedural due process, including proper notice and a hearing before revoking credits after they have been previously earned."

¹In his papers filed subsequent to the Court's September 4, 1998 Order, Petitioner repeatedly states that the Court's reliance on Waldon was improper because Waldon has been "overruled" by Canady v. Reynolds, 880 P.2d 391, 400 (Okla. Crim. App. 1994). Petitioner's contention is erroneous. This Court is well aware of the Canady decision. While Canady provides further guidance on the mandamus remedy, it does not overrule Waldon.

Petitioner in this case never claims that ODOC officials have failed to provide notice and a hearing before refusing to include the requested credits in their calculation of his time served. Whether mandamus is an available remedy in a case such as Petitioner's is, at best, unclear. However, during the pendency of this case, a state remedy has become available for Petitioner's unexhausted claims. Therefore, the Court finds Petitioner's motion to vacate should be granted and the Order and Judgment entered September 4, 1998 should be vacated. Nonetheless, as discussed below this action must be dismissed.

B. Petitioner has an available state remedy

In his "notice to the court, and motion for a ruling" (#25), filed on June 11, 1999, Petitioner states that "within the next two months, Ramer **will be eligible** for immediate release upon the granting of the writ." (emphasis in original). Also, in his most recent communication to the Court, his August 16, 1999 letter to the undersigned, Petitioner indicates that he is "being incarcerated beyond my maximum mandatory release date as of now." In other words, Petitioner now claims that he would be entitled to immediate release should he be awarded the earned credits he believes he is entitled to receive. As a result, it is now clear that Petitioner has an available state remedy, the petition for writ of habeas corpus, Canady, 880 P.2d at 400 (citing Waldon, 861 P.2d at 313, and stating that the writ of habeas corpus is appropriate at such time as a prisoner is entitled to immediate release), which must be exhausted before this Court can consider granting habeas corpus relief. 28 U.S.C. § 2254(b); Rose v. Lundy, 455 U.S. 509 (1982) (holding that a federal district court must dismiss a habeas corpus petition containing exhausted and unexhausted grounds for relief). Therefore, the Court concludes that this petition, containing both exhausted and unexhausted claims, must be dismissed without prejudice for failure to exhaust an available state remedy.

CONCLUSION

Because Petitioner now asserts that he would be entitled to immediate release should habeas corpus relief be granted, he definitely has an available state remedy, the petition for writ of habeas corpus, for his unexhausted claims. That remedy must be exhausted before this Court can consider Petitioner's claims. The Court's previous Order and Judgment, both entered September 4, 1998, dismissing this petition for failure to exhaust, should be vacated because they were premised on the availability of the petition for writ of mandamus as a state remedy. Also, because Petitioner seeks to add another unexhausted claim to his petition, his motion to amend or supplement the petition should be denied. Petitioner's motions for a ruling on the motion to vacate should be denied as moot.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Petitioner's motion to vacate judgment (#13) is **granted**. The Order and Judgment entered September 4, 1998 (#s 11 and 12) are **vacated**.
2. Petitioner's motions for ruling on motion to vacate (#s 14 and 25) are **moot**.
3. The petition for writ of habeas corpus (#1) is **dismissed without prejudice for failure to exhaust an available state remedy**.
4. Respondent's motion to dismiss (#5) is **moot**.
5. Petitioner's motion for a ruling (#10) is **moot**.

6. Petitioner's motion to supplement and amend the petition for writ of habeas corpus (#24) is **denied**. The Clerk is directed to return the proposed Supplemented an Amended Petition for Writ of Habeas Corpus to Petitioner.

SO ORDERED THIS 19 day of Aug, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

AUG 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PHILLIP R. EVANS,
SSN: 573-74-5770

Plaintiff,

v.

Kenneth S. Apfel, Commissioner of
Social Security,

Defendant.

No. 98-CV-681-J ✓

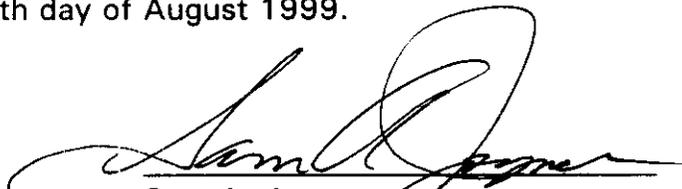
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DATE AUG 20 1999

JUDGMENT

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

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


Sam A. Joyner
United States Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

PHILLIP R. EVANS,
SSN: 573-74-5770

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

FILED

AUG 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 98-CV-681-J ✓

ENTERED ON DOCKET

DATE AUG 20 1999

ORDER^{1/}

Plaintiff, Phillip R. Evans, 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 conclusion that Plaintiff had the capacity to perform light work was not supported by the record, and (2) the ALJ failed to properly develop Plaintiff's claim of a mental impairment. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff alleges he is disabled due to his low back pain, numbness and burning which he experiences in his right leg, and post traumatic stress disorder due to service in Vietnam. [R. at 9].

^{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 Richard J. Kallsnick (hereafter "ALJ") concluded that Plaintiff was not disabled on July 24, 1997. [R. at 9]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on July 10, 1998. [R. at 4].

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In information completed by Plaintiff and submitted to the Commissioner in September 1995, Plaintiff indicated that he no longer drove. A third-party information sheet completed by Nowell Woods on January 2, 1996, indicated that Plaintiff had a drivers license and drove a car. [R. at 84].

A Mental Residual Functional Capacity ("RFC") Assessment completed February 22, 1996, indicated that Plaintiff was moderately limited in numerous categories (fifteen) and markedly limited in his ability to maintain attention and concentrate for extended periods, and markedly limited in his ability to sustain an ordinary routine without special supervision. [R. at 100-101]. Plaintiff was described as "not significantly limited," in his ability to remember simple instructions, in his ability to carry out short instructions, in his ability to ask simple questions, in his ability to maintain socially appropriate behavior, and in his ability to be aware of normal hazards. [R. at 101].

Plaintiff's physical RFC was rated by a doctor on February 6, 1996. [R. at 112]. The doctor noted that Plaintiff was occasionally able to lift 20^{3/} pounds, frequently lift 10 pounds, stand or walk six hours in an eight hour day, and sit six hours in an eight hour day. [R. at 113].

Plaintiff was also rated by a doctor on October 10, 1995. The doctor noted Plaintiff could occasionally lift 50 pounds, frequently lift 25 pounds, stand or walk

^{3/} The completed form is not completely clear and could be indicating that Plaintiff is able to lift 50 pounds. [R. at 113].

approximately six hours in an eight hour day, and sit approximately six hours in an eight hour day. [R. at 121].

The record contains several records from Plaintiff's visits to his doctors concerning Plaintiff's complaint of back pain. Diagnostic imaging on August 11, 1995, indicated bilateral spondylolysis at L5 with a mild Grade 1 spondylolisthesis of L5 on S1, and mild facet asymmetry at the L4/5 level. [R. at 142]. Electromyographic studies were conducted, and the interpreter indicated that "there is no electrodiagnostic evidence for acute right lumbar radiculopathy. [R. at 146]. A CT-scan of Plaintiff's lumbar spine in September 1995 indicated Grade I spondylolisthesis of L5 on S1, no definite herniated nucleus, and no other significant abnormalities.

Plaintiff was examined on January 20, 1996. The examining doctor noted that Plaintiff's CT scan apparently revealed Grade 1 spondylolisthesis, but that electromyography and nerve conduction results were normal. [R. at 151]. The examining physician concluded that Plaintiff could occasionally lift 50 pounds, frequently lift 25 pounds, had no limitations on standing or walking, and would be able to sit less than six hours. [R. at 155].

Plaintiff was evaluated by a psychiatrist on January 27, 1996. [R. at 159]. The psychiatrist noted that Plaintiff's symptoms were consistent with post traumatic stress disorder ("PTSD"). Plaintiff was diagnosed with PTSD, severe depressive disorder, and alcohol abuse. Plaintiff's Global Assessment of Functioning ("GAF") was reported as 40. The evaluator indicated Plaintiff had some difficulty relating and interacting in a meaningful manner, and that Plaintiff would probably have the same difficulty in a

work environment. "It is not my opinion that the claimant could withstand the stress and pressures associated with an eight-hour workday and day-to-day work activity at the present time because of the prevalence and severity of his psychological symptomatology suggestive of major depression and posttraumatic stress disorder, which overlap significantly, not uncommonly. . . . The duration of impairment is difficult to say, because posttraumatic stress disorder is typically refractory to such treatment." [R. at 163, emphasis added].

By letter dated February 2, 1996, the Veterans Administration psychologist indicated that he had had five sessions with Plaintiff since December 19, 1995. [R. at 164]. The psychologist noted that if any questions concerning Plaintiff existed, he could be contacted. [R. at 164].

A CT scan of the lumbar spine was interpreted on May 31, 1997, as indicating spondylolysis and spondylolisthesis at L5/S1. In addition, the L5/S1 disc presented a "bulge in appearance." [R. at 179].

Records submitted to the Appeals Council after the decision of the ALJ indicated that Plaintiff was granted "disability" by the Veterans Affairs office. [R. at 192]. The assessment noted that Plaintiff did not meet the requirements of a single disability at 60% or more, or combined disabilities of 70% or more, but that considering Plaintiff's disability, Plaintiff's age, education, and background, Plaintiff would be considered disabled. [R. at 192].

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).^{4/}

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

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

substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

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

"The finding of the Secretary^{5/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

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

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 could perform work at the light level of activity. The ALJ additionally determined that Plaintiff could perform sedentary work. With regard to Plaintiff's claim of PTSD, the ALJ noted that Plaintiff had submitted no records after the hearing by the VA Medical Center, that Plaintiff was able to watch television, and that Plaintiff drove to his medical appointments. The ALJ concluded that Plaintiff's mental condition resulted in moderate restrictions of activities of daily living and difficulties in maintaining social functioning. The ALJ completed a PRT Form, but did not discuss the findings of the form in his decision.

The ALJ determined that Plaintiff could not return to his past work. Based on the testimony of a vocational expert, the ALJ found that Plaintiff could perform a significant number of jobs in the national economy and was not disabled.

IV. REVIEW

VA RATING

Plaintiff asserts that he submitted a copy of the VA rating decision which concluded that Plaintiff was permanently totally disabled. Plaintiff notes that the information was not available or provided prior to the decision of the ALJ, but that it

was provided to the Appeals Council. Plaintiff complains that the Appeals Council did not give appropriate consideration to the findings of the VA.

Plaintiff refers to Baca v. Department of Health & Human Services, 5. 3d 476 (10th Cir. 1993). In Baca, the Tenth Circuit Court of Appeals remanded the action. The ALJ noted that "the ALJ should have considered the VA disability rating in making his decision." Id. at 480. The Court additionally observed that "[a]lthough findings by other agencies are not binding on the Secretary, they are entitled to weight and must be considered." Baca, *citing* Fowler, 596 F.2d at 603.

Of course in this case the information regarding the disability determination from the VA was not presented to the ALJ. However, numerous VA records were included in the information provided to the ALJ. Plaintiff does not note any specific records upon which the VA relied which were not available to the ALJ. Because the ALJ had the relevant information relating to the VA's decision, the Court is not convinced that this issue, alone, requires reversal of the VA's decision.

DUTY TO DEVELOP RECORD

Plaintiff asserts that the ALJ breached his duty to develop the record pursuant to Plaintiff's mental impairment. Plaintiff notes that the ALJ seemingly recognizes the "missing records" in the ALJ's decision. [R. at 19]. However, the ALJ made no efforts to retrieve such records, or to assist claimant in retrieving such records. Plaintiff notes that, pursuant to Oklahoma statute (43A O.S. § 1-109(b) 1999), a patients' psychiatric records cannot be released to the patient without express approval by the treating physician or court order. Plaintiff submits that Plaintiff

therefore was at a significant disadvantage in any attempt to gather his own records.

Defendant notes that Plaintiff was represented by an attorney at the Appeals Council stage and that that attorney failed to obtain any additional documentation for submission to the Appeals Council with regard to Plaintiff's mental status. Defendant makes a valid point. However, the Court declines to further evaluate this issue because the Court concludes that the ALJ's conclusion with regard to Plaintiff's mental impairment is not supported by substantial evidence. On remand the appropriate records should be obtained or submitted and reviewed.

Plaintiff additionally asserts that the ALJ erred by failing to discuss the findings recorded by the ALJ on the PRT Form in his decision. Plaintiff notes that the ALJ merely restated his conclusions in the PRT and did not discuss the conclusions. In Cruse v. United States Department of Health & Human Services, 49 F.3d 614, 617-18 (10th Cir. 1995), the Tenth Circuit Court of Appeals noted that the ALJ must, if the ALJ prepares the PRT Form, discuss the evidence considered by the ALJ.

Moreover, if the ALJ prepares the form himself, he must "discuss in his opinion the evidence he considered in reaching the conclusions expressed on the form." The ALJ failed to do that. In his written opinion, the ALJ repeated the conclusions indicated on the PRT form, but only generally discussed the evidence of Ms. Cruse's mental impairment. He did not relate that evidence to his conclusions.

Cruse 49 F.3d 617 (citations omitted). In this case, the ALJ did complete the PRT Form. The ALJ also noted his conclusions on the PRT Form in his decision. The ALJ did not, however, discuss any specifics related to those conclusions.

A Mental Residual Functional Capacity ("RFC") Assessment completed February 22, 1996, indicated that Plaintiff was moderately limited in numerous categories (fifteen) and markedly limited in his ability to maintain attention and concentrate for extended periods, and markedly limited in his ability to sustain an ordinary routine without special supervision. [R. at 100-101]. Plaintiff was described as "not significantly limited," in only three categories. [R. at 101].

Plaintiff was evaluated by a psychiatrist on January 27, 1996, and diagnosed with PTSD. [R. at 159]. Plaintiff's Global Assessment of Functioning ("GAF") was reported as 40. The evaluator concluded that, in his opinion, Plaintiff would be unable to perform the functions required to work.

The VA psychologist submitted a letter February 2, 1996. The psychiatrist, as of that date, had seen Plaintiff for five sessions. He submitted no additional documents but noted that if any questions concerning Plaintiff existed, he could be contacted. [R. at 164].

As noted by Plaintiff, the additional VA records are not included in the record, and the Court can discern no effort to obtain additional information from the VA psychologist. The ALJ dismissed the January 27, 1996 psychiatrist's assessment, in part, because the psychiatrist was an examining rather than treating physician. It is, however, the most detailed information regarding Plaintiff in the record and the

psychiatrist concludes that Plaintiff was, at that time, unable to handle the stressors associated with work. The only other mental assessment was by a non-examining physician who noted that Plaintiff had predominantly moderate to marked restrictions. The record contains insufficient evidence to support the ALJ's conclusion that Plaintiff could perform the mental requirements of substantial gainful activity.

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

Dated this 18 day of August 1999.



Sam A. Joyner
United States Magistrate Judge

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

JAMES S. STARR,
Petitioner,

vs.

LENORA JORDAN,
Respondent.

)
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)
)
)
)
)
)
)

ENTERED ON DOCKET

DATE AUG 20 1999

Case No. 98-CV-714-H (J)

FILED
AUG 19 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

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 18TH day of August, 1999.



Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT
STATE OF OKLAHOMA

JACK BROTTON, JR., d/b/a)
CARAVAN CATTLE COMPANY,)
)
Plaintiff,)
)
vs.)
)
AMERICAN EQUITY INSURANCE)
COMPANY, a foreign corporation,)
)
Defendant.)

FILED

AUG 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No.

99-CV-60-B J

ENTERED ON DOCKET

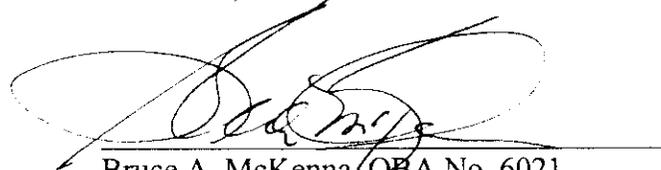
DATE AUG 19 1999

STIPULATION FOR DISMISSAL WITH PREJUDICE

The parties stipulate to the dismissal of the captioned litigation with prejudice of the refileing thereof. The parties further stipulate to each party paying his/its own expenses of litigation, including costs and attorneys fees. The parties simultaneously submit an Order of Dismissal With Prejudice.

Respectfully submitted,

HOLDEN, GLENDENING & MCKENNA



Bruce A. McKenna, OBA No. 6021
200 Reunion Center
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(918) 295-8889

ATTORNEYS FOR DEFENDANT
AMERICAN EQUITY INSURANCE
COMPANY

215



Joe Paulk
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(918) 581-8200

ATTORNEY FOR PLAINTIFF
JACK BROTTON, JR.

MT

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

FILED

AUG 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TIMOTHY JENKINS AND TANYA
JENKINS, husband and wife

Plaintiffs,

vs.

LIBERTY MUTUAL FIRE INSURANCE
COMPANY, a foreign corporation

Defendant.

ENTERED ON DOCKET

DATE AUG 19 1999

No. 99-CV 0126K (M)

STIPULATION FOR DISMISSAL WITH PREJUDICE

The parties hereby show the Court that they have reached a compromise settlement of all claims in this case and stipulate that the case should be dismissed with prejudice.

Kent B. Rainey

Neal E. Stauffer, OBA # 13168

Kent B. Rainey, OBA # 14619

STAUFFER, RAINEY, GUDGEL &
HATHCOAT

1100 Petroleum Club Building
601 South Boulder
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ATTORNEYS FOR PLAINTIFFS

mail
copies re
C/S

20



Robert S. Baker, OBA#457
DAY, EDWARDS, FEDERMAN
PROPESTER & CHRISTENSEN, P.C.
2900 Oklahoma Tower
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(405)236-1012 (facsimile)

ATTORNEYS FOR DEFENDANT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE AUG 18 1999

UNITED STATES OF AMERICA,)
 on behalf of the Secretary of Veterans Affairs,)
)
 Plaintiff,)
 v.)
)
 UDO SCHMELING aka Udo W. Schmeling)
 aka Udo Wolfgang Schmeling;)
 JUNE SCHMELING aka June A. Schmeling)
 aka June Ann Schmeling;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma;)
 BOARD OF COUNTY COMMISSIONERS,)
 Tulsa County, Oklahoma,)
)
 Defendants.)

FILED

AUG 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CIVIL ACTION NO. 99-CV-0179-K (J)

ORDER OF SALE

UNITED STATES OF AMERICA TO: U.S. Marshal for the
Northern District of Oklahoma

On August 2, 1999, the United States of America recovered judgment in rem against the Defendants, Udo Schmeling aka Udo W. Schmeling aka Udo Wolfgang Schmeling and June Schmeling aka June A. Schmeling aka June Ann Schmeling, in the above-styled action to enforce a mortgage lien upon the following described property:

Lot Twenty (20), Block Two (2), SOUTHBROOK III, an Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the Recorded Plat No. 4443.

The amount of the judgment is the sum of \$68,737.74, plus administrative charges in the amount of \$510.00, plus penalty charges in the amount of \$396.80, plus accrued interest in the amount of \$2,696.84 as of April 20, 1998, plus interest accruing thereafter at the rate of 4 percent per

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annum until judgment, plus interest thereafter at the current legal rate of 4.966 percent per annum until fully paid, plus the costs of this action in the amount of \$10.00 (fee for recording Notice of Lis Pendens), plus any other advances. The judgment further provides that the mortgage on the above-described property is foreclosed, and that all Defendants and all persons claiming under them are barred from claiming any right, title, interest, and equity in the property. If Defendants, Udo Schmeling aka Udo W. Schmeling aka Udo Wolfgang Schmeling and June Schmeling aka June A. Schmeling aka June Ann Schmeling, should fail to satisfy the in rem judgment to the Plaintiff, the judgment provides that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell the property according to Plaintiff's election with or without appraisalment and to apply the proceeds to the payment of the costs of the sale and the Plaintiff's judgment. Any residue is to be paid to the Court Clerk to await further order of this Court.

THEREFORE, this is to command you to proceed according to law, to advertise and sell, with appraisalment, the above-described real property and apply the proceeds thereof as directed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the United States District Court for the Northern District of Oklahoma, in my office in the City of Tulsa, Oklahoma, on the 19th day of August, 1999.

PHIL LOMBARDI, Clerk
United States District Court for
the Northern District of Oklahoma

By K. Raimo
Deputy

F I L E D

AUG 18 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

INTELICAD COMPUTERS, INC.,)	
)	
Plaintiff,)	
)	
vs.)	No. 97-C-912-B
)	
MASSACHUSETTS BAY)	
INSURANCE COMPANY,)	
)	
Defendant.)	

ENTERED ON DOCKET
DATE **AUG 19 1999**

ORDER

Before the Court are the Rule 60(b) motion (Docket No. 54) and the Amended Motion for Leave to File Amended and Supplemental Complaint (Docket No. 49) filed by plaintiff, InteliCAD Computers, Inc. ("InteliCAD") and the Rule 60(b) motion filed by defendant Massachusetts Bay Insurance Company ("MBI")(Docket No. 47).¹

The parties ask the Court to reconsider its May 18, 1999 Order on the following grounds: MBI argues there are no fact questions for the jury on issues of waiver and estoppel and it has no duty to indemnify InteliCAD; InteliCAD asserts the amendment to 35 U.S.C. §271 creates the possibility of "advertising injury" coverage for patent infringement claims. The Court rejects both parties' arguments and denies the Rule 60(b) motions.

As MBI appears to be confused as to the Court's holding in its May 18, 1999

¹ As the motions have been exhaustively briefed, the Court denies MBI's unopposed application for an extension of time to file reply briefs (Docket No. 57).

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Parties' ph...

Order, the Court will clarify the Order on the issue of detrimental reliance. MBI argues in its motion to reconsider that InteliCAD could not, as a matter of law, have detrimentally relied upon any act or omission by MBI or Schiefen. The Court disagrees.

On March 20, 1992, InteliCAD made an "absolute unconditional demand" upon MBI to acknowledge coverage of the patent infringement claims brought against it in the 1992 action. On March 30, 1992, MBI responded that it was investigating the question of coverage and would "immediately" advise InteliCAD of its position when it received the legal opinion on the matter. Previously, counsel employed by MBI had advised InteliCAD MBI was exclusively handling the matter on behalf of InteliCAD and InteliCAD was to yield to MBI's representation.

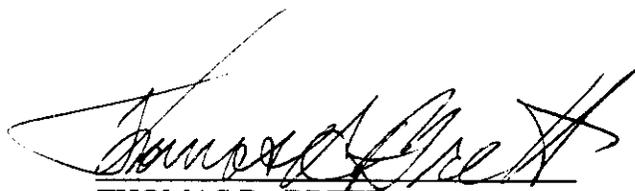
It is disputed that MBI mailed the unsigned April 22, 1992 letter to InteliCAD advising InteliCAD it had received the legal opinion and would continue to defend the 1992 action under a "complete reservation of rights." InteliCAD claims it saw the letter for the first time in July 1997 when it made demand on MBI to defend it in the refiled 1997 action. One reasonable view of the record is that MBI decided in April 1992 to continue to provide a defense to InteliCAD in the CTI litigation and deny any duty to pay under the policy, but inexplicably decided to wait for five years to advise InteliCAD of its position, despite InteliCAD's unequivocal demand. Had InteliCAD been so advised in April 1992, InteliCAD's own counsel would have had control over the defense and settlement of CTI's claims throughout the five-year period. As a result of MBI's conduct in the intervening five years, InteliCAD continued to rely on MBI's duty to defend and indemnify it from CTI's claims. This creates factual questions regarding detrimental reliance. As the Court noted in its May 18, 1999 Order, the purpose of the general rule

estopping an insurer from denying coverage if the insurer assumes defense of an action against its insured with knowledge of the ground for non-coverage² and without an effective reservation of rights is the recognition of the inherent conflict of interest in such representation. *See Gay & Taylor, Inc. v. St. Paul Fire & Marine Ins. Co.*, 550 F.Supp. 710, 714 (W.D. Okla. 1981)(citing *Hartford Accident and Indemnity Co. v. Sanford*, 344 F.Supp. 969 (W.D. Okla. 1972); *Zahn v. General Ins. Co. of America*, 611 P.2d 645 (Okla. 1980); *Insurors Indemnity & Ins. Co. v. Archer*, 254 P.2d 342 (Okla. 1953).

The Court also denies InteliCAD's motion to file its amended and supplemental complaint as untimely. InteliCAD was aware of the settlement negotiations and the entry of the Final Judgment on Consent in the underlying action on or before March 19, 1998, yet did not seek to amend until a month before the pretrial conference.

This case is set for pretrial conference on Friday, August 20, 1999 at 11:30 a.m. The parties should be prepared to discuss matters concerning trial of this case.

IT IS SO ORDERED, this 18th day of August, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

² The undisputed facts establish MBI had knowledge of a defense to coverage before April 22, 1999.

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

ST. PAUL RE-INSURANCE, LTD.

Plaintiff,

GLEND A ANN MCCORMICK,
CHRISTINA V. WILEY and
STATE INSURANCE FUND,

Defendants.

ENTERED ON DOCKET

DATE AUG 19 1999

No. 99-CV-484-K. ✓

F I L E D

AUG 18 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

It appears that the defendants Glenda Ann McCormick and Christina V. Wiley are in default. The Court finds that judgment should be entered for the Plaintiff.

IT IS THEREFORE ORDERED that Plaintiff be reimbursed for its costs and attorneys fees in the defense of Glenda Ann McCormick and Christina V. Wiley as of the date of this Order. The amount is to be determined on the pleadings submitted by the parties.

ORDERED this 17 day of August, 1999.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

COREY DION ATCHISON,

Petitioner,

vs.

GARY GIBSON,

Respondent.

ENTERED ON DOCKET

DATE AUG 19 1999

Case No. 98-CV-377-H (M) ✓

FILED

AUG 18 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

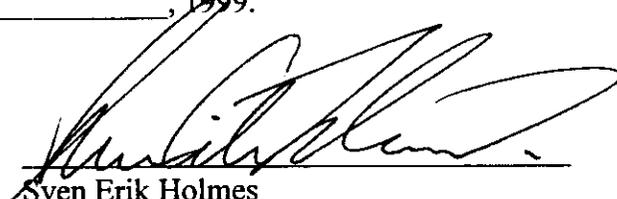
JUDGMENT

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 17th day of August, 1999.


Sven Erik Holmes
United States District Judge

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

COREY DION ATCHISON,)
)
Petitioner,)
)
vs.)
)
GARY GIBSON,)
)
Respondent.)

ENTERED ON DOCKET

DATE AUG 19 1999

Case No. 98-CV-377-H (P)

FILED

AUG 18 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 time barred by the statute of limitations (Docket #7). Petitioner has filed a response to the motion (#9). Respondent's motion to dismiss is premised on the allegation that Petitioner, a state inmate appearing *pro se*, failed to file this petition for writ of habeas corpus within the one-year limitations period prescribed by 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). For the reasons discussed below, the Court finds that the petition is untimely filed and Respondent's motion to dismiss should be granted.

BACKGROUND

Petitioner was convicted by a jury of First Degree Murder in Tulsa County District Court, Case No. CF-91-691. He was sentenced to life imprisonment with the possibility of parole. Petitioner appealed his judgment and sentence to the Oklahoma Court of Criminal Appeals where, on November 4, 1994, his conviction was affirmed (see #8, Ex. A). Nothing in the record indicates Petitioner sought *certiorari* review in the United States Supreme Court.

Respondent indicates that Petitioner sought post-conviction relief in the state district court on December 29, 1997. According to the docket sheet from the Oklahoma Court of Criminal

Appeals, the state district court denied post-conviction relief on January 21, 1998 (#8, Ex. B). On February 17, 1998, Petitioner appealed the denial of post-conviction relief (#8, Ex. B). On April 20, 1998, the Oklahoma Court of Criminal Appeals affirmed the denial of post-conviction relief (#8, Ex. C).

Petitioner filed the instant petition for writ of habeas corpus on May 22, 1998 (#1).

ANALYSIS

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

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

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

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

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

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

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

28 U.S.C. § 2244(d). Because the limitations period generally begins to run from the date on which a prisoner's direct appeal from his conviction became final, a literal application of the AEDPA limitations language would result in the preclusion of habeas corpus relief for any prisoner whose

conviction became final more than one year before enactment of the AEDPA. Recognizing the retroactivity problems associated with that result, the Tenth Circuit Court of Appeals has held that for prisoners whose convictions became final before April 24, 1996, the one-year statute of limitation does not begin to run until April 24, 1996. United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997). In other words, prisoners whose convictions became final before April 24, 1996, the date of enactment of the AEDPA, were afforded a one-year grace period within which to file for federal habeas corpus relief.

In addition, the tolling provision of 28 U.S.C. § 2244(d)(2) applies in § 2254 cases 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 while pursuing state post-conviction proceedings properly filed during the grace period.

Application of these principles to the instant case leads to the conclusion that this habeas petition fails to meet the one-year limitations period. Petitioner's conviction became final on or about February 2, 1995, after the 90 day time period for filing a petition for writ of *certiorari* in the United States Supreme Court had lapsed. See Caspari v. Bohlen, 510 U.S. 383, 390 (1994). Therefore, his conviction became final before enactment of the AEDPA and, as a result, his limitations clock began to run on April 24, 1996, when the AEDPA went into effect. Petitioner had one year, or until April 23, 1997, to file his petition for writ of habeas corpus.

Although the limitations period would be tolled during the grace period when Petitioner had "a properly filed application for State post-conviction or other collateral review" pending in the state courts, § 2244(d)(2), the Court finds that in this case, Petitioner did not file his application for post-conviction relief until after expiration of the grace period. A collateral petition filed in state court

after the limitations period has expired no longer serves to toll the statute of limitations. Rashad v. Khulmann, 991 F. Supp. 254, 259 (S.D. N.Y. 1998). Respondent indicates that the application for post conviction relief was filed in the state district court on December 29, 1997, or more than eight (8) months after the April 23, 1997 deadline. As a result, the limitations period was not tolled during the pendency of Petitioner's post-conviction proceedings. Therefore, unless Petitioner can demonstrate that he is entitled to other statutory or equitable tolling of the limitations period, his petition filed May 22, 1998 is clearly untimely.

In his response to the motion to dismiss (#9), Petitioner relies on § 2244(d)(1)(B) and argues that the limitations period should be extended because the state created an impediment to his ability to seek habeas corpus relief. Specifically, Petitioner complains that while he was housed in the F-cellhouse ("FCH") unit on run 3 at the Oklahoma State Penitentiary ("OSP"), the prison provided no law clerk to assist him in preparing his legal papers. As a result, Petitioner asserts he was denied his constitutional right of access to courts. In order for this Court to find a constitutional violation of Petitioner's right of access to the courts under Lewis v. Casey, 518 U.S. 343 (1996), Petitioner must show that he diligently pursued his federal claims but was prevented from doing so as a result of deficiencies in the prison library. Lewis, 518 U.S. at 349. Petitioner in this case waited more than three (3) years after resolution of his direct appeal, and after expiration of the judicially created grace period, before exhausting his federal claims in state post-conviction proceedings. Petitioner indicates he was not transferred to FCH until February, 1997. He offers no explanation for his failure to pursue his claims from November, 1994, to February, 1997. In the absence of an adequate explanation for this delay, the Court concludes that Petitioner did not diligently pursue his constitutional claims.

Furthermore, Petitioner complains of his lack of access to legal assistance only during the period he was housed in FCH, from February, 1997 to May, 1998. During that time period, however, Petitioner was able to access the courts in order to file his application for post-conviction relief. Therefore, the Court rejects Petitioner's argument and concludes Petitioner was not denied access to courts in violation of the Constitution. The limitations period should not be extended.

Because the limitations period should not be extended beyond April 23, 1997 or equitably tolled in this case, the Court concludes that the petition filed May 22, 1998 is untimely. Respondent's motion to dismiss should be granted and the petition for writ of habeas corpus should be dismissed with prejudice.

CONCLUSION

Petitioner failed to file his petition for writ of habeas corpus within the one-year limitations period. Therefore, 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.

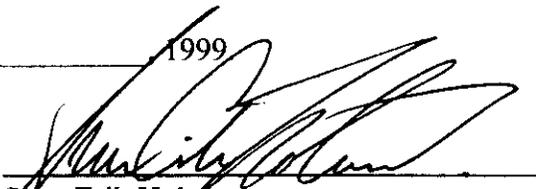
ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss petition for writ of habeas corpus (#7) is **granted**.
2. The petition for writ of habeas corpus is **dismissed with prejudice**.

IT IS SO ORDERED.

This 17TH day of August

1999


Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 WILLIAM F. CRAIG,)
)
 Defendant.)

ENTERED ON DOCKET

DATE AUG 19 1999

CASE NO. 99CV0325H(E)

FILED

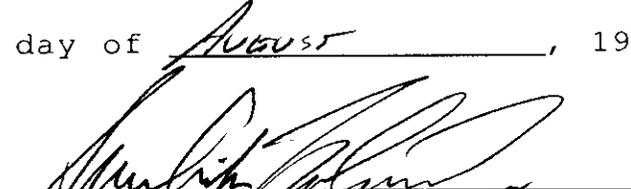
AUG 18 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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 William F. Craig, be dismissed without prejudice, the parties to bear their own costs and attorneys' fees.

Dated this 17th day of August, 1999.


UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney



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

PEP/dlo

5

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

AUG 18 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

PATRICIA D. WILSON,)
SSN: 448-50-2866,)

Plaintiff,)

v.)

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

Defendant.)

Case No. 98-CV-0392-EA

ENTERED ON DOCKET

DATE AUG 18 1999

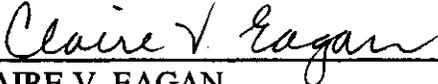
ORDER

On August 18, 1999, the Court heard oral argument on the plaintiff's appeal of the Commissioner's decision to deny her application for supplemental security income, the disposition of which both parties have consented to before this Court. Paul McTighe, Esq., appeared on behalf of the plaintiff, and Loretta Radford, Assistant United States Attorney, appeared on behalf of the Commissioner. Following oral argument, and for the reasons stated on the record, the Court finds that the determination of the Administrative Law Judge (ALJ) is not supported by substantial evidence and the ALJ failed to apply the correct legal standards. See Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted).

IT IS THEREFORE ORDERED that, pursuant to sentence four, 42 U.S.C. § 405(g), the decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion. On remand, the Commissioner should hear from a medical expert, perform a proper step four analysis under Winfrey v. Chater, 92 F.3d 1017 (10th Cir. 1996), and consider, at a minimum, a closed period of disability.

If the Commissioner “failed to apply the correct legal test, there is ground for reversal apart from a lack of substantial evidence.” Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993) (citation omitted). The ALJ’s decision in this case may ultimately turn out to be correct, and nothing in this order is to be taken to suggest that the Court has presently concluded otherwise. This remand “simply assures that the correct legal standards are invoked in reaching a decision based on the facts of this case.” Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988).

Dated this 18th day of August, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

FILED

AUG 17 1999

Phill Lombardi, Clerk
U.S. DISTRICT COURT

TYLER LEE FERRELL,)

Plaintiff,)

vs.)

Case No. 98-CV-0749-B(M) ✓

CITY OF TULSA, a municipality;)
TULSA POLICE DEPARTMENT; OFFICER)
S.E. HICKEY, an individual, OFFICER)
J.T. GATWOOD, an individual,)

Defendants.)

ENTERED ON DOCKET
DATE AUG 18 1999

JUDGMENT

In accordance with the Order filed on August 17, 1999 sustaining the Motion for Summary Judgment filed by defendants City of Tulsa and Tulsa Police Department, the Court hereby enters judgment in favor of Defendants City of Tulsa and Tulsa Police Department and against Plaintiff Tyler Lee Ferrell. Costs are assessed against Plaintiff if properly applied for pursuant to Local Rule 54.1.

DATED, THIS 17th DAY OF AUGUST, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED

AUG 18 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JEFFREY M. WEISER, PAUL E.)
JORNAYVAZ AND HOWARD W. MARTIN,)
)
Plaintiffs,)
)
vs.)
)
STEPHEN J. HEYMAN, and STEPHEN)
E. JACKSON, individually)
and as Trustee of the)
Stephen E. Jackson Trust,)
)
Defendants.)

Case No. 95-CV-854-BU

ENTERED ON DOCKET
DATE AUG 18 1999

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the proceedings.

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

Entered this 18th day of August, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

70

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

JEFFREY M. WEISER, PAUL E.)
JORNAYVAZ AND HOWARD W. MARTIN,)
)
Plaintiffs,)
)
vs.)
)
STEPHEN J. HEYMAN, and STEPHEN)
E. JACKSON, individually)
and as Trustee of the)
Stephen E. Jackson Trust,)
)
Defendants.)

Case No. 95-CV-854-BU ✓

FILED

AUG 18 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

In light of the parties' settlement and compromise, the Court
DECLARES MOOT Plaintiffs' Motion to Reconsider Their Motion for
Summary Judgment on the Issue of Collateral Estoppel (Docket Entry
#43), Defendants' Motion for Summary Judgment (Docket Entry #52),
Plaintiffs' Motion for Partial Summary Judgment (Docket Entry #56)
and Plaintiffs' Cross-Motion for Summary Judgment on Defendants'
Affirmative Defense (Docket Entry #61). The hearing on these
motions currently scheduled for August 25, 1999 at 2:15 p.m. is
STRICKEN.

ENTERED this 18th day of August, 1999.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
IN OPEN COURT

AUG 18 1999

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

UNITED STATES OF AMERICA,)
on behalf of Rural Housing Service,)
formerly Farmers Home Administration,)
Plaintiff,)

v.)

RICHARD L. HOWARD;)
MARY I. HOWARD;)
COUNTY TREASURER, Pawnee County,)
Oklahoma;)
BOARD OF COUNTY COMMISSIONERS,)
Pawnee County, Oklahoma,)
Defendants.)

ENTERED ON DOCKET

DATE AUG 18 1999

) CIVIL ACTION NO. 98-CV-0375-K (J)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 18th day of August, 1999, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on June 14, 1999, pursuant to an Order of Sale dated February 26, 1999, of the following described property located in Pawnee County, Oklahoma:

Lots Fifteen (15), Sixteen (16), Seventeen (17), Eighteen (18), and Nineteen (19), in Block Twelve (12), in the ORIGINAL TOWN of Terlton, in Pawnee County, State of Oklahoma, according to the recorded plat thereof, subject to all valid outstanding easements, rights-of-way, mineral leases, mineral reservations, mineral conveyances, and protective or restrictive covenants of record.

Appearing for the United States of America is Cathryn D. McClanahan, Assistant United States Attorney. Notice was given the Defendants, Richard L. Howard; Mary I. Howard; and County Treasurer and Board of County Commissioners, Pawnee County, Oklahoma, through

16

Alan B. Foster, Assistant District Attorney, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

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

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

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

Claire Egan
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 19th day of August, 1949.
C. Portello, Deputy Clerk

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



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

Report and Recommendation of United States Magistrate Judge
Case No. 98-CV-0375-K (J) (Howard)

CDM:ess

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

F I L E D

AUG 18 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BARON L. LEWIS,)
)
Plaintiff,)
)
vs.)
)
KENNETH S. APFEL, Commissioner of)
Social Security Administration,)
)
Defendant.)

No. 98-CV-0535-EA ✓

ENTERED ON DOCKET
DATE AUG 18 1999

ORDER OF DISMISSAL

Now on this 18th day of August, 1999, the above-styled matter came on before me pursuant of the written Stipulation of Dismissal of the Plaintiff and Defendant. The Court after being fully advised in this matter finds that the Stipulation of Dismissal should be granted.

IT IS ORDERED, ADJUDGED AND DECREED by the Court that the Stipulation of Dismissal of the parties is granted and that this case is ordered dismissed with each party responsible for their own costs.

Claire V. Egan
~~UNITED STATES DISTRICT JUDGE or~~
UNITED STATES MAGISTRATE JUDGE

12

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

FILED

AUG 17 1999

HORSEHEAD INDUSTRIES, INC., d/b/a
ZINC CORPORATION OF AMERICA,

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Plaintiff,

v.

Case No. 99-CV-70-12

CYPRUS AMAX MINERALS
COMPANY,

ENTERED ON DOCKET
AUG 18 1999

Defendant.

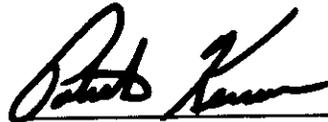
DATE _____

DISMISSAL WITHOUT PREJUDICE

Pursuant to Fed. R. Civ. P. 41, Plaintiff, Horsehead Industries, Inc., d/b/a Zinc Corporation of America, hereby dismisses its cause of action against the Defendant, Cyprus Amax Minerals Company without prejudice.

Dated this 17th day of August 1999.

Respectfully submitted,



MARK D. COLDIRON, #1774
JOHN S. GARDNER, #14936
PATRICK H. KERNAN, #4983
Attorneys for Plaintiff, Horsehead Industries

OF COUNSEL:

McKINNEY & STRINGER, P.C.
101 North Robinson, Suite 1300
Oklahoma City, Oklahoma 73102
405/239-6444
405/239-7902 (fax)

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

EQUAL EMPLOYMENT OPPORTUNITY)
COMMISSION,)
)
Plaintiffs,)
)
vs.)
)
NORRIS, a Dover Resources)
Company,)
)
)
Defendant.)

ENTERED ON DOCKET
DATE AUG 18 1999

No. 99-CV-195-K ✓

F I L E D

AUG 17 1999 *gr*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

O R D E R

By order entered March 17, 1999, this Court denied the plaintiff's motions for temporary restraining order and preliminary injunction. Plaintiff appealed that decision to the United States Court of Appeals for the Tenth Circuit. On May 20, 1999, the parties were sent a form directing them to complete a proposed case management plan, as is customary in this Court. The parties returned the form, stating that no case management plan was necessary because the case was on appeal.

At the Court's request, the courtroom deputy for the undersigned called defense counsel (who resides in Tulsa), stating that the Court nevertheless desired a case management plan. Defense counsel declined, stating that the case was "stayed" because of the appeal. On July 28, 1999, the Court entered a written order, granting the parties until August 13, 1999 to submit a proposed case management plan.

On August 13, 1999, the final day of the deadline, the parties

filed essentially a one-page "joint response" to the Court's order. Once again, they refuse to comply. The parties state that "this case has been fully decided on the merits". Further, "[s]hould the Tenth Circuit reverse the District Court's decision and remand the case to the District Court, however, a case management plan may become necessary at that time."

The Tenth Circuit Court of Appeals might take a year or more to issue an appellate ruling. The Court does not intend for this case to sit in limbo for that period of time. The standard for preliminary injunctive relief is different from that of trial on the merits. Further, one of the bases upon which the Court denied plaintiff's motions was absence of evidence on defendant's intent in filing its state court action against Reverend Easley. Traditionally, discovery is a means by which questions of intent are resolved, but the parties show no interest in discovery.

While not explicitly stated, the position of the parties appears to be that 42 U.S.C. §2000e-5(f)(2), upon which the EEOC brought this action, is limited to interim injunctive relief until the EEOC completes its investigation. It may not be, or at least in this case has not been, combined with a prayer for damages. Thus, under the parties' view, and their stipulation that "all of the issues before this court have been adjudicated", the Court should have combined denial of plaintiff's motions with dismissal. The Court hereby corrects the oversight.

It is the Order of the Court that this action is hereby dismissed without prejudice to the EEOC filing a further action upon completion of its investigation.

ORDERED this 16 day of August, 1999.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

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

FILED

AUG 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LELA BREWER; HEATHER A.)
CHAPMAN; KATHRYN ANN HAIR;)
TAMMY HEMPHILL; SHERRI)
RANTILLA; LORI E. RICH; RACHEL)
R. ROBINS; and LORETTA G. ROGERS,)
all individually,)

Plaintiffs,)

v.)

DICKINSON OF TULSA, INC., a Kansas)
corporation, d/b/a Career Point Business)
School; EDUDYNE SYSTEMS, INC., a)
Missouri corporation; and LAWRENCE)
D. EARLE, individually,)

Defendants.)

Case No. 99-C-612-H(J) ✓

ENTERED ON DOCKET

DATE AUG 18 1999

ORDER

This matter comes before the Court on Defendant's notice of removal (Docket # 1). Plaintiffs originally brought this action in the District Court of Tulsa County. Plaintiff's Petition alleges violations of the Oklahoma Consumer Fraud Act, common law fraud, and breach of contract. In their Petition, Plaintiffs seek damages in excess of \$10,000.¹

Defendants removed this action to this Court on the basis of diversity jurisdiction. Defendants contend that diversity jurisdiction is properly invoked here because EduDyne is a foreign corporation incorporated in Missouri with its principal place of business in Texas, Dickinson is a foreign corporation incorporated in Kansas with its principal place of business in

¹ In Oklahoma, the general rules of pleading require that:

[e]very pleading demanding relief for damages in money in excess of Ten Thousand Dollars (\$10,000) shall, without demanding any specific amount of money, set forth only that amount sought as damages is in excess of Ten Thousand Dollars (\$10,000), except in actions sounding in contract.

Okla. Stat. tit. 12, § 2008(2).

Texas, and Mr. Earle is a citizen of Texas. Defendants further contend the federal jurisdictional amount in controversy is met, stating:

the matter in controversy in this action exceeds Seventy-Five Thousand Dollars (\$75,000) exclusive of interest and costs.

Def.'s Notice of Removal, ¶ 6 (Docket # 1).

Section 1447 requires that a case be remanded to state court if at any time before final judgment it appears the court lacks subject matter jurisdiction. 28 U.S.C. § 1447(c). Initially, the Court notes that federal courts are courts of limited jurisdiction. With respect to diversity jurisdiction, "[d]efendant's right to remove and plaintiff's right to choose his forum are not on equal footing; for example, unlike the rules applied when plaintiff has filed suit in federal court with a claim that, on its face, satisfies the jurisdictional amount, removal statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand." Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994).

In order for a federal court to have diversity jurisdiction, the amount in controversy must exceed \$75,000. 28 U.S.C. § 1332(a). The Tenth Circuit has clarified the analysis which a district court should undertake in determining whether an amount in controversy is greater than \$75,000. The Tenth Circuit stated:

[t]he amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal. The burden is on the party requesting removal to set forth, in the notice of removal itself, the "underlying facts supporting [the] assertion that the amount in controversy exceeds [\$75,000]." Moreover, there is a presumption against removal jurisdiction.

Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995) (citations omitted) (emphasis in original); e.g., Hughes v. E-Z Serve Petroleum Marketing Co., 932 F. Supp. 266 (N.D. Okla. 1996) (applying Laughlin and remanding case); Barber v. Albertson's, Inc., 935 F. Supp. 1188 (N.D. Okla. 1996) (same); Martin v. Missouri Pacific R.R. Co. d/b/a Union Pacific R.R. Co., 932 F. Supp. 264 (N.D. Okla. 1996) (same); Herber v. Wal-Mart Stores, 886 F. Supp. 19, 20 (D. Wyo. 1995) (same); Homolka v. Hartford Ins.. Group, Individually and d/b/a Hartford

Underwriters Ins. Co., 953 F. Supp. 350 (N.D. Okla. 1995) (same); Johnson v. Wal-Mart Stores, Inc., 953 F. Supp. 351 (N.D. Okla. 1995) (same); Maxon v. Texaco Ref. & Marketing Inc., 905 F. Supp. 976 (N.D. Okla. 1995) (same).

Further, “both the requisite amount in controversy and the existence of diversity must be affirmatively established on the face of either the petition or the removal notice.” Laughlin, 50 F.3d at 873. See Asociacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia (Anpac) v. Dow Quimica de Colombia S.A., 988 F.2d 559, 565 (5th Cir. 1993) (finding defendant’s conclusory statement that “the matter in controversy exceeds [\$75,000] exclusive of interest and costs” did not establish that removal jurisdiction was proper); Gaus v. Miles, Inc., 980 F.2d 564 (9th Cir. 1992) (mere recitation that the amount in controversy exceeds \$75,000 is not sufficient to establish removal jurisdiction).

Where the face of the complaint does not affirmatively establish the requisite amount in controversy, the plain language of Laughlin requires a removing defendant to set forth, in the removal documents, not only the defendant's good faith belief that the amount in controversy exceeds \$75,000, but also facts underlying defendant's assertion. In other words, a removing defendant must set forth specific facts which form the basis of its belief that there is more than \$75,000 at issue in the case. The removing defendant bears the burden of establishing federal court jurisdiction at the time of removal, and not by supplemental submission. Laughlin, 50 F.3d at 873. See Herber, 886 F. Supp. at 20 (holding that the jurisdictional allegation is determined as of the time of the filing of the Notice of Removal). And the Tenth Circuit has clearly stated what is required to satisfy that burden. As set out in Johnson v. Wal-Mart Stores, Inc., 953 F. Supp. 351 (N.D. Okla. 1995), if the face of the petition does not affirmatively establish that the amount in controversy exceeds \$75,000.00, then the rationale of Laughlin contemplates that the removing party will undertake to perform an economic analysis of the alleged damages with underlying facts.

In the instant case, in their Petition, Plaintiffs alleged four claims for relief. With respect to each claim, Plaintiffs asserted only that the amount of damages exceeds \$10,000. Therefore, the jurisdictional amount is not satisfied on the face of the Petition. In their notice of removal, Defendants failed to set forth any specific facts that demonstrate the federal amount in controversy has been met. Defendants simply assert that "attorneys' fees that will be expended in this action will significantly exceed Twenty-Five Thousand Dollars," but offer no factual support whatever for this assertion. Furthermore, Defendants' sweeping statement that "Plaintiffs may potentially recover punitive damages up to Five Hundred Thousand Dollars," is unsubstantiated in any way and thus is pure speculation.

Based on a review of the record, the Court finds that Defendants' conclusory assertions do not satisfy the standards set forth by the Tenth Circuit in Laughlin. Accordingly, the Court concludes that removal is improper on the basis of diversity jurisdiction since it has not been established that the amount in controversy here exceeds \$75,000, either in Plaintiffs' Petition or in Defendants' notice of removal.

Since Defendants have not met their burden, as defined by the Tenth Circuit in Laughlin, the Court is without subject matter jurisdiction and lacks the power to hear this matter. As a result, the Court must remand this action to the District Court of Tulsa County. The Court hereby orders the Court Clerk to remand the case to the District Court in and for Tulsa County.

IT IS SO ORDERED.

This 16TH day of August, 1999.


Sven Erik Holmes
United States District Judge

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

FILED

AUG 17 1999 *SL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TEC PIPELINE, L.L.C., and)
TEC RESOURCES, L.L.C.,)

Plaintiffs,)

vs.)

ERNIE GOUGE, individually and)
d/b/a WESTFIELD OIL & GAS CO.,)

Defendants.)

Case No. 99-CV-0579K(J) ✓

ENTERED ON DOCKET

DATE AUG 18 1999

NOTICE OF DISMISSAL

COME NOW the Plaintiffs, TEC Pipeline, L.L.C. and TEC Resources, L.L.C. and, pursuant to Fed.R.Civ.P. 41(a)(1), hereby dismisses the referenced action. The Plaintiffs advise the Court that there has been no service on the Defendants, nor has a motion for summary judgment been filed.

Respectfully submitted,



Kenneth E. Crump Jr. (OBA #11803)
David P. Page (OBA # 6852)
Rodney H. Dusingberre (OBA #17611)
CRUMP, TOLSON & PAGE LLP
1516 South Boston Avenue, Suite 310
Tulsa, Oklahoma 74119-4019
(918) 583-2393

Attorneys for Plaintiffs
TEC Pipeline, L.L.C. and
TEC Resources, L.L.C.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

AUG 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVID J. HARDING,)
SSN: 444-40-7421,)

Plaintiff,)

v.)

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

Defendant.)

Case No. 98-CV-0413-EA

ENTERED ON DOCKET

DATE ~~AUG 18 1999~~

JUDGMENT

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

It is so ordered this 17th day of August 1999.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

AUG 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVID J. HARDING,)
SSN: 444-40-7421,)

Plaintiff,)

v.)

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

Defendant.)

Case No. 98-CV-0413-EA

ENTERED ON DOCKET

DATE AUG 18 1999

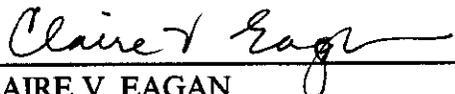
ORDER

On August 17, 1999, the Court heard oral argument on the plaintiff's appeal of the Commissioner's decision to deny his application for supplemental security income benefits, the disposition of which both parties have consented to before this Court. Paul McTighe, Esq., appeared on behalf of the plaintiff, and Loretta Radford, Assistant United States Attorney, appeared on behalf of the Commissioner. Following oral argument, and for the reasons stated on the record, the Court finds that the determination of the Administrative Law Judge (ALJ) is not supported by substantial evidence and the ALJ failed to apply the correct legal standards. See Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted).

IT IS THEREFORE ORDERED that, pursuant to sentence four, 42 U.S.C. § 405(g), the decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion. On remand, the Commissioner should re-evaluate claimant's residual functional capacity in light of all of the evidence, and if necessary, request an RFC assessment.

If the Commissioner “failed to apply the correct legal test, there is ground for reversal apart from a lack of substantial evidence.” Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993) (citation omitted). The ALJ’s decision in this case may ultimately turn out to be correct, and nothing in this order is to be taken to suggest that the Court has presently concluded otherwise. This remand “simply assures that the correct legal standards are invoked in reaching a decision based on the facts of this case.” Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988).

Dated this 17th day of August, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

FILED

AUG 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

TYLER LEE FERRELL,)

Plaintiff,)

vs.)

CITY OF TULSA, a municipality;)
TULSA POLICE DEPARTMENT; OFFICER)
S.E. HICKEY, an individual, OFFICER)
J.T. GATWOOD, an individual,)

Defendants.)

Case No. 98-CV-0749-B(M)

ENTERED ON DOCKET

DATE AUG 18 1999

ORDER

Before the Court is the motion for summary judgment filed by defendants City of Tulsa and Tulsa Police Department (collectively referred to as the "City") (Docket No. 11).

Plaintiff Tyler Lee Ferrell ("Ferrell") brought this action pursuant to 42 U.S.C. §1983 against the City of Tulsa, the Tulsa Police Department, and Officers S.E. Hickey ("Hickey") and J.T. Gatwood ("Gatwood"), two officers of the Tulsa Police Department. Ferrell alleges Hickey and Gatwood shot him with their service pistols, causing serious and life-threatening injuries to Ferrell, when Ferrell attempted to elude them during a vehicular pursuit. Ferrell also alleges Hickey and Gatwood were acting pursuant to the unconstitutional policy and custom of the City. On April 15 1999, the Court dismissed Ferrell's claims against Hickey and Gatwood for failure to meet the heightened pleading standard required by the Tenth Circuit in the context of a qualified immunity defense. *See Breidenbach v. Bolish*, 126 F.3d 1288, 1292-93 (10th Cir. 1997). The City now moves for summary judgment based on Ferrell's failure to provide any evidence in support of his claim against the City.

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, 345 (10th Cir. 1986). In *Celotex*, the Supreme Court stated:

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

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts sufficient to raise a "genuine issue of material fact." *Anderson*, 477 U.S. at 247-48.

The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 250. In its review, the Court must construe the evidence and inferences therefrom in a light most favorable to the nonmoving party. *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1521 (10th Cir. 1992).

In his response to the City's motion, Ferrell states the following:

The Tulsa Police Department Academy's Officer training and its on-the-job

training instills and encourages the unconstitutional use of deadly force to effect misdemeanor traffic stops.

Further, the policy or custom of the Tulsa Police Department's shooting review board to hold harmless officer's improper use of deadly force instills and encourages unconstitutional use of deadly force by officers in the field.

This custom or policy of Tulsa and its Police Department was a proximate cause of the unconstitutional deprivation and violation of Plaintiff's constitutional rights. But for Tulsa's policy of instructing its officers to use deadly force in an unconstitutional manner, Plaintiff would not have been shot multiple times for misdemeanor traffic violations.

Ferrell, however, offers no evidence in support of these conclusory statements. As Ferrell has failed to make a showing sufficient to establish the existence of an official policy or custom of the City which caused a constitutional violation, the Court grants the City's motion for summary judgment.

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


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

AUG 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ALFRED W. LUMPKIN,)
SSN: 440-34-5634,)
)
Plaintiff,)
)
v.)
)
KENNETH S. APFEL, Commissioner,)
Social Security Administration,)
)
Defendant.)

Case No. 98-CV-0421-EA

ENTERED ON DOCKET

DATE AUG 18 1999

JUDGMENT

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

It is so ordered this 17th day of August 1999.

Claire V. Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

AUG 17 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ALFRED W. LUMPKIN,)
SSN: 440-34-5634,)

Plaintiff,)

v.)

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

Defendant.)

Case No. 98-CV-0421-EA

ENTERED ON DOCKET

AUG 18 1999

DATE _____

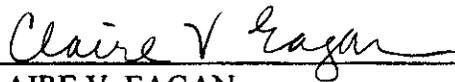
ORDER

On August 17, 1999, the Court heard oral argument on the plaintiff's appeal of the Commissioner's decision to deny his application for supplemental security income and disability insurance benefits during the period April 15, 1986 to May 28, 1990, the disposition of which both parties have consented to before this Court. Paul McTighe, Esq., appeared on behalf of the plaintiff, and Loretta Radford, Assistant United States Attorney, appeared on behalf of the Commissioner. Following oral argument, and for the reasons stated on the record, the Court finds that the determination of the Administrative Law Judge (ALJ) is not supported by substantial evidence. See Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted).

IT IS THEREFORE ORDERED that, pursuant to sentence four, 42 U.S.C. § 405(g), the decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion. On remand, the Commissioner should pose questions to the vocational expert that relate with precision all of claimant's impairments. In addition, the Commissioner should determine whether Miller v. Chater, 99 F.3d 972 (10th Cir. 1996), is applicable to the onset date of claimant's disability.

The ALJ's decision in this case may ultimately turn out to be correct, and nothing in this order is to be taken to suggest that the Court has presently concluded otherwise. This remand "simply assures that the correct legal standards are invoked in reaching a decision based on the facts of this case." Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988).

Dated this 17th day of August, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARGARET M. FEEMSTER,

Defendant.

)
)
)
)
)
)
)
)
)
)

No. 99CV0425BU(J)

ENTERED ON DOCKET

AUG 17 1999

DATE _____

DEFAULT JUDGMENT

This matter comes on for consideration this 16th day of August, 1999, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Margaret M. Feemster, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Margaret M. Feemster, was served with Summons and Complaint on July 12, 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.

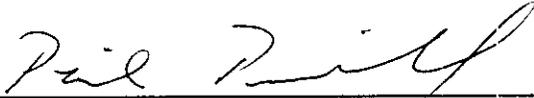
IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Margaret M. Feemster, for the principal amounts of \$2,833.84 and \$5,299.19, plus accrued interest of \$1,145.22 and \$2,325.94, plus administrative charges in the amounts of \$35.14 and \$42.40, plus

interest thereafter at the rates of 8% and 9.13% 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 4.966 percent per annum until paid, plus costs of this action.

s/ MICHAEL BURRAGE

United States District Judge

Submitted By:



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

PEP/llf

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

UNITED STATES OF AMERICA,

Plaintiff,

v.

JERRY D. CROSSLEY,

Defendant.

AUG 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 99CV0444BU(M)

ENTERED ON DOCKET

AUG 17 1999

DATE _____

DEFAULT JUDGMENT

This matter comes on for consideration this 16th day of Aug, 1999, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Jerry D. Crossley, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Jerry D. Crossley, was served with Summons and Complaint on July 19, 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, Jerry D. Crossley, for the principal amount of \$3,877.16, plus accrued

interest of \$106.10, plus administrative charges in the amount of \$.00, plus interest thereafter at the rate of 8.98 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 4.966 percent per annum until paid, plus costs of this action.

s/ MICHAEL BURRAGE

United States District Judge

Submitted By:



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

PEP/alh

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

FILED

AUG 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVID STITES,)
)
Plaintiff,)
)
vs.)
)
GREEN METAL FABRICATORS COMPANY,)
an Oklahoma Corporation,)
)
Defendant.)

Case No. 99-CV-213-BU

ENTERED ON DOCKET

DATE AUG 17 1999

ORDER

This matter comes before the Court upon Plaintiff's Motion to Dismiss Without Prejudice. Upon due consideration, the Court finds that Plaintiff's motion should be granted.

Accordingly, Plaintiff's Motion to Dismiss Without Prejudice (Docket Entry #2) is **GRANTED**. Plaintiff's action is **DISMISSED WITHOUT PREJUDICE**.

ENTERED this 16th day of August, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

AUG 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHARON K. BARNETT,
SSN: 445-40-1238,

Plaintiff,

vs.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-505-BU(J)

ENTERED ON DOCKET
DATE AUG 17 1999

JUDGMENT

Pursuant to the Court's Order, judgment is hereby entered in favor of Defendant, Kenneth S. Apfel, Commissioner of the Social Security Administration, and against Plaintiff, Sharon K. Barnett.

ENTERED this 16 day of August, 1999.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

SHARON K. BARNETT,)
SSN: 445-40-1238)
)
Plaintiff,)
)
vs.)
)
KENNETH S. APFEL, Commissioner,)
Social Security Administration,)
)
Defendant.)

ENTERED ON DOCKET
DATE AUG 17 1999

Case No. 98-CV-505-BU(J)✓

FILED

AUG 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

On July 9, 1998, Plaintiff, Sharon K. Barnett, filed a Complaint seeking judicial review of the final decision of the Commissioner of the Social Security Administration denying her Social Security benefits. Pursuant to 28 U.S.C. § 636 and N.D. LR 72.1, this Court referred the matter to United States Magistrate Judge Sam A. Joyner for submission of findings and recommendations. On July 19, 1999, Magistrate Judge Joyner issued a Report and Recommendation, wherein he recommended that the Commissioner's decision be affirmed. In the Report and Recommendation, Magistrate Judge Joyner addressed each of the alleged errors raised by Plaintiff in regard to the Commissioner's decision and found no reversible error.

This matter now comes before the Court upon Plaintiff's objections to Magistrate Judge Joyner's Report and Recommendation. In accordance with 28 U.S.C. § 636(b), the Court has conducted a de novo review of the matter. Having done so, the Court finds that Plaintiff's objections are without merit. The Court accepts Magistrate Judge Joyner's Report and Recommendation in its

entirety.

Accordingly, the Court **ACCEPTS** the Report and Recommendation (Docket Entry #12) issued by United States Magistrate Judge Sam A. Joyner. The final decision of the Commissioner of the Social Security Administration denying Plaintiff, Sharon K. Barnett, Social Security benefits is **AFFIRMED**. Judgment shall issue forthwith.

ENTERED this 16th day of August, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

RICK RITSCHEL,)
)
 Plaintiff,)
)
 vs.)
)
 THE STATE OF OKLAHOMA, ex rel.,)
 THE BOARD OF REGENTS FOR THE)
 OKLAHOMA STATE UNIVERSITY)
 AGRICULTURAL & MECHANICAL)
 COLLEGES,)
)
 Defendant.)

Case No. 98-CV-942-BU(E) ✓

ENTERED ON DOCKET
DATE AUG 17 1999

FILED

AUG 16 1999 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court upon the Motion for Summary Judgment filed by Defendant, The State of Oklahoma, ex rel., The Board of Regents for the Oklahoma State University Agricultural & Mechanical Colleges, and the Court having considered the issues and having dismissed without prejudice the claim of Plaintiff, Rick Ritschel, for breach of contract and having granted summary judgment in favor of Defendant, The State of Oklahoma, ex rel., The Board of Regents for the Oklahoma State University Agricultural & Mechanical Colleges on the claims of Plaintiff, Rick Ritschel, for violations of Title VI and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000d and 42 U.S.C. § 2000e,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Defendant, The State of Oklahoma, ex rel., The Board of Regents for the Oklahoma State University Agricultural & Mechanical Colleges and against Plaintiff, Rick Ritschel, and that Defendant, The State of Oklahoma, ex rel., The Board of Regents for

the Oklahoma State University Agricultural & Mechanical Colleges,
recover from Plaintiff, Rick Ritschel, its costs of action.

DATED at Tulsa, Oklahoma, this 16th day of August, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

RICK RITSCHEL,)
)
 Plaintiff,)
)
 vs.)
)
 THE STATE OF OKLAHOMA, ex rel.,)
 THE BOARD OF REGENTS FOR THE)
 OKLAHOMA STATE UNIVERSITY)
 AGRICULTURAL & MECHANICAL)
 COLLEGES,)
)
 Defendant.)

Case No. 98-CV-942-BU(E)

FILED

AUG 16 1999 *AL*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court upon the Motion for Summary Judgment filed by Defendant, The State of Oklahoma, ex rel., The Board of Regents for the Oklahoma State University Agricultural & Mechanical College. Plaintiff, Rick Ritschel, has responded to the motion and Defendant has replied thereto. Upon due consideration of the parties' submissions, the Court makes its determination.

Plaintiff, a white male, is a former head baseball coach and counselor for Northeastern Oklahoma A & M College ("NEO") in Miami, Oklahoma. On January 12, 1998, Plaintiff was terminated from his coaching position. Plaintiff alleges that his termination violated Title VI and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000d and 42 U.S.C. § 2000e. He also alleges that his termination resulted in a breach of his employment contract. According to Plaintiff, he was terminated by Defendant in retaliation for his complaints in February 1996 about the racists and discriminatory statements made by Robert Maxwell, NEO's

Athletic Director. Plaintiff alleges that Mr. Maxwell made statements to the NEO football coaches that NEO had too many blacks on its campus and that the football coaches should recruit fewer black student-athletes to participate as student-athletes at NEO. Plaintiff also alleges that Mr. Maxwell stated to him that the problem with the football program and the campus in general was that NEO had too many blacks. Plaintiff alleges that he and other NEO coaches reported the racist statements to NEO's President, Dr. Jerry Carroll, and Mr. Maxwell was thereafter placed on probation. Plaintiff also alleges that after he and the other coaches reported the racist statements, they were subjected to retaliation from Mr. Maxwell and NEO's Interim President, Dr. Jim Lovell, took no active steps to protect Plaintiff. Plaintiff contends that the retaliatory acts ultimately led to his termination.

Defendant denies that it retaliated against Plaintiff because of his reporting of the alleged racist statements made by Mr. Maxwell. Defendant contends that Plaintiff was terminated from his employment because he did not properly perform his duties as baseball coach beginning in the spring of 1997.

In its motion, Defendant contends that it is entitled to summary judgment on Plaintiff's claims under Title VI and Title VII of the Civil Rights Act. Defendant contends that even assuming that the racist statements by Mr. Maxwell were made (which Defendant states Mr. Maxwell has denied in deposition testimony) and there was retaliation by Defendant for Plaintiff's complaining of the statements, Plaintiff is not entitled to relief under either

federal statute. In regard to Title VII, Defendant asserts that Plaintiff was not engaged in an act protected against retaliation under the statute. According to Defendant, section 2000e-3(a) of Title 42 of the United States Code provides a cause of action for discrimination against an employee because the employee has opposed any practice made an unlawful employment practice under Title VII. Defendant contends that Mr. Maxwell's alleged racist statements that there were too many blacks on campus and in the football program had nothing to do with an employment practice. Defendant thus asserts that Plaintiff, in reporting the alleged racist statement, did not oppose any unlawful employment practice. Because section 2000e-3(a) gives a cause of action only for retaliation against an employee who has opposed an employment practice made illegal under Title VII, Defendant contends that Plaintiff has no cause of action against it under Title VII.

As to Title VI, Defendant contends that Plaintiff has no cause of action because he was not excluded on account of his race from any program or activity receiving federal financial assistance. Defendant also asserts that Plaintiff has no standing under Title VI as he cannot show that he was the intended beneficiary of a federally funded program. In addition, Defendant contends that an action is not authorized under Title VI with respect to any employment practice except where the primary objective of the federal financial assistance is to provide employment. Defendant contends that Plaintiff cannot show that any federal funding received by NEO is to provide employment. Finally, Defendant

contends that Title VI does not provide for a cause of action for retaliation.

Even if Plaintiff could assert causes of action under Title VII and Title VI, Defendant contends that it is still entitled to summary judgment on these federal claims. Defendant contends that it has sufficiently satisfied its burden of production as it has produced evidence of a legitimate non-discriminatory reason for its employment action. Specifically, it has produced evidence that Plaintiff was terminated due to his poor performance as a baseball coach. Furthermore, Defendant asserts that Plaintiff cannot demonstrate that this non-discriminatory reason for his termination was a pretext for discrimination.

In addition to the federal claims, Defendant contends that it is entitled to summary judgment on Plaintiff's state law claim for breach of contract. Defendant contends that it did not breach any employment contract with Plaintiff. Defendant asserts that Plaintiff had a year to year contract until July 2, 1997, at which time Plaintiff was given a probationary contract. According to Defendant, Plaintiff's probationary contract expired on December 12, 1997. Thus, Defendant contends the termination of Plaintiff as baseball coach did not breach any existing employment contract. Defendant further contends that Plaintiff cannot recover on any breach of an implied covenant of good faith and fair dealing as no implied covenant of good faith and fair dealing governed its decision to terminate the at-will employment contract of Plaintiff.

With regard to the state law breach of contract claim,

Defendant also requests that the Court decline the exercise of supplemental jurisdiction over the claim, if the Court finds Plaintiff has no causes of action under Title VI and Title VII.

In response, Plaintiff contends that he may bring a cause of action under Title VII for retaliation. Plaintiff asserts that the phrase "employment practice" should be construed to include any acts taken by Mr. Maxwell in his position as athletic director and in the performance of his job. Thus, Plaintiff contends that any racial slurs and other racial discriminatory conduct made by Mr. Maxwell in the regular course of his job were employment practices for purposes of the opposition clause of Title VII. Consequently, Plaintiff asserts that his opposition to those racist statements was opposition to unlawful employment practices. Plaintiff contends that in order to recover under Title VII, he must not only show that he subjectively believed that his employer was engaged in unlawful employment practices but also that his belief was objectively reasonable in light of the facts and circumstances presented. Plaintiff contends that the facts and circumstances support both Plaintiff's subjective belief and its objective reasonableness.

As to his Title VI claim, Plaintiff concedes that he was not a beneficiary of any federally funded Title VI program at NEO. He also concedes that no federal dollars were used to fund his job as a baseball coach and counselor. Plaintiff, however, asserts that the Court should engage in a case-by-case analysis of the facts. Plaintiff contends that none of the students who were beneficiaries

of the federal funds received by NEO knew of Mr. Maxwell's racist statements. Plaintiff asserts that if he and the other coaches had not complained to Dr. Carroll about the racist statements, Mr. Maxwell's efforts to exclude blacks from NEO would never have become known. Plaintiff contends that a requirement of standing would vitiate the protections of Title VI when the racial discrimination is hidden and not known by those who are the intended beneficiaries. Therefore, Plaintiff asserts that the Court should recognize Plaintiff as having standing to assert violation of Title VI by NEO.

Plaintiff additionally contends that the evidence in the record is sufficient to submit the Title VII and Title VI claims to a jury. Plaintiff asserts that he has established a prima facie case of discrimination. He also contends that he has presented adequate evidence to raise a genuine issue of fact as to whether Defendant's purported reason for terminating Plaintiff was pretextual.

In regard to his state law claim, Plaintiff contends that he was not an employee at will as argued by Defendant, but was employed pursuant to a written contract. According to Plaintiff, NEO hired Plaintiff pursuant to a written contract on July 2, 1997 and his employment under that contract was for ten months. Plaintiff asserts that under Oklahoma law, the written contract contained an implied duty of good faith and fair dealing. Plaintiff contends that Defendant breached such duty and that summary judgment is not appropriate on this claim.

Summary judgment is appropriate if the record shows that, "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party has the burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986). A genuine issue of material fact exists when "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986). In determining whether a genuine issue of a material fact exists, the evidence is to be taken in the light most favorable to the non-moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials of the pleadings, which demonstrates that there is a genuine issue for trial. Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir. 1983).

Section 704 of Title VII prohibits an employer from "discriminat[ing] against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3(a). Section 703(a) of Title VII defines an "unlawful employment practice" as follows:

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin

42 U.S.C. § 2000e(2)(a)(1).

In a Title VII action, the plaintiff has the initial burden of establishing by a preponderance of the evidence that a prima facie case exists. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)). If the plaintiff prevails at the prima facie stage, the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." Burdine, 450 U.S. at 253. If the defendant is successful in this second stage, the plaintiff must have the opportunity to prove by a preponderance of the evidence that the reasons proffered by the defendant are pretextual. Id.

To establish a prima facie case of retaliation, a plaintiff must show that (1) he was engaged in protected opposition to Title VII discrimination; (2) he suffered an adverse employment action subsequent to or contemporaneous with such protected activity; and (3) there was a causal connection between the protected activity and the adverse employment action. Berry v. Stevinson Chevrolet, 74 F.3d 980, 985 (10th Cir. 1996).

Upon review, the Court finds that Plaintiff has failed to establish the first element of the prima facie case. He has not demonstrated that he was engaged in protected opposition to Title VII discrimination. Plaintiff's theory of recovery is that he was

(4th Cir. 1989). In Crowley, the plaintiff, a white male, claimed that his salary was downgraded by his former employer for drawing attention to racial harassment in the police department. At trial, the jury returned a verdict in favor of the plaintiff. On appeal, the Fourth Circuit reversed the verdict, holding that the plaintiff's theory of recovery, that he had been retaliated against for "investigating instances of racial harassment perpetrated by police officers against members of the community," was not cognizable under Title VII. 890 F.2d at 687. The Fourth Circuit's reasoning, which the Second Circuit in Wimmer found equally applicable, was stated as follows:

It may be that the downgrading of [plaintiff's] position by the chief of police was wrongful or even spiteful. We have emphasized, however, that Title VII "is not a general 'bad acts' statute." Rather, the conduct it prohibits is specifically set forth While Congress may decide to extend the statute's coverage to persons who bring any discriminatory practice of an employer to light, such a step lies beyond the province of the courts. To find in Title VII protection for whistle-blowers on each and every instance of discrimination on the part of an employer is more than we think the plain language of its provisions will support.

Crowley, 890 F.2d at 687. See also, Little v. United Technologies, 103 F.3d 956, 959 (11th Cir. 1997); Silver v. KCA, Inc., 586 F.2d 138, 141 (9th Cir. 1978) ("[N]ot every act by an employee in opposition to racial discrimination is protected. The opposition must be directed at an unlawful employment practice of an employer, not an act of discrimination by a private individual.").

In the instant case, Plaintiff presented evidence that Mr. Maxwell made racial statements that there were too many blacks in the football program and on campus. Plaintiff offered no evidence,

however, that there was unlawful discrimination with respect to the terms and conditions of employment at NEO. In the absence of such evidence, the Court finds that Plaintiff's claim of retaliation is not cognizable under Title VII because his opposition was not directed at an unlawful employment practice of his employer. See, Wimmer, 176 F.3d 125, 135 (2nd Cir. 1999); Little, 103 F.3d at 959-960; Silver, 586 F.2d at 141 ("The specific evil at which Title VII was directed was not the eradication of all discrimination by private individuals, undesirable though that is, but the eradication of discrimination by employers against employees.").

Citing to Little, Plaintiff argues that to establish his prima facie case, he need not show that the racial statements of Mr. Maxwell were violative of Title VII, but only that he had a good faith, reasonable belief that the underlying employment practice was unlawful. In Little, the Eleventh Circuit ruled that a plaintiff may establish a prima facie case of retaliation under the opposition clause of Title VII on the ground that he had a good faith, reasonable belief that the employer was engaged in an unlawful employment practice. Little, 103 F.3d at 960. In the instant case, however, the Court finds that Plaintiff could not have reasonably believed that he was opposing an employment practice because the evidence does not establish any racial discrimination in an employment practice. There is no evidence of any discrimination against any individual with respect to his compensation, terms, conditions, or privileges of employment because of his race. See, 42 U.S.C. § 2000e-2(a)(1). Therefore,

the Court finds that summary judgment is appropriate on Plaintiff's Title VII retaliation claim.

As stated, Defendant also seeks summary judgment on Plaintiff's claim under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Title VI prohibits discrimination on the basis of race, color or national origin in any program or activity receiving federal financial assistance.¹ That prohibition extends to discrimination in employment by programs or activities that receive federal funding. However, the covered entities can only be sued for employment discrimination "where the primary objective of the Federal financial assistance [to that program or activity] is to provide employment." Reynolds v. School District No. 1, 69 F.3d 1523, 1531 (10th Cir. 1995) (quoting 42 U.S.C. § 2000d-3).² See also, Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 627 n. 6, 107 S.Ct. 1442, 1449 n. 6, 94 L.Ed.2d 615

¹ Section 2000d of Title 42 of the United States Code specifically provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

² Section 2000d of Title 42 of the United States Code specifically provides:

Nothing contained in this subchapter shall be construed to authorize action under this subchapter by department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

(1987) (noting Congress' concern that Title VI not subsume Title VII by making any employer who receives federal financial assistance liable under Title VI). Therefore, in order to sustain a claim under Title VI for discrimination in employment, a plaintiff must show that the defendant received federal funds for a primary objective of providing for employment. Reynolds, 69 F.3d at 1531.

Upon review of the record, the Court finds that Plaintiff has failed to show that Defendant received federal funds for the primary objective of providing for employment. Plaintiff has offered no evidence that the federal funds NEO received are for the primary objective of providing employment. Accordingly, Plaintiff has not carried his burden of proof on the Title VI claim and summary judgment is appropriate on that claim.³

Having found that summary judgment is appropriate on Plaintiff's federal law claims, the Court must determine whether to exercise supplemental jurisdiction over Plaintiff's state law claim for breach of contract. Judicial economy, fairness, convenience and comity are all considerations that are to guide a district court's decision whether to defer to a state court rather than retaining and disposing of a state law claim itself. United Mine Workers v. Gibbs, 383 U.S. 715, 726-27, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). However, the Tenth Circuit has held that when the federal claims are resolved before trial, the district court should

³ The Court also finds that summary judgment is appropriate on the Title VI claim as Plaintiff has not shown that he was not excluded from participation in, denied benefits of or was subjected to discrimination on account of his race under any program or activity receiving Federal financial assistance.

federal claims are resolved before trial, the district court should usually decline to exercise jurisdiction over the state law claim and allow the plaintiff to pursue it in state court. See, Smith v. City of Enid By and Through Enid City Com'n, 149 F.3d 1151, 1156 (10th Cir. 1998); Ball v. Renner, 54 F.3d 664, 669 (10th Cir. 1995). Having disposed of the federal law claims prior to trial and finding no consideration requiring the Court to retain and dispose of Plaintiff's state law claim, the Court, in its discretion and pursuant to 28 U.S.C. § 1367(c)(3), declines to exercise supplemental jurisdiction over Plaintiff's state law claim of breach of contract. The Court shall therefore dismiss the state law claim without prejudice.

Based upon the foregoing, the Motion for Summary Judgment filed by Defendant, The State of Oklahoma, ex rel., The Board of Regents for the Oklahoma State University Agricultural & Mechanical Colleges (Docket Entry #13-1) is **GRANTED** to the extent it seeks summary judgment on Plaintiff's federal law claims for violations of Title VI and Title VII of the Civil Rights Act. As to Plaintiff's state law claim for breach of contract, the Court, in its discretion and pursuant to 28 U.S.C. § 1367(c)(3), declines to exercise supplemental jurisdiction over the claim and the state law claim is **DISMISSED WITHOUT PREJUDICE**. Judgment as to Plaintiff's federal claims for violations of Title VI and Title VII of the Civil Rights Act shall issue forthwith. In light of the Court's ruling on the Motion for Summary Judgment, the Court **DECLARES MOOT**

the Motion in Limine filed by Plaintiff, Rick Ritschel (Docket Entry #12-1) and the Motion in Limine filed by Defendant, The State of Oklahoma, ex rel., The Board of Regents for the Oklahoma State University Agricultural & Mechanical Colleges (Docket Entry #17-1).

Entered this 16th day of August, 1999.

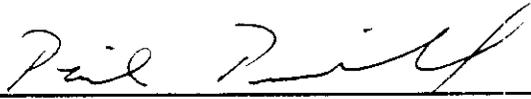


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

interest thereafter at the rates of 8% and 9.13% 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 4.966 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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

PEP/llf

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JERRY D. CROSSLEY,

Defendant.

) ENTERED ON DOCKET
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) **AUG 17 1999**
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FILED

AUG 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DEFAULT JUDGMENT

This matter comes on for consideration this 16th day of August, 1999, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and the Defendant, Jerry D. Crossley, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Jerry D. Crossley, was served with Summons and Complaint on July 19, 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, Jerry D. Crossley, for the principal amount of \$3,877.16, plus accrued

interest of \$106.10, plus administrative charges in the amount of \$106.10, plus interest thereafter at the rate of 8.98 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 4.966 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


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

PEP/alh

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

FILED

AUG 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BARBARA STARR SCOTT, and)
WOODROW WILSON,)
)
Plaintiffs,)

vs.)

Case No.: 99 C 156(B)

CHARLIE ADDINGTON,)
JOEL THOMPSON,)
BOB LEWANDOWSKI,)
MARK McCULLOUGH,)
JOE BYRD, BOB POWELL)
THE HOUSING AUTHORITY OF)
THE CHEROKEE NATION BOARD)
COMMISSIONERS in their personal)
and Official Capacities Composed of)
SAM ED BUSH, STANLEY JOE)
CRITTENDEN, ALEYENE HOGNER,)
NICK LAY, BILLY HEATH (as)
successor to NICK LAY), and MELVINA)
SHOTPOUCH and JOHN DOE(S),)
Defendants not yet known,)
)
Defendants.)

Senior Judge Thomas R. Brett

ENTERED ON DOCKET
AUG 17 1999
DATE _____

(formerly 99 CV 0161B (E))

**PLAINTIFF BARBARA STARR SCOTT'S DISMISSAL
WITHOUT PREJUDICE OF DEFENDANT BILLY HEATH
OF THE HOUSING AUTHORITY OF THE CHEROKEE NATION,
BOARD OF COMMISSIONERS, AS SUCCESSOR TO NICK LAY**

Comes now the Plaintiff, Barbara Starr Scott, through her lawyers, Sneed Lang, P.C., to dismiss without prejudice Defendant Billy Heath only, a member of the Board of Commissions of the Housing Authority of the Cherokee Nation, in his individual and official capacity based upon stipulation with the lawyer for the Housing Authority of the Cherokee Nation of Oklahoma.

41

015

Dated June 10th, 1999.

Respectfully submitted,

SNEED LANG, P.C.

Mike McBride

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LAWYERS FOR PLAINTIFF Barbara Starr Scott

CERTIFICATE OF SERVICE

This is to certify that on the 10th day of June, 1999, a true and correct copy of the above and foregoing instrument was mailed, postage fully prepaid thereon to the following named counsel of record:

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D. Michael McBride III

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

AUG 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN D. McDOULET,
SSN: 442-54-3661,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 98-CV-0042-EA

ENTERED ON DOCKET

DATE AUG 17 1999

ORDER

On August 16, 1999, the Court heard oral argument on the plaintiff's appeal of the Commissioner's decision to terminate his disability insurance benefits, the disposition of which both parties have consented to before this Court. Paul McTighe, Esq., appeared on behalf of the plaintiff, and Wyn Dee Baker, Assistant United States Attorney, appeared on behalf of the Commissioner. Following oral argument, and for the reasons stated on the record, the Court finds that the determination of the Administrative Law Judge (ALJ) is not supported by substantial evidence and the ALJ failed to apply the correct legal standards. See Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted).

IT IS THEREFORE ORDERED that, pursuant to sentence four, 42 U.S.C. § 405(g), the decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion. On remand, the Commissioner should perform a proper step four analysis, including the three phases outlined in Winfrey v. Chater, 92 F.3d 1017 (10th Cir. 1996).

If the Commissioner “failed to apply the correct legal test, there is ground for reversal apart from a lack of substantial evidence.” Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993) (citation omitted). The ALJ’s decision in this case may ultimately turn out to be correct, and nothing in this order is to be taken to suggest that the Court has presently concluded otherwise. This remand “simply assures that the correct legal standards are invoked in reaching a decision based on the facts of this case.” Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988).

Dated this 16th day of August, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

FAYE McKINNEY,
o/b/o Meisha F. Platt, a minor,
SSN: 442-98-2354,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

AUG 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-0919-EA

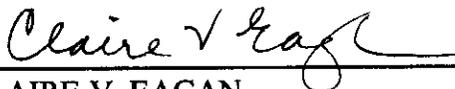
ENTERED ON DOCKET

DATE AUG 17 1999

JUDGMENT

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

Dated this 16th day of August, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

AUG 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FAYE MCKINNEY,
o/b/o Meisha F. Platt, a minor,
SSN: 442-98-2354,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 97-CV-0919-EA

ENTERED ON DOCKET

DATE AUG 17 1999

ORDER

On August 16, 1999, the Court heard oral argument on the plaintiff's appeal of the Commissioner's decision to deny her application for supplemental security income, the disposition of which both parties have consented to before this Court. Paul McTighe, Esq., appeared on behalf of the plaintiff, and Wyn Dee Baker, Assistant United States Attorney, appeared on behalf of the Commissioner. Following oral argument, and for the reasons stated on the record, the Court finds that the determination of the Administrative Law Judge (ALJ) is not supported by substantial evidence and the ALJ failed to apply the correct legal standards. See Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted).

IT IS THEREFORE ORDERED that, pursuant to sentence four, 42 U.S.C. § 405(g), the decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion. On remand, the Commissioner should apply the three-step sequential evaluation process found at 20 C.F.R. § 416.924, and if necessary, ensure that a Childhood Disability Evaluation Form, SSA-538, is properly completed and considered. See id., § 416.924(g).

If the Commissioner “failed to apply the correct legal test, there is ground for reversal apart from a lack of substantial evidence.” Thompson v. Sullivan, 987 F.2d 1482, 1487 (10th Cir. 1993) (citation omitted). The ALJ’s decision in this case may ultimately turn out to be correct, and nothing in this order is to be taken to suggest that the Court has presently concluded otherwise. This remand “simply assures that the correct legal standards are invoked in reaching a decision based on the facts of this case.” Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988).

Dated this 16th day of August, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

RANDY CAFFEY, individually and
DIANA CAFFEY, his wife,

Plaintiffs,

v.

WAL-MART STORES, INC., a
foreign corporation, and
SOLARAY CORP., an Oklahoma corporation,

Defendants.

ENTERED ON DOCKET
AUG 16 1999
DATE _____

Case No. 99-CV-490-H-(E) ✓

FILED

AUG 15 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on Plaintiffs' Motion to Remand (Docket # 5). Plaintiffs originally filed their action in the state court on August 21, 1999. Plaintiffs' petition contained claims for negligence against Defendant Wal-Mart Stores, Inc. ("Wal-Mart"). In addition, Plaintiffs sought a declaratory judgment against Defendant Solaray Corp. ("Solaray"). On June 24, 1999, Wal-Mart filed its petition for removal to this Court, alleging that "Plaintiffs' sole motivation for naming Solaray in the Petition and Amended Petition is to deny Wal-Mart its right to remove this case to federal court." Plaintiffs move to remand on the basis that the notice of removal was filed more than 30 days after Wal-Mart had notice that the case was removable, or alternatively, on the basis that Solaray is a proper defendant in this action.

Wal-Mart removed this case to federal court pursuant to 28 U.S.C. §1441, which permits removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." The alleged basis for jurisdiction in this case is 28 U.S.C. § 1332, which has two essential requirements: (1) an amount of controversy in excess of \$75,000; and (2) diversity of citizenship. Neither party disputes the existence of the requisite amount in controversy in this case. Plaintiffs move to remand, alleging that requirement of total diversity between the parties is not met, since Plaintiffs are citizens of Oklahoma and Defendant Solaray is

an Oklahoma corporation. In contrast, Wal-Mart argues that total diversity between the parties does exist, because Defendant Solaray was fraudulently joined as a party to this action.

This is not the first time that Wal-Mart has argued that Defendant Solaray was fraudulently joined. Wal-Mart made the same argument before the state court in both its first motion to dismiss and its motion to dismiss Solaray as an improper party defendant.¹ The state court considered this argument and resolved the issue against Wal-Mart in its order of January, 25, 1999. The Court finds that this ruling of the state court constitutes the law of the case. "The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." Mason v. Texaco, 948 F.2d 1546, 1553 (10th Cir. 1991). "The law of the case rule applies ... when a federal district court reviews matter previously considered in state court involving the same parties." Gage v. General Motors, 746 F.2d 345, 349 (10th Cir. 1986).

Wal-Mart raised the issue of Solaray's improper joinder before of the state court. The state court's ruling on that issue, denying Wal-Mart's motion to dismiss Solaray as an improper defendant, is the law of the case and will not be relitigated in this Court. Accordingly, Solaray is a proper party to this action. Since Solaray is a proper party in this case, complete diversity between the parties does not exist.

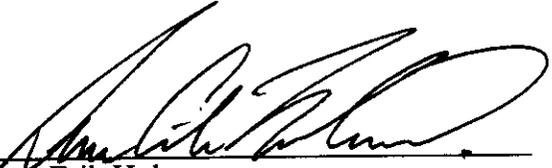
Based on the above, the Court finds that Defendant Solaray is properly joined in this action, the requirements for diversity jurisdiction under 28 U.S.C. 1332 have not been satisfied and therefore, the Court must remand this action to the District Court of Creek County. The Court hereby orders the Court Clerk to remand this case to the District Court for Creek County.

¹ In its Defendant's first motion to dismiss, filed in state court on Sept. 19, 1998, Wal-Mart alleged that "Plaintiff has no standing to bring this action against Defendant Solaray and it is merely an attempt to secure jurisdiction and defeat possible removal of this action." Def.'s First Mot. to Dismiss, ¶ 2. On December 11, 1998, Wal-Mart filed a motion in state court to dismiss Solaray as an improper party defendant, alleging, inter alia, that there was no justiciable controversy between Plaintiff's and Solaray. Def.'s Mot. to Dismiss Improper Party Def., ¶ 3.

Accordingly, Plaintiff's motion to remand (Docket # 5) is hereby granted.

IT IS SO ORDERED.

This 12TH day of August, 1999.



Sven Erik Holmes
United States District Judge

MT

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

FILED

AUG 16 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

RONALD E. TERRELL,)
)
 Appellant,)
)
 vs.)
)
 KENNETH S. APFEL, Commissioner of)
 Social Security Administration,)
)
 Appellee.)

No. 99-CV-160-M

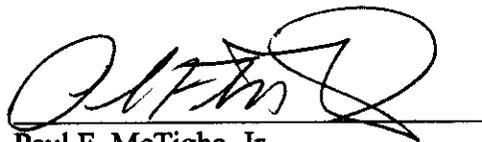
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DATE AUG 16 1999

STIPULATION OF DISMISSAL OF APPEAL

COME NOW, the Appellant and Appellee, pursuant to Federal Rule of Appellate Procedure 42(b), do hereby stipulate as follows:

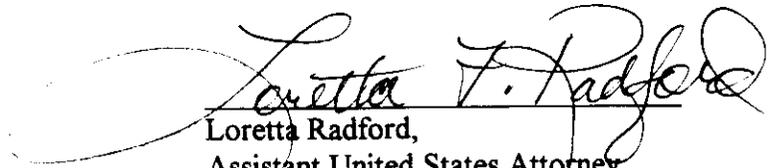
- 1.) That the pending appeal in this action may be dismissed by the Clerk of this Court.
- 2.) That the parties agree that each shall pay their own costs of this action.
- 3.) That there are no fees due in this action.

WHEREFORE, Appellant and Appellee stipulate that the appeal pending in this case may be dismissed by the Clerk of this Court and for such other and further relief as the Court deems proper.



Paul F. McTighe, Jr.
Attorney for Appellant
Oklahoma Bar Number 6094
717 South Houston; Suite 408
Tulsa, OK 74127-9029
PH: 918-584-1475

CFM

A handwritten signature in cursive script, reading "Loretta T. Radford". The signature is written in black ink and is positioned above a horizontal line.

Loretta Radford,
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, OK 74103

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

F I L E D

AUG 16 1999

FRANKLIN DAGGS,)
)
Plaintiff,)
)
vs.)
)
ALEXANDER & ALEXANDER, INC.)
(Oklahoma); ALEXANDER &)
ALEXANDER SERVICES, INC.;)
AON GROUP, INC.; ALEXANDER &)
ALEXANDER, INC.; AON RISK)
SERVICES, INC.; ALEXANDER &)
ALEXANDER PENSION PLAN;)
AON PENSION PLAN; ALEXANDER &)
ALEXANDER THRIFT PLAN; and)
AON SAVINGS PLAN,)
)
Defendants.)
)

No. 96-C-967-B

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE AUG 16 1999

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for non-jury trial on July 7, 1999, on plaintiff Franklin Daggs' claim for denial of Earnings Continuation and Long Term Disability ("LTD") benefits pursuant to Section 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1132(a)(1)(B), against defendants Alexander & Alexander, Inc. (Oklahoma), Alexander & Alexander Services, Inc., AON Group, Inc., Alexander & Alexander, Inc., Alexander & Alexander Pension Plan, AON Pension Plan, Alexander & Alexander Thrift Plan and AON Savings Plan (hereinafter collectively referred to as "A& A"). After considering the evidence, the arguments of counsel, and the applicable law, the Court enters the following Findings of Fact and Conclusions of Law:

I. Findings of Fact

1. Plaintiff Franklin Daggs (“Daggs”) was employed by Alexander & Alexander, Inc. from June 1974 until May 1995.
2. The parties have stipulated that the Plan documents involved in this case are Joint Exhibit 1, Alexander & Alexander Services, Inc. Disability Benefits Plan (the “Plan”) and Joint Exhibit 2, Your Benefits Handbook (the “Handbook”). The Plan, as defined in Article 1, “means, collectively, the Alexander & Alexander Services, Inc. Disability Benefits Plan as herein set forth as it hereafter may be amended from time to time and the Component Plans hereunder.” Although the Plan references the Earnings Continuation Plan and the Long Term Disability (“LTD”) Plan as “Component Plans” contained in the Plan Appendix, the Appendix has not been attached and therefore the Component Plans are not part of the record before the Court.
3. Until his termination, Daggs was a participant in the Earnings Continuation Plan (frequently referred to as “short term disability”) which provided for up to 180 days of full pay for a fully vested participant who is disabled because of illness or injury. The Earnings Continuation Plan was funded entirely by employer contributions.
4. Until his termination, Daggs was a participant in the Long Term Disability (“LTD”) Plan. The LTD Plan provided for payment of 70% of wages during a period of disability that lasted in excess of 180 days. Daggs’ contributions for participation in the LTD Plan were deducted from his paycheck and totaled 501 payments during his employment.
5. Article 7 of the Plan addresses the Administration of the Plan:
 - 7.1 THE ADMINISTRATOR. Except as to those functions reserved within

the Plan or a Component Plan to the Company or an Insurer, the Administrator shall control and manage the operation and administration of the Plan and shall be the "named fiduciary" for purposes of ERISA. The Administrator shall be the Company or such other person or committee as may be appointed from time to time by the Company to administer the Plan. The Administrator or any person who is a member of a committee that is appointed hereunder to be the Administrator may or may not be a Participant in the Plan.

7.2 ADMINISTRATIVE RULES AND DETERMINATIONS. Subject to the limitations of the Plan, the Administrator shall establish rules for the administration of the Plan and the transaction of its business. The Administrator shall have the exclusive right (except as to matters reserved to the Company or an Insurer by the Plan or a Component Plan which the Company may reserve to itself) to interpret the Plan and to decide all matters arising thereunder, including the right to remedy possible ambiguities, inconsistencies, or omissions. All determinations of the Administrator or the Company in respect to any matter hereunder shall be conclusive and binding on all persons. Without limiting the generality of the foregoing, the Administrator shall have the following powers and duties:

- (a) To require any person to furnish such information as the Administrator may request for the purpose of the proper administration of the Plan as a condition to receiving any Benefits under the Plan;
- (b) To make and enforce such rules and regulations and prescribe the use of such forms as the Administrator shall deem necessary for the efficient administration of the Plan;
- (c) To decide on questions concerning the Plan and the eligibility of any employee to participate in the Plan, in accordance with the provisions of the Plan; and
- (d) To determine the amount of Benefits which shall be payable to any person in accordance with the provisions of the Plan, to inform the Employer of the amount of such Benefits and to provide a full and fair review to any Participant whose claim for Benefits has been denied in whole or in part.

In carrying out its duties herein, the Administrator shall have discretionary authority to exercise all powers and to make all determinations, consistent with the terms of the Plan, in all matters entrusted to it, and its determinations shall be given deference and shall be final and binding on all interested parties.

7.3 DELEGATION AND RELIANCE. The Administrator, subject to approval of the Company, may employ the services of such firms or persons as it may deem necessary or desirable in connection with the Plan.

The Administrator may delegate any of its powers or duties to another person or persons. . . .

6. The Handbook identifies the United States Benefit Administration Committee (the "Benefit Committee") as the Plan Administrator. The parties, however, stipulate that the U.S. Benefits Claims Adjudication Subcommittee was "a Plan Administrator." The record is unclear as to which entity reviewed Daggs' claim for disability benefits.¹ The Court assumes for purpose of these findings of fact that the decision to deny Daggs' disability benefits, whether made by the Subcommittee or the Benefit Committee, was made by the Plan Administrator.
7. Article 2 of the Plan sets forth in pertinent part the following eligibility requirements of the Plan:

2.1 PARTICIPATION. Each Employee is eligible to participate in the Plan as of the later of the Effective Date or his or her "Participation Date," which will be the date the Employee becomes an Employee. However, individual Component Plans may impose certain eligibility and participation requirements as provided therein.²

Each Employee shall become a Participant on his or her "Participation Date", provided that the Employee completes and submits an Election Form on or prior to that date (or within thirty-one (31) days following such date) and provided further that the Employee has the status, as determined by the Employer, of an active Employee of the Employer on such date. . . .

2.2 TERMINATION OF PARTICIPATION. A Participant's participation in the Plan shall terminate on the earliest of the following dates:

- (a) The day on which the Participant terminates employment (or, if later and the Participant is eligible to receive severance benefits under the Alexander &

¹ Although Daggs submitted his appeal to the Subcommittee c/o Kim Kuhr, Kuhr refers to the decision-making body alternately as the "U.S. Employee Benefits Committee" in her May 27, 1997 letter and as the "US Benefits Claims Adjudication Committee" in her September 18, 1997 letter.

² As the Component Plans are not in the record, any further eligibility requirement under the Earnings Continuation and LTD Plans are not before the Court.

Alexander Services Inc. Severance Plan in other than a single lump sum, the date severance benefits under the Alexander & Alexander Services Inc. Severance Plan end).

- (b) The day on which the Participant ceases to qualify as an Employee or a Participant (or, if later and the Participant is eligible to receive severance benefits under the Alexander & Alexander Services Inc. Severance Plan in other than a single lump sum, the date severance benefits under the Alexander & Alexander Services Inc. Severance Plan end).
- (c) With respect to any coverage requiring Participant contributions, the last day of the period for which contributions by the Participant are made.
- (d) In the case of participation in the Earnings Continuation Supplemental Coverage Plan Account, the day on which the Participant completes ten (10) years of continuous employment as an Employee.
- (e) The day on which all benefits, or the applicable benefit(s), are terminated by amendment of the Plan, by whole or partial termination of the Plan or by discontinuation of contributions by the Employer.

8. Article 8 of the Plan sets forth the procedure for making a claim for benefits under the Plan:

8.1 CLAIMS PROCEDURE.

- (a) Initial Claim. If a Participant or a Participant's spouse, dependent or beneficiary (hereinafter referred to as a "Claimant") is denied any Benefit under this Plan, the Claimant may file a claim with the Administrator. The Administrator shall review the claim itself or appoint an individual or an entity to review the claim. The Claimant shall be notified within ninety (90) days after the claim is filed whether the claim is allowed or denied, unless the Claimant receives written notice from the Administrator or appointee of the Administrator prior to the end of the ninety (90) day period stating that circumstances require an extension of the time for decision, such extension not to extend beyond the day which is one hundred eighty (180) days after the day the claim is filed. The notice of the decision shall be in writing, sent by mail to the Claimant's last known address, and, if the notice is a denial of the claim, the notice shall contain the following information:
 - (i) the specific reasons for the denial;
 - (ii) a specific reference to pertinent provisions of the Plan on which the denial is based;
 - (iii) if applicable, a description of any additional information or material necessary to perfect the claim and an explanation of why such information or material is necessary; and
 - (iv) an explanation of the Plan's claims review procedure.

(b) Review Procedure. A Claimant is entitled to request a review by the Administrator of any denial of the Claimant's claim. The request for review must be submitted to the Administrator in writing within sixty (60) days of mailing of notice of the denial. Absent a request for review within the sixty (60) days period, the claim will be deemed to be conclusively denied. The review of a denial of a claim shall be conducted by the Administrator or an Individual or entity appointed by the Administrator. The reviewer shall afford the Claimant an opportunity to review all pertinent documents and submit issues and comments in writing and shall render a review decision in writing, all within sixty (60) days after receipt of a request for a review, provided that, where not prohibited by law, the reviewer may extend the time for decision by not more than sixty (60) days upon written notice to the Claimant. The Claimant shall receive written notice of the reviewer's decision, together with specific reasons for the decision and reference to the pertinent provisions of the Plan.

9. Daggs was hospitalized in March of 1994 when he underwent coronary artery bypass graft surgery. He continued to experience chest pains, hypertension, nausea, migraine headaches and depression and was subsequently admitted to the hospital in April 1994 (2 days), May 1994 (3 days), July 1994 (6 days), August 1994 (4 days), December 1994 (2 days), March 1995 (3 days), April 1995 (8 days), and May 1995 (12 days).
10. On April 12, 1995, Daggs was admitted to the hospital complaining of chest pains and nausea and remained hospitalized through April 19, 1995. He continued to receive out-patient care from April 20 through May 9, 1995.
11. Employees of A&A's Tulsa office, including Steve Snider and Sibyl McClintock ("McClintock"), as well as Laura Yancey ("Yancey"), A&A's Human Resource Manager who oversaw the Tulsa office, were aware of Daggs' continual health problems and absenteeism.
12. On May 3, 1995, Daggs went into the office at the request of Joe Sykes ("Sykes"),

A&A's Senior Vice-President, to meet with Sykes and Yancey. At that meeting Sykes informed Daggs that his employment was terminated and gave Daggs a termination letter dated May 3, 1995 which stated in pertinent part the following:

We regret that your employment has been terminated and today will be your last day at A&A. . . .

Your final paycheck will include regular pay through May 17, 1995, which includes two weeks in lieu of notice, making your final date of termination May 17, 1995.

13. Later that day, Daggs' wife called McClintock for information about Daggs' eligibility for LTD benefits. Yancey returned the call the next day and told Daggs he was not entitled to LTD benefits, although he could apply for the benefits in six months and receive no pay for those six months. Although Yancey testified that she "would have been the appropriate person" for Daggs to contact to request Earnings Continuation and LTD benefits, Yancey did not provide Daggs with any application forms for these benefits or any information on how to process a claim for these benefits.
14. On May 10, 1995, Daggs was again admitted to the hospital for chest pain, nausea, abdominal pain, and hypertension. During this hospitalization, Daggs was diagnosed as having a chemical dependency to Stadol, a narcotic nasal spray prescribed for treatment of his migraine headaches. He was transferred to the in-patient chemical dependency program at the hospital where he remained through May 17, 1995.
15. On May 15, 1995, while Daggs was hospitalized, his wife spoke with Phyllis Tusing ("Tusing") at A&A's corporate office in Owings Mills, Maryland requesting information about medical benefits and informing her that Daggs was in the hospital and was concerned his medical coverage would cease. After her call to Tusing, Ms. Daggs sent a

telegram to Henry Kramer ("Kramer"), Alexander & Alexander Services, Inc.'s Director of Benefit Programs, on behalf of Daggs stating the following: "I hereby elect early retirement as of May 17, 1995 and comprehensive medical plan as discussed today between Betty Joe Daggs and Phyllis Dissing [sic]. Letter to follow." On the same day, Daggs sent the following letter to Kramer:

I hereby elect early retirement as of May 17, 1995; which is my employment termination date as stated in letter of May 3, 1995, from Joe Sykes. I request the Combined Medical Plan with Aetna Managed Choice, as discussed between Betty Jo Daggs and Phyllis Dissing [sic] this morning. It is my understanding this medical plan includes comprehensive medical cover, prescription and dental coverage.

I had requested early retirement information from Laura Yancey on May 4, 1995. As of this date, the information has not been received. Since I am currently in the hospital, I request short term disability and sick leave.

Daggs testified he elected early retirement because he wanted to insure he would continue to receive the same medical benefits.

16. On June 7, 1995, Daggs wrote Yancey to follow up on correspondence with her that remained unanswered. Daggs reminded Yancey of his letter requesting "disability (Long Term) which was prompted by [his] most recent Hospitalization (May 10th through May 17th and again May 20th through May 23." Daggs added that he had "two doctors [sic] statements that will document this request."
17. On June 8, 1995, Daggs received the first response from Kramer to his request for benefits. Kramer stated the following: "You also requested information regarding payouts for short term disability and sick leave. Since you were an active employee on the date you were terminated, you are not eligible for any disability or salary continuation

benefits.” Kramer did not refer to the “pertinent provisions of the Plan on which the denial is based,” describe what “additional information or material [was] necessary to perfect the claim and an explanation of why such information or material is necessary,” or explain “the Plan’s claims review procedure,” as required under Article 8 of the Plan.

18. On June 12, 1995, Daggs again wrote Kramer to request Earning Continuation and LTD benefits:

Thank you for the reply to my request for Salary Continuation and Disability benefits. I understand your answer, I was in the office May 03, 1995, the date I was given notice of termination. The reason I came in was at the request of Joe Sykes. I was still under doctors care.

My next hospitalization was May 10th through May 17th and again May 20th through May 23, 1995. My termination date was May 17th. You can see that I was not active on the date of my termination as you stated.

Once again I am requesting Disability. I await your reply.

19. Despite this information, Kramer did not investigate Daggs’ claim. When asked about Daggs’ June 12, 1995 letter, Kramer testified: “It seemed to me like I talked to the office and they confirmed that he was active working full-time the date of his termination. And as of the information that I received from the office, we continued to deny the claim that he was an active employee when terminated. All benefits cease as of termination date, so he wasn’t eligible.” Accordingly, Kramer responded by letter dated June 30, 1995 as follows:

In response to your letter of June 12, 1995, you were actively at work on the date of your termination and therefore ineligible for disability or salary continuation benefits. If you wish to appeal this decision, please write to the U.S. Benefits Claims Adjudication Subcommittee c/o Kim D. Kuhr at the above address. Your letter should include all pertinent information relating to the issue, and

specifically request that you wish to appeal.
Should you have any further questions, please do not hesitate to
contact me at 410-363-5137.

Other than identifying Kim Kuhr and the U.S. Benefits Claims Adjudication Subcommittee as the appropriate forum for Daggs' appeal, Kramer again did not refer to the "pertinent provisions of the Plan on which the denial is based," describe what "additional information or material [was] necessary to perfect the claim and an explanation of why such information or material is necessary," or explain "the Plan's claims review procedure," as required under Article 8 of the Plan.

20. On December 6, 1995, Daggs wrote another letter to Kramer again protesting Kramer's determination that he was not entitled to disability benefits, which stated in pertinent part:

On several occasions I have written to you and Laura Yancey regarding unpaid benefits. You responded to one of my letters, saying that I was not entitled to Disability due to being active on the date of my termination. Your statement was not correct. My termination date was May 17, 1995 and I was in the Hospital on that date and the week leading up to May 17, 1995. You can see that I was not active on the official date of my termination.

21. Kramer responded by letter dated December 20, 1995 stating, among other things, that "Our records indicate that you were active at work on the date you were terminated, therefore you are not eligible for disability benefits." In denying Daggs' request for Earnings Continuation and LTD benefits, Kramer again did not refer to the "pertinent provisions of the Plan on which the denial is based," describe what "additional information or material [was] necessary to perfect the claim and an explanation of why such information or material is necessary," or explain "the Plan's claims review

procedure," as required under Article 8 of the Plan.

22. On December 26, 1995, Daggs wrote Dave Thompson, Vice President, Affinity Group - Alexander & Alexander, Inc., stating in part:

On several occasions I have written to Mr. Henry Kramer and Laura Yancey regarding unpaid benefits resulting out of my Wrongful Termination from Alexander & Alexander, Inc.. I did receive a letter back from Henry Kramer declining my request for Disability. He said that I was active on the date of my termination, for that reason he declined my request. I wrote back to him and informed him that my official date of termination was May 17, 1995 and that I was Hospitalized one week before that date and was in the Hospital and under treatment after that date.

23. On May 6, 1997, Daggs wrote Kim Kuhr ("Kuhr"), secretary of the U.S. Benefits Claims Adjudication Subcommittee, requesting a review of the denial of his long term disability benefits:

Since May of 1995, I have been corresponding with Henry C. Kramer, Director, Benefits Programs, regarding my claim for long term disability benefits. In one of Mr. Kramer's letters he advised me that I could appeal his decision. I submit this letter as my official notice to appeal. Please send me the necessary instructions or forms so that I may start this procedure. In addition, I would like to have a complete copy of my long term disability policy.

24. Kuhr responded by letter dated May 15, 1997 as follows:

I am in receipt of your letter dated May 6, 1997 in which you request an appeal of the decision to deny you disability benefits. According to our records, your employment was terminated on 5-17-95. You requested disability benefits be paid to you in December 1995. You were informed that since you were active at work when you were terminated you were not eligible for disability benefits. At this point, it has been over one year since you were notified that you were not eligible for benefits. This is significantly more than the 60 days in which a participant has to appeal a denied claim as specified in the administration section of

the Employee Benefits Handbook. Unless there are extenuating circumstances that you can provide to the Committee concerning the reason for not appealing in a timely manner, I must inform you that the Committee is not obligated to review your appeal. I am enclosing a copy of the Long Term Disability Plan. Would you please forward to me a check in the amount of \$3.50 for the cost of providing this plan document to you. If you have any questions regarding the above please do not hesitate to contact me.

The document sent to Daggs was a copy of the Plan which did not include the Component Plans.³

25. On May 27, 1997, Kuhr wrote Daggs accepting the matter for appeal and requesting pertinent information:

I am in receipt of your letter, and check, dated May 20th, regarding your appeal for disability benefits. Again, it is the administrative policy that all benefit appeals must be submitted within 60 days of the denial notification, unless an extension of time has been granted, or if extenuating circumstances are involved. Based on your letter I understand it is your belief that extenuating circumstances are involved in this appeal process.

Your appeal, including the timing of the original denial notification, will be presented to the U.S. Employee Benefits Committee within the next 60 days. In order for the Committee to review your appeal you need to submit all pertinent correspondence, medical information etc., regarding the circumstances which led to the original benefits denial, as well as all correspondence which has occurred up to this point.

This information should be submitted as soon as possible, and is necessary to submit a complete appeal representation to the Committee.

Should you have any questions, or need anything further, please do not hesitate to contact me.

26. Daggs responded by letter dated July 22, 1997 as follows:

Again, I wish to thank you for responding to my various letters regarding my application for Long Term Disability Benefits. You can see from my documentation that I made many appeals for

³ Daggs testified that this was the first time he had access to the Plan, and although a copy of the Handbook was kept at A&A's Tulsa office, he did not have access to the Handbook after May 3, 1995, his last day at work.

Disability Benefits that my doctors and attorney believe that I am entitled to.

One important fact is, at the time I was given the letter of termination I was under rehabilitation for Coronary Artery Bypass Graft Surgery and Prescription Drug Dependency and under treatment for Depression. My release to return to work from Coronary Artery Bypass Surgery was on a limited basis. No release was given to me to return to work from my hospitalization of April 12th through April 19th, which was In Patient treatment for Prescription Drug abuse. I was released from In Patient treatment and placed on Out Patient status.

The result of not being granted Long Term Disability brought about additional hospital stays, readmitted to In Patient Treatment for Prescription Drug abuse. Further deterioration of my health leading to significant atherosclerotic cardiovascular disease and intermittent episodes of paroxysmal [sic] hypertension, hypercholesterolemia, chronic headaches and chronic depression. In addition, the financial hardship and the inability to obtain Disability Insurance has been harmful on me and my family.

Enclosed is the following documentation:

- (a) Letters from my Doctors outlining my condition
- (b) List of Hospitalization stay
- (c) Copies of letters written to Alexander & Alexander, Inc. Personnel requesting Benefits.

Other documentation that I will be obtaining is a Sworn and Notarized affidavit from Jim Jackson A&A Tulsa, attesting to a statement made by Joe Sykes in which he (Joe Sykes) said he would have granted me Long Term Disability if I had asked him for the benefit and I will show where another A&A Tulsa employee who was working without a release from being hospitalized was granted Long Term Disability at the time of his termination.

Please point out to the committee that I was insured under the Long Term Disability insurance for twenty two (22) years, I was not just another employee along for the ride. I made a significant contribution to Alexander & Alexander, Inc.. My achievements were, Summit Club Qualifier nine (9) consecutive years, Technical Excellence award Winner two (2) years, Top Regional Sales one (1) year and Soubry award winner in 1992, Top Producer for Class III, IV & V Offices 1991.

Should you require dates of my first hospitalization 1992 which was the year of my first Heart attack, I will be happy to forward to you. Thank you for your attention to my request. I look forward to

a favorable decision.

27. On September 18, 1997, Kuhr sent the following letter to Daggs denying his appeal:

This is in response to your letter of July 22, 1997 regarding your request for the US Benefits Claims Adjudication Committee to consider your request for long term disability benefits. The Committee has denied your request for the following reasons:

- (a) Your employment was terminated in May 1995 and you did not submit a claim for benefits on a timely basis. It is the participants [sic] responsibility to file for benefits and the Committee feels that a claim that is two years old should not be considered at this time.
- (b) You were actively at work when you were terminated therefore you could not have been totally and permanently disabled.
- (c) Just after your termination from Alexander and Alexander, you were gainfully employed by another company which confirms that you were not disabled at the time.

I am sorry I do not have a more favorable response. If you have any questions regarding the above, please do not hesitate to contact me.

28. On October 8, 1997, Daggs sent the following letter to Kuhr requesting reconsideration of the Benefit Committee's decision:

I am in receipt of your letter dated September 18, 1997, in which you list three (3) reasons for declining my request for Long-Term Disability.

Once again the facts of my case have been misstated and used to deny my request. I will briefly touch on the correct facts and as [sic] you to once again to reconsider my case based on the true facts.

The facts are as follows:

- (a) I submitted my claim before my termination date. Check letter to Mr. Kramer requesting Long-Term Disability. Two years did not elapse before I submitted a claim.
- (b) I was in St. John Hospital at the time of my original request for Benefits. This had been documented several times.
- (c) I was not employed after my termination from Alexander & Alexander, Inc.. Employment did not come for many months after I left Alexander & Alexander, Inc.. I was forced into employment to pay the bills. This employment further deteriorated my health even though I worked from my house on a limited basis.

Again, I am requesting you to reconsider my many request[s] and to present the true facts of my case. Thank you for your attention to my letter.

29. There is no record of any response to Daggs' request for reconsideration.

II. Conclusions of law

1. This Court has jurisdiction pursuant to 28 U.S.C. §1331 and 29 U.S.C. §1132(e)(1) and venue is proper pursuant to 29 U.S.C. §1132(e)(2).
2. Any finding of fact above that could be properly characterized as a conclusion of law is incorporated herein.
3. A denial of benefits challenged under 29 U.S.C. §1132(a)(1)(B) is reviewed under an arbitrary and capricious standard if the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989); *McGraw v. Prudential Ins. Co. of America*, 137 F.3d 1253, 1258 (10th Cir. 1998).
4. Pursuant to the terms of the Plan, the Benefit Committee as Plan Administrator had discretionary authority to determine eligibility for benefits and its decision is reviewed under an arbitrary and capricious standard.
4. Defendants also claim Henry Kramer, Alexander & Alexander Services, Inc.'s Director of Benefit Programs, was acting as Plan Administrator when he denied Daggs' requests for benefits in 1995. Defendants cite Kramer's testimony at page 100 of his deposition in which he answers that the Plan Administrator was "Generally me and the U.S. Benefits Committee." The Court questions the sufficiency of this evidence as the Plan does not identify who was appointed Plan Administrator during the relevant time period, no

separate delegation or appointment document is in the record, and the Handbook identifies the United States Benefit Administration Committee as the Plan Administrator and expressly distinguishes the Plan Administrator from the Director, Benefits Programs. *See Averhart v. US West Management Pension Plan*, 46 F.3d 1480, 1489-90 (10th Cir. 1994); *Rodriguez-Abreu v. Chase Manhattan Bank, N.A.*, 986 F.2d 580, 584 (1st Cir. 1993)("To be an effective delegation of discretionary authority so that the deferential standard of review will apply, therefore, the fiduciary must properly designate a delegate for the fiduciary's discretionary authority."). The Court, however, need not determine whether Kramer was acting as Plan Administrator in denying Daggs' request for Earnings Continuation benefits as the Court cannot affirm the decision even under the deferential standard of review.

5. Kramer denied Daggs' request for Earnings Continuation benefits because Daggs was "actively at work on the date of [his] termination and therefore ineligible for disability or salary continuation benefits." The Court finds Kramer's decision to be arbitrary and capricious on the merits and as a result of its failure to provide the procedural protections required under ERISA, 29 U.S.C. §1133(1) and 29 C.F.R. §2560.503-1(f)(1)-(4) and Article 8 of the Plan.
6. In its termination letter, A&A identified May 17, 1995 as Daggs' "final date of termination." In addition, A&A kept Daggs active on the payroll, receiving his "regular pay," his earnings minus taxes and standard deductions (which included the premium deduction for LTD benefits), through May 17, 1995. Further, in her May 15, 1997 letter in response to Dagg's request to appeal, Kuhr states "according to our records, your

employment was terminated on 5-17-95." The Court finds May 17, 1995 was the date Dagg's employment was terminated.

7. It is undisputed that Dagg was hospitalized from May 10 through 17, 1995 and again on May 20 through 23, 1995. On May 15, 1995, the fifth day of his hospitalization, Dagg wrote Kramer requesting short term disability (Earnings Continuation) benefits. He informed Kramer that he was in the hospital. When he received Kramer's June 8, 1995 letter denying his request, Dagg sent the June 12, 1995 letter informing Kramer that he was hospitalized "from May 10th through 17th and again on May 20th through May 23, 1995"; his termination date was May 17th; and he was therefore not active at work on the date of his termination. Kramer did not investigate Dagg's claim and again denied him Earning Continuation benefits in the June 30, 1995 letter.

The Court finds the decision denying Dagg's request for Earnings Continuation benefits arbitrary and capricious. Under the terms of the Plan and pursuant to the directives set forth on pp. 80-81 of the Handbook, Dagg was "disabled because of an illness" and could not "work for five or more consecutive days." It is undisputed he was hospitalized from May 10 through May 17, 1995, and thus eligible for Earnings Continuation benefits when he requested the benefits on May 15, 1995. In addition, A&A was aware Dagg suffered from continual health problems since his coronary bypass surgery in March 1994. More specifically, A&A was aware Dagg was not "active at work" from mid-April through May 3, 1995 when he was hospitalized for seven days and continued treatment on an outpatient basis. His absence was apparently notable

enough to require Sykes to ask him to come into the office on May 3rd so that Sykes could inform him of his termination. Further, Daggs informed Kramer in his June 12, 1995 letter that he was “still under doctors care” on May 3rd and the reason he went into the office was “at the request of Joe Sykes.” In light of this evidence, there was no reasonable basis for Kramer’s determination that Daggs was “actively at work on the date of [his] termination and therefore ineligible for disability or salary continuation benefits,” regardless of whether Daggs’ termination date was May 3 or 17, 1995.

Finally, Kramer acted in an arbitrary and capricious manner in failing to investigate Daggs’ employment status and health condition before determining he was ineligible for disability benefits, *McGraw*, 137 F.3d at 1262, and in failing to provide the procedural protections required by Article 8 of the Plan and 29 U.S.C. §1133(1) and 29 C.F.R. §2560.503-1(f)(1)-(4). *Sandoval v. Aetna Life and Casualty Ins. Co.*, 967 F.2d 377, 382 (10th Cir. 1992); *Weaver v. Phoenix Home Life Mutual Ins. Co.*, 990 F.2d 154, 157-58 (4th Cir. 1993).

9. For the reasons stated above, the Court similarly concludes the Benefit Committee’s denial of LTD benefits on appeal because Daggs was “actively at work when [he was] terminated” and therefore “could not have been totally and permanently disabled” was arbitrary and capricious.⁴ In addition, the Benefit Committee failed to provide Daggs a full and fair review of the denial of disability

⁴ The Handbook identifies when LTD coverage ends as “[t]he date your employment ends or your eligibility for coverage ends (*including your salary continuation period*). (emphasis added).

benefits as required by Article 8 of the Plan and 29 U.S.C. §1133(2) and 29 C.F.R. §2560.503-1(f)(1)-(4) and (g)(1). *Sandoval*, 967 F.2d at 382; *see generally, Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 821-22 (10th Cir. 1996)

8. Although not cited by Kramer or the Benefit Committee as a reason for Daggs' ineligibility for Earnings Continuation or LTD benefits, Defendants argued at trial that Daggs' participation in the Plan was terminated pursuant to Article 2.2(b) of the Plan on May 3, 1995 because he ceased "to qualify as an Employee" on that date. "Participant" is defined under Article 1 of the Plan as "an Employee who becomes a Participant pursuant to Article 2." "Employee" is also defined in pertinent part therein as "a person who is an employee of the Employer regularly scheduled to work thirty (30) or more hours per week for the Employer (as determined by the Employer)." Defendants contend Daggs ceased "to qualify as an Employee" on May 3, 1995, his last day of work, because he was no longer "regularly scheduled to work thirty (30) or more hours per week" for A&A. The Court disagrees with defendants' interpretation. To read Article 2.2(b) as defendants urge would effectively exclude all legitimate applicants for LTD benefits as such applicants would necessarily have been disabled for more than 180 days and thus not "regularly scheduled to work thirty (30) or more hours per week." The definition of "Employee" in Article 1 is intended to classify the type of employee (*e.g.*, one who works a regular work week as opposed to temporary, part-time help) who is eligible to participate in the Plan.
9. The Court rejects defendants' argument that Daggs' ERISA claim should fail for failure to exhaust administrative remedies and timely appeal the denial of benefits. *See*

generally *McGraw v. Prudential Ins. Co. of America*, 137 F.3d 1253 (10th Cir. 1998).

First, the Court finds Daggs was not afforded the procedural protections required under ERISA, 29 U.S.C. §1133(1) and 29 C.F.R. §2560.503-1(f)(1)-(4) and (g)(1), and Article 8 of the Plan, and thus not sufficiently apprised of the internal appellate procedure to preclude his claim for benefits for failure to follow same. Kramer and the Benefits Committee did not refer to the “pertinent provisions of the Plan on which the denial [was] based”; describe what “additional information or material [was] necessary to perfect the claim and an explanation of why such information or material [was] necessary”; or sufficiently explain “the Plan’s claims review procedure.” See *Tabron v. Colgate-Palmolive Co.*, 881 F.Supp. 512, 518-19 (D.Kan.1995)(“The exhaustion requirement . . . is not absolute and may be waived in certain situations. Exceptions to the exhaustion requirement have been recognized in situations in which a claimant is denied meaningful access to the plan’s administrative claims procedure. . . . Also related to the administrative exhaustion requirement are regulations which define certain minimum requirements for employee benefit plan claims procedures which have been promulgated under the authority of 29 U.S.C. §1133. Regulations provide that each plan must establish a procedure for a claimant: to appeal a denied claim and receive a full review of the denial.); *Curry v. Contract Fabricators Inc. Profit Sharing Plan*, 891 F.2d 842, 846-47 (11th Cir. 1990)(“When a plan administrator in control of the available review procedures denies a claimant meaningful access to those procedures, the district court has discretion not to require exhaustion.”). Second, the Court concludes defendants waived any right to complain of the untimeliness of Daggs’ appeal to the Benefit Committee as

the Committee accepted Daggs' claim for review.

10. The Court also rejects defendants' argument that Daggs waived any claim for LTD benefits when he elected early retirement, effective May 17, 1995, the date of his termination. First, the record does not support defendants' contention that Daggs requested early retirement prior to and in lieu of LTD benefits. Yancey and Daggs both testified Daggs requested disability benefits as well as information on early retirement during their phone conversation on May 4, 1995. During that conversation, Yancey informed Daggs he was not eligible for LTD benefits, but could apply in six months. Further, although Daggs also requested information on early retirement in reference to continuing medical benefits, Yancey did not inform him that retirement would preclude him from applying for LTD benefits in six months. Neither did Kramer inform Daggs that his requests were mutually exclusive when he responded to Daggs' May 15, 1995 letter again requesting early retirement information as well as short term disability. In short, there is no evidence to support Daggs' knowing, intentional relinquishment of his claim for disability benefits by electing early retirement as of May 17, 1995. *Rodriguez-Abreu*, 986 F.2d at 587("Issues of relinquishment of rights and waiver are governed by federal common law developed in ERISA cases To be valid, a waiver of ERISA benefits must be an intentional relinquishment or abandonment of a known right or privilege."); *Smart v. Gillette Company Long-Term Disability Plan*, 70 F.3d 173, 182 (1st Cir. 1995)("The inquiry into waiver consists of two questions: whether a party actually knew she was relinquishing a benefit, and whether she acted voluntarily in doing so. Answering these companion questions is a fact- intensive exercise, and the trier's

factfinding is entitled to deference (unless it is tainted by a mistake of law."); *In re HECI Exploration Co.*, 862 F.2d 513, 523 (5th Cir.1988).

11. The record before the Court is limited to that presented to the Benefit Committee. *Sandoval*, 967 F.2d at 380 ("In determining whether the plan administrator's decision was arbitrary and capricious, the district court generally may consider only the arguments and evidence before the administrator at the time it made that decision."). The Court concludes the administrative record is inadequate for the Court to conduct a meaningful review of Daggs' entitlement to Earnings Continuation or LTD benefits. *Bernstein v. Capital-Care, Inc.*, 70 F.3d 783, 789 (4th Cir. 1995); *see generally Chambers*, 100 F.3d at 821-22.
12. The Court reverses and remands this matter to the current Plan Administrator for further proceedings based on the following: (1) the claims process in this case was short-circuited by Kramer's arbitrary and capricious finding that Daggs was ineligible for Earnings Continuation and LTD benefits because he was "actively at work" on the date of his termination and therefore not disabled, which decision was affirmed by the Benefits Committee; (2) the administrative record before the Benefits Committee is inadequate to allow the Court to conduct a meaningful review of the decision to deny disability benefits; and (3) Daggs was denied the procedural fairness required by the Plan and ERISA to insure a full and fair review of his claim for benefits.

IT IS THEREFORE ORDERED, the case is remanded to the current Plan Administrator to process Daggs' claim for Earnings Continuation and LTD benefits in accordance with the requirements of Article 8 of the Plan, 29 U.S.C. §1133(1) and 29 C.F.R. §2560.503-1(f) and (g).

In so doing, the Plan Administrator must include pertinent citations to the Plan upon which its decision is based⁵ and open the record to request what "additional information or material [is] necessary to perfect the claim and an explanation of why such information or material is necessary." Although the Court has found Daggs eligible to receive Earnings Continuation benefits commencing May 17, 1995, the record before the Court is insufficient to determine the extent of time Daggs remained disabled. Therefore, the case is remanded to the Plan Administrator to receive the medical evidence necessary to determine how long Daggs was entitled to Earnings Continuation benefits and if and how long he was entitled to receive LTD benefits.⁶

In accordance with the above findings of fact and conclusions of law, the Court grants plaintiff reasonable attorney's fees and costs pursuant to 29 U.S.C. §1132(g)(1) if timely applied for under Local Rule 54.1 and 54.2. The Court will retain jurisdiction solely for the purpose of determining the issue of attorney's fees. The Plan Administrator should proceed forthwith in the determination of Daggs' entitlement to Earnings Continuation and LTD benefits on remand.

DATED, this 15th day of August, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

⁵ The Component Plans, if they exist, should also be made part of the administrative record on remand.

⁶ Any entitlement to disability benefits should be adjusted or offset, where appropriate, by early retirement payments Daggs received.

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

FILED

AUG 13 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

EVONNA LARAY FORD,)
)
Plaintiff,)
vs.)
)
BUDDY COOK, individually,)
and in his official capacity,)
)
Defendant.)

Case No. 98-CV-837-BU(E)

ENTERED ON DOCKET

DATE AUG 16 1999

ORDER

This matter comes before the Court upon Defendant's Motion for Stay of Trial Pending Final Disposition of Interlocutory Appeal. In its motion, Defendant seeks an order of this Court staying the trial of this action pending the final disposition of Defendant's interlocutory appeal from this Court's denial of Defendant's summary judgment motion on the issue of qualified immunity. Citing to Stewart v. Donges, 915 F.2d 572 (10th Cir. 1990), Defendant contends that the interlocutory appeal divested the Court of jurisdiction to conduct the trial of this case and it is entitled to a stay until the appellate process is concluded.

Plaintiff, in response, argues that Defendant's interlocutory appeal is frivolous under recent authority of the United States Supreme Court and the Tenth Circuit Court of Appeals and that this Court has the ability and authority to certify that the interlocutory appeal is frivolous and proceed with the trial. Plaintiff defers to the Court in considering whether the subject interlocutory appeal is frivolous. Plaintiff states that she is amenable to having the Tenth Circuit Court of Appeals determine the jurisdictional issue and frivolity issue associated with the

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interlocutory appeal. She gives notice of her intent to argue to the Tenth Circuit Court of Appeals that the interlocutory appeal is frivolous and that she is entitled to double costs and attorney's fees based upon the improper interlocutory appeal.

Upon review of the parties' submissions, the Court concludes that Defendant's motion should be granted. The Court declines to take the affirmative step of certifying to the Tenth Circuit Court of Appeals that the interlocutory appeal filed by Defendant is frivolous. This matter therefore shall be stayed pending the final disposition of Defendant's interlocutory appeal.

Based upon the foregoing, Defendant's Motion for Stay of Trial Pending Final Disposition of Interlocutory Appeal (Docket Entry #46) is **GRANTED**. For statistical purposes, the Court **ORDERS** the Clerk of the Court to administratively close this matter in his records pending final disposition of Defendant's interlocutory appeal by the Tenth Circuit Court of Appeals. Within five (5) days of the mandate of the Tenth Circuit Court of Appeals, the parties shall file a motion to reopen this matter for final resolution of this litigation.

Entered this 13th day of August, 1999.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

AUG 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GAYLON R. HUTCHINS,)
SSN: 444-44-5606,)

Plaintiff,)

v.)

KENNETH S. APFEL, Commissioner,)
Social Security Administration,¹)

Defendant.)

Case No. 97-CV-0601-EA

ENTERED ON DOCKET

DATE AUG 13 1999

ORDER

Claimant, Gaylon R. Hutchins, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of the Social Security Administration (“Commissioner”) denying claimant’s application for disability benefits under the Social Security Act.² In accordance with 28 U.S.C. § 636(c)(1) and (3), the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this order will be directly to the Tenth Circuit Court of Appeals.

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

² On March 18, 1994, claimant protectively filed for disability benefits under Title II (42 U.S.C. § 401 et seq.), and for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.). Claimant’s applications for benefits were denied in their entirety initially (August 17, 1994), and on reconsideration (December 1 and 15, 1994). A hearing before Administrative Law Judge Richard J. Kallsnick (ALJ) was held October 13, 1995, in Tulsa, Oklahoma. By decision dated January 24, 1996, the ALJ found that claimant was not disabled at any time through the date of the decision. On April 21, 1997, the Appeals Council denied review of the ALJ’s findings. Thus, the decision of the ALJ represents the Commissioner’s final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

Claimant appeals the decision of the ALJ and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **REVERSES** and **REMANDS** the Commissioner's decision.

I. SOCIAL SECURITY LAW AND STANDARDS OF REVIEW

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" *Id.*, § 423(d)(2)(A). Social Security regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. § 404.1520.³

Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). This Court's review is limited to two inquiries: first, whether the decision was supported

³ Step one requires claimant to establish that he is not engaged in substantial gainful activity, as defined by 20 C.F.R. § 404.1510. Step two requires that claimant establish that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 404.1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with certain impairments listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1. A claimant suffering from a listed impairment or impairments "medically equivalent" to a listed impairment is determined to be disabled without further inquiry. If not, the evaluation proceeds to step four, where claimant must establish that he does not retain the residual functional capacity (RFC) to perform his past relevant work. If claimant's step four burden is met, the burden shifts to the Commissioner to establish at step five that work exists in significant numbers in the national economy which claimant--taking into account his age, education, work experience, and RFC--can perform. Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work.

by substantial evidence; and, second, whether the correct legal standards were applied. Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted). The term substantial evidence has been interpreted by the U.S. Supreme Court to require “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The Court may not reweigh the evidence nor substitute its discretion for that of the agency. Casias v. Secretary of Health & Human Servs., 933 F.2d 799, 800 (10th Cir. 1991). Nevertheless, the court must review the record as a whole, and “the substantiality of the evidence must take into account whatever in the record fairly detracts from its weight.” Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); see also Casias, 933 F.2d at 800-01.

II. CLAIMANT’S BACKGROUND

Claimant was born on June 25, 1944, and was 51 years old at the time of the administrative hearing in this matter. He has a twelfth grade education; his past relevant work is as a heating and air conditioning installer. Claimant alleges an inability to work beginning July 31, 1992, due to Alzheimer’s disease, inability to concentrate, and poor memory.

III. MEDICAL HISTORY OF CLAIMANT

Claimant first reported symptoms of indecisiveness, confusion, irritability, memory impairment, and frustration to his physician, R. Michael Eimen, D.O. (R. 165-76) On August 8, 1991, Dr. Eiman recommended that claimant undergo a complete neurological evaluation. (R. 168)

On August 19, 1991, claimant was examined by Jay K. Johnson, D.O., of Tulsa Neurology Clinic. (R. 159-62) After examination, Dr. Johnson opined that claimant was “primarily . . . having problems with his memory, behavioral changes and subjective speech production problems, with a

nonfocal examination. Certainly, the possibility of a dementing illness exists.” (R. 160) Dr. Johnson recommended a MRI scan of the brain, EEG, and lumbar puncture. Claimant did not receive treatment from Dr. Johnson.

More than a year later, in October 1992, Dr. Eimen referred claimant to Ralph W. Richter, M.D., neurologist and psychiatrist, for complaints of indecisiveness and memory loss. (R. 163) Dr. Richter reported a normal neurological examination. However, Dr. Richter recommended claimant for Alzheimer’s disease clinical trials. (R. 163) Thereafter, Dr. Richter treated claimant through October 31, 1996. During this course of treatment, Dr. Richter’s progress notes reflect that claimant suffered from numerous mental limitations including irregular sleep patterns, difficulty with attention and concentration, depression, irritability and frustration, indecisiveness, decreased memory, dizziness, and crying spells. (R. 196-226, 228-54)

During the hearing, the ALJ requested that claimant have Dr. Richter complete a mental assessment form listing claimant’s problems and limitations. (R. 51, 70) Claimant complied with the ALJ’s request, submitting a form completed by Dr. Richter dated October 19, 1995. (R. 192-94) Dr. Richter opined that claimant would have a poor ability to make occupational, performance, and personal-social adjustments. (Id.) Dr. Richter stated in his cover letter that claimant had evidence of a “progressive disorder involving memory and cognitive function,” which was probably Alzheimer’s disease, and that the disease was “progressive and will show further deterioration.” (R. 191) Dr. Richter further stated his belief that claimant was not able to manage his own affairs. (Id.)

The ALJ gave little probative weight to Dr. Richter’s mental assessment form on the basis that the responses were not consistent with the progress notes. (R. 20-21) Instead, the ALJ relied

on, inter alia, the report of the consultative examination requested by the Social Security Administration. (R. 18, 177-81)

The consultative examination was performed on August 3, 1994 by Donald R. Inbody, M.D., a psychiatrist. The mental status examination showed that claimant's

speech was logical, coherent and sequential with no affective disturbances or associational defects in thinking. No psychotic symptomatology was noted. He was oriented in all spheres and appears to be of average intelligence. He showed no evidence of clinical anxiety, nor was there any clinical evidence today of depression, and he denies any suicidal ideation. Sleep pattern and appetite are intact. He shows some possible early memory loss for recent events. This is characterized by requiring some time to think of his step children's ages and the date of the month. He did know the date, day of the week and year, and that he was on the 6th floor. He was able to name the current and past two presidents. He was able to do mathematical computations, but could not do multiplication above 6X6. For his level of education it is felt that this probably represents an impairment. He was able to do serial subtractions. He answered similarities and proverbs accurately. He recalled four items in my office at two, five and ten minute intervals accurately. There were no disturbances in attention and concentration and judgment is felt to be intact. He shows no significant impairment in reasoning, but obviously has had occupational problems in terms of memory loss interfering with functioning on the job.

(R. 178-79) Dr. Inbody's impression was, for Axis I, possible organic brain disorder or primary degenerative dementia of the Alzheimer's disease type, early, mild, diagnosed by a neurologist and not being treated; for Axis II and Axis III, no diagnosis; for Axis IV, psychosocial stressors were moderate; and for Axis V, a global assessment of functioning (GAF) of 60, with highest GAF in the past year of 70. Dr. Inbody believed that claimant was able to handle his own money. (R. 179)

IV. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant suffered from severe organic brain disorder and depression, but that he had the residual functional capacity (RFC) to perform the nonexertional requirements of work, except for complex

work activity in more than a low stress environment. The ALJ concluded that claimant could not perform his past relevant work, but there were other jobs existing in significant numbers in the national and regional economies that he could be expected to make a vocational adjustment to perform, based on his RFC, age, education, and work experience. Having concluded that there were a significant number of jobs which claimant could make a vocational adjustment to perform, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

V. REVIEW

Claimant asserts as error that the ALJ: (1) ignored without adequate justification the treating physician's opinion contained in the mental assessment form, which the ALJ specifically requested; and (2) ignored the vocational expert testimony that a person with claimant's impairments could not perform even simple work assignments.

Treating Physician's Opinion

Claimant's treating physician, Dr. Richter, is a neurologist who treats, and conducts clinical trials of pharmaceuticals for, patients with Alzheimer's disease. (R. 177) The record indicates that Dr. Richter first saw claimant in October 1992 and treated claimant through at least October 1996. (R. 196-226, 228-54) At the time Dr. Inbody conducted a consultative psychiatric examination of claimant in August 1994, Dr. Richter was claimant's treating physician. The opinions of those two specialists at that time are substantially similar. Each diagnosed claimant with early, mild degenerative dementia: Dr. Inbody characterized it as "of the Alzheimer's disease type" (R. 179); and Dr. Richter called it "memory loss" and "general cognitive decline." (R. 215) The Court finds nothing inconsistent between these two opinions in 1994.

During the administrative hearing, the ALJ noted the absence of Dr. Richter's records, requested those records, and suggested that Dr. Richter complete a mental assessment form. (R. 70) When Dr. Richter completed that form on October 19, 1995, he indicated that claimant would have poor to no ability to follow work rules, relate to co-workers, deal with the public, use judgment with the public, interact with supervisors, deal with work stresses, function independently, and maintain attention and concentration. Dr. Richter further opined that the claimant would have poor to no ability to understand, remember, and carry out complex, detailed but not complex, and simple job instructions; and would have poor or no ability to maintain his personal appearance, to behave in an emotionally stable manner, to relate predictably in social situations, or to demonstrate reliability. (R. 192-94) The assessment form was accompanied by a cover letter expressing the diagnosis of "probable Alzheimer's disease." (R. 191) Dr. Richter's treatment notes through October 1995 were made part of the record before the ALJ. (R. 196-226)

The ALJ rejected Dr. Richter's mental assessment, finding it inconsistent with his treatment notes. The ALJ found that the notes reflect that on four occasions claimant was quiet, pleasant, cooperative, and oriented to person, place and time. (R. 21)

Social Security regulations require that mental impairments must be established by medical evidence consisting of signs, symptoms, and laboratory findings. 20 C.F.R. §§ 404.1508, 416.908. Symptoms include claimant's own description of his mental impairment. *Id.* §§ 404.1528, 416.928. Signs include anatomical, physiological, or psychological abnormalities which can be observed, and must be shown by medically acceptable clinical diagnostic techniques. *Id.* Psychiatric signs are medically demonstrable phenomena which indicate specific abnormalities of behavior, affect, thought, memory, orientation, and must be shown by observable facts that can be medically

described and evaluated. Id. The treatment notes of Dr. Richter through October 1995 contain significant symptoms and psychiatric signs of progressive dementia, a severe mental impairment. (See R. 163, 190-216) The Court finds that the treatment notes are not inconsistent with Dr. Richter's opinion.

Both Dr. Richter and Dr. Inbody diagnosed claimant with dementia. Dr. Richter diagnosed "probable Alzheimer's disease" (R. 191); Dr. Inbody opined that it was "of the Alzheimer's disease type" (R. 179). Alzheimer's disease is a progressive degenerative disease of the brain characterized by senile plaques. Beers and Berhow, The Merck Manual of Diagnosis and Therapy 1395 (17th ed. 1999). Its early stage is characterized by loss of recent memory, inability to learn and retain new information, language problems, mood swings, and personality changes; the intermediate stage includes behavioral disorganization, getting lost, confusion, agitation, uncooperativeness, and loss of sense of time and place. Id. at 1397. The disease progresses from slight memory disturbance or personality changes to profound dementia and, eventually, death. Id.

Pursuant to regulations adopted in 1991, a treating physician may offer an opinion which reflects a judgment about the nature and severity of the claimant's impairments, including the claimant's symptoms, diagnosis and prognosis, what claimant can do despite the claimant's impairment, and any physical or mental restrictions. 20 C.F.R. §§ 404.1527(a)(2); 416.927(a)(2). The Commissioner will give controlling weight to that type of opinion if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record. Id. §§ 404.1527(d)(2); 416.927(d)(2). Dr. Richter's opinion was based on clinical diagnoses and is not inconsistent with the other evidence of record.

Tenth Circuit law requires that substantial weight must be given to the opinion of a treating physician unless good cause is shown for rejecting it. Goatcher v. United States Dep't. of Health & Human Servs., 52 F.3d 288, 289-90 (10th Cir. 1995) (citations omitted.) A treating physician's report may be rejected if it is brief, conclusory, and unsupported by medical evidence. Bernal v. Bowen, 851 F.2d 297 (10th Cir. 1988); see also Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1029 (10th Cir. 1994). If the treating physician's opinion is to be disregarded, specific, legitimate reasons for doing so must be set forth. Eggleston v. Bowen, 851 F.2d 1244, 1246-47 (10th Cir. 1988). The Court finds that claimant's orientation and cooperation in the doctor's office on four occasions is not a legitimate reason to reject Dr. Richter's opinion. Dr. Richter is a specialist in treatment of Alzheimer's disease, and had examined claimant numerous times and had treated claimant over a period of years at the time he rendered his opinion, which the ALJ had requested. The opinion of a doctor who treats claimant over a period of time is entitled to great weight. Williams v. Bowen, 844 F.2d 748, 757 (10th Cir. 1988). The ALJ's rejection of the treating physician's opinion is contrary to law.

Dr. Richter's 1996 treatment notes were submitted to the Appeals Council by claimant's counsel (R. 7, 8), and are part of the record. Although they were not required to be considered by the Appeals Council because they relate to a period after the ALJ decision, 20 C.F.R. §§ 404.970(b), 416.1470(b), they further document claimant's symptoms and psychiatric signs, such as: memory impairment, depression, headaches, sleep disturbance, crying, lower leg urticaria (R. 254); hypertension (R. 250); frustration in daily routines (R. 228); recurring depression, mental lapses, confusion (R. 249); acute depression, crying, no desire to live (R. 229); depression, crying, anxiousness (R. 244); depression, withdrawal, crying, anger (R. 231); depression (R. 230).

A Clinical Dementia Rating Worksheet completed by M.S. Wells, R.N.B.S., in August 1996 and contained in Dr. Richter's records, indicates that claimant's wife at that time reported that claimant had a consistent problem with memory or thinking, sometimes recalled events, rarely remembered a short list of items, had decline in memory in the past year, had memory impairment that would interfere with daily activities, sometimes forgot major events within a few weeks, usually forgot pertinent details of a major event, and sometimes forgot important information of the distant past. (R. 232)

When the nurse interviewed claimant for the dementia rating, claimant gave incorrect details for a recent event, and incorrect date, month, and time. (R. 238-39) For the clinical dementia rating, claimant was rated with: memory--severe memory loss, only highly learned material retained, new material rapidly lost; orientation--moderate difficulty with time relationships, oriented for place at examination, may have geographic disorientation elsewhere; judgment and problem solving--moderate difficulty in handling problems, similarities, differences, social judgment usually maintained; community affairs--unable to function independently at these activities though may still be engaged in some, appears normal to casual inspection; home and hobbies--only simple chores preserved, very restricted interests, poorly maintained; personal care--fully capable of self care. (R. 241) These notes corroborate Dr. Richter's earlier opinion. Upon remand, the Commissioner should give Dr. Richter's opinion controlling weight, or give other specific, legitimate reasons for disregarding it.

Vocational Expert Testimony

The Court declines to reach the remaining issue, which relates to the hypothetical question posed by the ALJ to the vocational expert. This issue may be mooted by the proceedings or

disposition on remand. The Court does note, however, that the vocational expert testified that if the testimony of claimant was found to be credible and substantially verified by medical evidence, claimant could not perform any jobs. The expert explained:

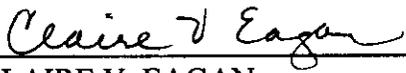
But the first clue is when he was not able to continue with his driver's license because he would get confused and get lost. Then, I believe his wife testified that he had trouble, and he did also verify this, that he would have trouble making decisions even when he got up in the morning as to what clothes to wear. He would get confused with this. And certainly this would affect -- if he had trouble making those kind of decisions, it would certainly reflect in any type of work assignment that he would do. He has trouble comprehending reading. Examples of -- his wife had indicated that sometimes he tries to wash the clothes and he might stop the cycle in the middle and remove the clothes or put the clothes up wet. Same thing with doing the dishes. So those would be fairly simple, routine things. And if he had trouble doing that, I just can't see that he would be able to perform any meaningful work without some accommodation or in a sheltered type situation where he had some direct supervision.

(R. 68-69) This is an unusually strong statement from a vocational expert.

VI. CONCLUSION

The decision of the Commissioner is not supported by substantial evidence and the correct legal standards were not applied. The decision is **REVERSED** and **REMANDED**.

DATED this 12th day of August, 1999.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

AUG 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BILLY DON RUCKER,)
)
Petitioner,)
)
vs.)
)
KEN KLINGLER,)
)
Respondent.)

Case No. 98-CV-554-K (M) ✓
(BASE FILE)
98-CV-567-K (M)

ENTERED ON DOCKET

DATE AUG 13 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. The Clerk is directed to file a copy of this Judgment in Case No. 98-CV-467-K.

SO ORDERED THIS 12 day of August, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

FILED
AUG 12 1999

BILLY DON RUCKER,)
)
Petitioner,)
)
vs.)
)
KEN KLINGLER,)
)
Respondent.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-554-K (M) ✓
(BASE FILE)
98-CV-567-K (M)

ENTERED ON DOCKET

DATE AUG 13 1999

ORDER

Before the Court in this consolidated¹ habeas corpus action are Respondent's motion to dismiss petition for habeas corpus as time barred by the statute of limitations (Docket #7) and Petitioner's motion for an evidentiary hearing (#10). Petitioner has filed a response to the motion to dismiss (#9). Respondent's motion 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. As a result, Petitioner's motion for an evidentiary hearing has been rendered moot.

BACKGROUND

On May 20, 1993, Petitioner was convicted after entering a plea of *nolo contendere* to one (1) count of Assault and Battery With a Dangerous Weapon, and one (1) count of Maiming, in Tulsa County District Court, Case No. CF-92-4767. He was sentenced to ten (10) years imprisonment on

¹Petitioner filed his habeas corpus petition on July 27, 1998. Four (4) days later, on July 31, 1998, Petitioner filed a 42 U.S.C. § 1983 civil rights complaint which was assigned Case No. 98-CV-567-K. On August 27, 1998, the Court converted the civil rights complaint to a habeas corpus action after finding that Petitioner was challenging the very fact of his imprisonment and sought immediate release from prison. Thereafter, on December 1, 1998, Petitioner's two habeas corpus actions, Case Nos. 98-CV-554-K and 98-CV-567-K, both challenging Petitioner's conviction entered in Tulsa County District Court, Case No. CF-92-4767, were consolidated.

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Count 1 and to seven (7) years imprisonment on Count 2, to be served consecutively. Petitioner did not move to withdraw his plea and did not otherwise perfect a direct appeal.

According to the Tulsa County District Court docket sheet provided by Respondent, Petitioner's first application for post-conviction relief was denied by the district court on July 10, 1995. See #8, Ex. A. Petitioner did not appeal that denial of post-conviction relief. On May 22, 1998, Petitioner filed a second application for post-conviction relief in Tulsa County District Court. The court's order denying relief was file stamped and mailed to Petitioner on August 11, 1998. Petitioner filed a petition in error in the Oklahoma Court of Criminal Appeals on September 24, 1998, but the appeal was dismissed as untimely on October 12, 1998. See #8, Ex. C.

Petitioner also filed two petitions for writ of habeas corpus in the Oklahoma Court of Criminal Appeals. The first was filed on April 15, 1998 and dismissed on May 1, 1998, see #8, Ex. B; the second was filed on November 3, 1998 and denied on November 30, 1998, see #8, Ex. D.

On July 27, 1998, Petitioner filed the instant petition for writ of habeas corpus asserting three grounds of error (#1).

ANALYSIS

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

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

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

(B) the date on which the impediment to filing an application

created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State actions;

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

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

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

28 U.S.C. § 2244(d). Because the limitations period generally begins to run from the date on which a prisoner's direct appeal from his conviction became final, a literal application of the AEDPA limitations language would result in the preclusion of habeas corpus relief for any prisoner whose conviction became final more than one year before enactment of the AEDPA. Recognizing the retroactivity problems associated with that result, the Tenth Circuit Court of Appeals has held that for prisoners whose convictions became final before April 24, 1996, the one-year statute of limitation does not begin to run until April 24, 1996. United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997). In other words, prisoners whose convictions became final before April 24, 1996, the date of enactment of the AEDPA, were 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 in § 2254 cases 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 state applications for post-conviction relief properly filed during the grace period.

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, his conviction became final ten (10) days after entry of his Judgment and Sentence, or on May 30, 1993. See Rule 4.2, *Rules of the Court of Criminal Appeals* (requiring the defendant to file an application to withdraw *nolo contendere* plea within ten (10) days from the date of the pronouncement of the Judgment and Sentence in order to commence an appeal from any conviction of a plea of *nolo contendere*). 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. Under Simmonds, 111 F.3d at 746, Petitioner had until April 23, 1997, to submit a timely petition for writ of habeas corpus.

Although the running of the limitations period would be tolled or suspended during the pendency of any post-conviction or other collateral proceeding properly filed during the grace period, 28 U.S.C. § 2244(d)(2); Hoggro, 150 F.3d at 1226, Petitioner's collateral proceedings were filed in the state courts either before or after but not during the grace period. Thus, neither the post-conviction proceedings nor the state habeas corpus proceedings can toll the limitations period in this case. Petitioner did not file his federal petition until July 27, 1998, more than a year beyond the April 23, 1997 deadline. Therefore, absent a basis for either statutory or equitable tolling, this action is time-barred.

In his response to the motion to dismiss (#9), Petitioner argues that because he had no knowledge of the "AEDPA" until after he filed this case, he meets the requirements to have his case heard. However, neither Petitioner's *pro se* status nor his unfamiliarity with the law is sufficient cause to excuse his untimeliness. See, e.g., Rodriguez v. Maynard, 948 F.2d 684, 687 (10th Cir.1991) (cause and prejudice standard applies to pro se prisoner's lack of awareness and training on legal issues); Saahir v. Collins, 956 F.2d 115, 118 (5th Cir.1992) (actual knowledge of legal

issues not required by *pro se* petitioner). Therefore, the Court declines to excuse Petitioner's untimely filing and concludes Respondent's motion to dismiss should be granted.

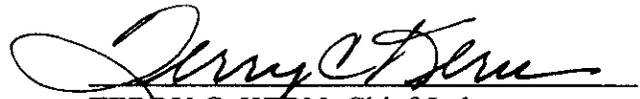
CONCLUSION

Because Petitioner failed to file his petition for writ of habeas corpus within the one-year grace period, see Hoggro v. Boone, 150 F.3d 1223 (10th Cir. 1998); United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997), Respondent's motion to dismiss for failure to file within the limitations period 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 (#7) is **granted**.
2. The petition for writ of habeas corpus is **dismissed with prejudice**.
3. Petitioner's motion for an evidentiary hearing (#10) is **moot**.
4. The Clerk is directed to file a copy of this Order in Case No. 98-CV-567-K.

SO ORDERED THIS 12 day of August, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

CALVIN E. RAGLAND,)
)
 Petitioner,)
)
 vs.)
)
 STEVE HARGETT, Warden,)
)
 Respondent.)

ENTERED ON DOCKET
DATE AUG 13 1999

Case No. 97-CV-749-H (J) ✓

FILED

AUG 12 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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. CRF-95-5464. Respondent has filed a Rule 5 response (#10) to which Petitioner has replied (#13). Petitioner has also filed a "request for summary judgment" (#19), which the Court liberally construes, see Haines v. Kerner, 404 U.S. 519 (1972), as a motion for expedited ruling. As more fully set out below the Court concludes that this petition should be denied. As a result, Petitioner's motion for expedited ruling has been rendered moot.

BACKGROUND

On April 15, 1996, Petitioner pled guilty to the crime of Unlawful Possession of a Controlled Dangerous Substance, After Former Conviction of Two or More Felonies, in Tulsa County District Court, Case No. CRF-95-5464. Petitioner was sentenced to twenty-two (22) years imprisonment. Petitioner did not move to withdraw his guilty plea and did not otherwise perfect a direct appeal.

On October 15, 1996, Petitioner filed an application for post-conviction relief in the state district court, raising the following six (6) grounds of error:

1. Petitioner's sentence is excessive;
2. Petitioner was denied the effective assistance of counsel;
3. Petitioner's sentence violates the Eighth Amendment;
4. Petitioner was denied his right to a direct appeal;
5. Petitioner's sentence is void, due to the presiding judge's involvement in the plea agreement;
6. All prior convictions are void as enhancement evidence.

See #10, attachment to Ex. A. On November 25, 1996, the district court denied post-conviction relief (#10, attachment to Ex. A). On January 2, 1997, Petitioner filed a petition in error and brief in support in the Oklahoma Court of Criminal Appeals, and on February 25, 1997, that court dismissed the appeal as untimely (#10, Ex. A).

Thereafter, Petitioner sought a post-conviction appeal out of time, alleging that his failure to perfect his appeal of the trial court's denial of his post-conviction relief application was not his fault, but rather due to oversights by the Tulsa County Court Clerk and Appellate Court Clerk. On March 26, 1997, the state district court entered its order recommending denial of a post-conviction appeal out of time. Petitioner appealed and on May 7, 1997, the Oklahoma Court of Criminal Appeals affirmed the denial of the application for a post-conviction appeal out of time (#10, Ex. B).

On July 18, 1997, Petitioner filed a petition for writ of habeas corpus in the United States District Court for the Western District of Oklahoma. The case was transferred to this court on August 15, 1997. Petitioner raises the following grounds of error: (1) Petitioner was denied a direct appeal through no fault of his own, (2) Petitioner was denied effective assistance of counsel because his counsel did not have knowledge of relevant law, (3) Petitioner's sentence is void, due to the

judge's involvement in plea negotiations, (4) Petitioner's sentence is excessive, violates the 8th Amendment and was enhanced by void prior convictions which violates due process. (#5, Memorandum in Support of Petition).

In his response, Respondent argues that Petitioner's claims of ineffective assistance of counsel (claim 2) and that he was denied a direct appeal through no fault of his own (claim 1) are without merit. Respondent also asserts that claims 3 and 4 are procedurally barred from this Court's review. In his reply, Petitioner contests Respondent's arguments. Petitioner has also submitted his "supplemental information" in support of his claim that his sentence was improperly enhanced with invalid prior convictions (#18).

ANALYSIS

A. Exhaustion/Evidentiary Hearing

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).

B. Petitioner's Claims are Procedurally Barred

Two levels of procedural default in state courts occurred in this case. First, Petitioner failed to perfect a direct appeal following the entry of his guilty plea. Second, Petitioner failed to perfect a timely post-conviction appeal thereby waiving consideration of his claims a second time. In dismissing Petitioner's post-conviction appeal, the Oklahoma Court of Criminal Appeals relied only on Petitioner's failure to comply with Rule 5.2(C)(1) in refusing to consider the claims asserted in the post-conviction application.

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 that each of Petitioner's claims, including his ineffective assistance of counsel claim,¹ is barred by the procedural default doctrine. Citing Okla. Stat. tit. 22, § 1087 (1991) and Rule 5.2(C)(1), *Rules of the Court of Criminal Appeals*, the Oklahoma Court of Criminal Appeals dismissed Petitioner's post-conviction appeal because Petitioner failed to comply with filing deadlines mandated by the court's rules (#10, Ex. A). 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." Ake v. Oklahoma, 470 U.S. 68, 75 (1985); Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently required compliance with Rule 5.2(C) before considering post-conviction appeals. See Duvall v. Reynolds, 139 F.3d 768, 797 (10th Cir. 1998).

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

¹The Court notes that although Petitioner did not perfect a direct appeal after pleading guilty, this Court would not be precluded from considering the ineffective assistance of counsel claim on the merits had Petitioner not defaulted the claim a second time in failing to perfect his post-conviction appeal. See Miller v. Champion, 161 F.3d 1249 (10th Cir. 1998); English v. Cody, 146 F.2d 1257, 1264 (10th Cir. 1998).

of justice would result if his claims are not considered. See Coleman, 510 U.S. at 750; Hoxsie v. Kerby, 108 F.3d 1239, 1243 (10th Cir. 1997). 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, 483 (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 under the "mailbox rule," his petition in error was timely filed in the Oklahoma Court of Criminal Appeals. Petitioner also alleges that the Clerk of the Oklahoma Court of Criminal Appeals received the pleading prior to the deadline imposed by Rule 5.2(C)(1) but withheld filing until January 2, 1997, allegedly because Petitioner had not provided an affidavit in support of his request to proceed *in forma pauperis*. However, the Oklahoma Court of Criminal Appeals does not recognize the "mailbox rule" for prisoner filings. See Hunnicutt v. State, 952 P.2d 988 (Okla. Crim. App. 1997); Behrens v. Patterson, 952 P.2d 990 (Okla. Crim. App. 1997). Furthermore, Petitioner offers nothing to support his conclusory allegation that the state court clerk "withheld" the filing of his petition in error for any reason other than Petitioner's failure to comply with the state court's rules. In short, Petitioner has not demonstrated that the untimeliness of his filing was attributable to factors external to himself. Therefore, 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, 506 U.S. 390, 403-404 (1993); Sawyer v. Whitley, 505 U.S. 333, 339-340 (1992). Petitioner in this case does not assert that he is actually innocent of the crime of which he was convicted. Therefore, the Court finds that the fundamental miscarriage of justice exception has no application to this case.

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

CONCLUSION

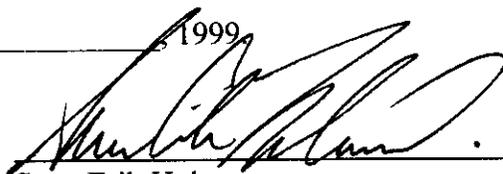
After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The petition for a writ of habeas corpus is **denied**.
2. Petitioner's request for summary judgment (#19), construed as a motion for expedited ruling, is **moot**.

IT IS SO ORDERED.

This 17th day of August, 1999.


Sven Erik Holmes
United States District Judge

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

FILED

AUG 11 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARCUS R. MILLER,)
)
Petitioner,)
)
vs.)
)
KEN KLINGLER, Warden,)
)
Respondent.)

Case No. 97-CV-288-H ✓

ENTERED ON DOCKET

DATE AUG 12 1999

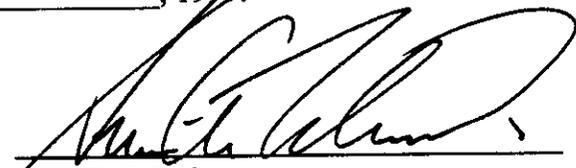
JUDGMENT

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.

IT IS SO ORDERED.

This 11TH day of August, 1999.



Sven Erik Holmes
United States District Judge

20

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

MARCUS R. MILLER,)
)
Petitioner,)
)
vs.)
)
KEN KLINGLER, Warden,)
)
Respondent.)

ENTERED ON DOCKET

DATE AUG 12 1999

Case No. 97-CV-288-H ✓

F I L E D

AUG 11 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently in the custody of the Oklahoma Department of Corrections, challenges his conviction entered in Tulsa County District Court, Case No. CF-89-5423. Respondent has filed a Rule 5 response (#8). Petitioner has filed a reply (# 15). Petitioner has also filed a "motion for speedy disposition" (#18). For the reasons discussed below, the Court finds that this petition should be denied. Today's decision renders Petitioner's "motion for speedy disposition" moot.

BACKGROUND

On December 13, 1989, Petitioner and a Tulsa County Sheriff's Deputy were involved in an altercation outside the Law Library of the Tulsa County Jail where Petitioner was incarcerated. As a result of the altercation, Petitioner was charged in Tulsa County District Court, Case No. CF-89-5423, with Assault and Battery on a Police Officer.

Petitioner proceeded to trial, represented by court-appointed attorney Robert Nigh. On February 5-7, 1990, a jury found Petitioner guilty as charged. Petitioner was sentenced to twenty

(20) years imprisonment. Petitioner perfected a direct appeal, where he, represented by Barry Derryberry, a different attorney from the Public Defender's Office, raised four (4) propositions of error: (1) the trial court committed reversible error by admitting prejudicial hearsay into evidence; (2) the trial court issued inadequate instructions on the elements of the charged offense; (3) the trial court refused to give the defendant's requested self-defense instructions; and (4) the trial court committed fundamental error by conducting a unitary trial proceeding (#8, Ex. A). The Oklahoma Court of Criminal Appeals affirmed Petitioner's conviction and sentence on September 28, 1993 (see #8, Ex. B).

On June 16, 1995, Petitioner filed an application for post-conviction relief in the trial court. (#8, attachment to Ex. B). He raised the following grounds of error: (1) Petitioner was denied effective assistance of appellate counsel, and (2) fundamental error occurred where the legal instructions negated the presumption of innocence and misstated the burden of proof (the "Flores claim"). On July 20, 1995, the state district court denied the relief requested. Petitioner appealed the denial of post-conviction relief to the Oklahoma Court of Criminal Appeals and on March 11, 1996, the Oklahoma Court of Criminal Appeals affirmed the denial of post-conviction relief. (#8, Ex. B).

Petitioner filed the instant petition on March 28, 1997 alleging (1) "Petitioner was denied a full and fair trial, and a fair adversarial review in state court, as well as being denied the effective assistance of appellate counsel, (2) "Petitioner's due process and constitutional rights were violated

¹In Flores, the Oklahoma Court of Criminal Appeals held that a trial judge's deviation from the uniform jury instructions regarding the presumption of innocence and the state's burden of proof when the jury was deciding the guilt or innocence of a defendant was reversible error. Flores v. State, 896 P.2d 558, 562 (Okla. Crim. App. 1995).

when the trial court gave an erroneous 'presumed not guilty' and burden of proof instructions instead of the statutory and const. required presumption of innocence," (3) "the Oklahoma court's procedural bar rule is not applied with consistency and regularity, and has ruled arbitrarily against Petitioner in applying it's (sic) procedural bar," (5) "if the decision in Flores does not embody a new rule of law, does the applicable principles of non retroactivity analysis dictate it's (sic) enforcement here?" and (6) "if Flores is to be applied, reversal of conviction is automatically due under Teague and Sullivan, supra?" (#1). In his response to the petition, Respondent argues that habeas corpus relief should be denied as to Petitioner's ineffective assistance of appellate counsel claim and that the remainder of his claims, all related to issues raised by the Flores v. State decision, including the ineffective assistance of trial counsel claim, are procedurally barred.

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. Petitioner's Flores claim and his claims related thereto as well as his ineffective assistance of trial counsel claim are procedurally barred

The alleged procedural default in this case results from Petitioner's failure to raise his ineffective assistance of trial counsel claim and the claims related to the Flores decision on direct appeal and his failure to provide the state courts with sufficient reason for that failure. In its opinion affirming the trial court's denial of post-conviction relief, the Oklahoma Court of Criminal Appeals cited Hale v. State, 807 P.2d 264 (Okla. Crim. App. 1991) in concluding that Petitioner had waived his right to raise the claims when he failed to raise them on direct appeal. Citing Webb v. State, 835 P.2d 115, 116 (Okla. Crim. App. 1992), the state appellate court also rejected Petitioner's argument that the failure to raise the claims on direct appeal was attributable to ineffective assistance of appellate counsel.

As a general rule, the doctrine of procedural default prohibits a federal court from considering specific habeas claims where the state's highest court declined to reach the merits of those claims 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 claims 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. 1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "'in the vast majority of cases.'" Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991)).

Applying these principles to the instant case, the Court concludes that Petitioner's claims related to the Flores decision, i.e., that he was denied a fair trial by the inclusion of "presumed to be not guilty" language in a jury instruction, are barred by the procedural default doctrine. The Oklahoma Court of Criminal Appeals' procedural bar as applied to Petitioner's claim first presented in his state application for post-conviction relief 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 applied a procedural bar and has denied such claims unless the petitioner provides "sufficient reason" for his failure to raise the claim earlier. Moore v. State, 889 P.2d 1253 (Okla. Crim. App. 1995); see also Sherrill v. Hargett, --- F.3d ---, 1999 WL 492682 (10th Cir. July 13, 1999) (finding that Oklahoma's procedural rule barring post-conviction relief for claims petitioner could have raised on direct appeal constitutes an independent and adequate ground barring review

of the Flores jury instruction claim).

As to Petitioner's ineffective assistance of trial counsel claim, the Tenth Circuit Court of Appeals has recognized that countervailing concerns justify an exception to the general rule. Brecheen v. Reynolds, 41 F.3d 1343, 1363 (10th Cir. 1994) (citing Kimmelman v. Morrison, 477 U.S. 365 (1986)). The unique concerns are "dictated by the interplay of two factors: the need for additional fact-finding, along with the need to permit the petitioner to consult with separate counsel on appeal in order to obtain an objective assessment as to trial counsel's performance." Id. at 1364 (citing Osborn v. Shillinger, 861 F.2d 612, 623 (10th Cir. 1988)). The Tenth Circuit explicitly narrowed the circumstances requiring imposition of a procedural bar on ineffective assistance of counsel claims first raised collaterally in English v. Cody, 146 F.3d 1257 (10th Cir. 1998). In English, the circuit court concluded that:

Kimmelman, Osborn, and Brecheen indicate that the Oklahoma bar will apply in those limited cases meeting the following two conditions: trial and appellate counsel differ; and the ineffectiveness claim can be resolved upon the trial record alone. All other ineffectiveness claims are procedurally barred only if Oklahoma's special appellate remand rule for ineffectiveness claims is adequately and evenhandedly applied.

Id. at 1264 (citation omitted).

After reviewing the record in the instant case in light of the factors identified in English, the Court concludes Petitioner's claim of ineffective assistance of trial counsel is procedurally barred. At trial, Petitioner was represented by a court-appointed public defender, Robert Nigh. On appeal, Petitioner was represented by a different public defender, Barry Derryberry. Thus, Petitioner had the opportunity to confer with separate counsel on appeal. Furthermore, Petitioner alleges his trial counsel provided ineffective assistance when he failed to object to the "presumed to be not guilty"

modification of the Oklahoma Uniform Jury Instruction given at trial. Because the instructions as given to the jury by the trial court are contained within the trial record, the issue could have been raised by appellate counsel and resolved without any additional fact finding. As a result, the Court concludes the factors identified in English are satisfied and Petitioner's claim of ineffective assistance of trial counsel is procedurally barred.

Because of his procedural default, this Court may not consider Petitioner's Flores claims and his ineffective assistance of trial counsel 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). The "fundamental miscarriage of justice" exception 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 his appellate counsel provided ineffective assistance in failing to raise these claims on direct appeal. 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); Hickman v. Spears, 160 F.3d 1269, 1273 (10th Cir. 1998). There is a "strong presumption

that counsel's conduct falls within the range of reasonable professional assistance." Strickland, 466 U.S. 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." Id. 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 claims in this case that his appellate counsel provided ineffective assistance in failing to argue on appeal that the language "presumed to be not guilty" found in the modified jury instruction rendered the instruction unconstitutional and that trial counsel provided ineffective assistance in failing to object to the modified instruction at trial. However, the record clearly establishes that Petitioner's conviction became final long before the Oklahoma Court of Criminal Appeals issued its decision in Flores v. State, 896 P.2d 558 (Okla. Crim. App. 1995). The Oklahoma Court of Criminal Appeals decided Flores on January 24, 1995, and denied rehearing on June 27, 1995. Petitioner was convicted in February, 1990, almost five (5) years before Flores. The Oklahoma Court of Criminal Appeals affirmed Petitioner's conviction on September 28, 1993, more than a year before Flores. Counsel is not ineffective for failing to anticipate arguments or appellate issues which are based on decisions issued after the appeal was submitted. See Lilly v. Gilmore, 988 F.2d 783, 786 (7th Cir. 1993). Thus, this Court finds that appellate counsel's failure to raise either the Flores issue or ineffective assistance of trial counsel on direct appeal does not represent an

unreasonable omission under Strickland. Therefore, the Court concludes that because appellate counsel's failure to raise these claims on direct appeal does not constitute ineffective assistance of appellate counsel, Petitioner has failed to demonstrate "cause" for his procedural default.

Petitioner's only other means of gaining federal habeas review of these 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 is "innocent" (see #15 at 10), Petitioner's claim of innocence is nothing more than a conclusory statement. He offers nothing in support his claim. To meet the narrow fundamental miscarriage of justice standard, "the petitioner must supplement his habeas claim with a *colorable* showing of factual innocence." Demarest v. Price, 130 F.3d 922, 941 (10th Cir.1997) (emphasis added). Petitioner has presented no evidence of his innocence.. 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.

Because Petitioner has failed to demonstrate "cause and prejudice" or a "fundamental miscarriage of justice," the Court concludes his Flores claims and his ineffective assistance of trial counsel claim are procedurally barred and should be denied on that basis.

B. Petitioner is not entitled to habeas corpus relief on his ineffective assistance of appellate counsel claim

1. Standard of review under the AEDPA

Pursuant to 28 U.S.C. § 2254(d), as amended by the AEDPA, this Court cannot grant habeas corpus relief on any of Petitioner's claims adjudicated on the merits by the Oklahoma Court of

Criminal Appeals either on direct appeal or on post-conviction appeal unless the adjudication of the claims –

- (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). During Petitioner's post-conviction appeal, the Oklahoma Court of Criminal Appeals considered Petitioner's ineffective assistance of appellate counsel claim on the merits as possible "cause" to overcome Petitioner's procedural default of the Flores claim. The state appellate court rejected the argument, concluding that appellate counsel was not ineffective. See #8, Ex. B. Therefore, unless the Court of Criminal Appeals's adjudication of this claim 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 that claim. 28 U.S.C. § 2254(d).

2. Ineffective assistance of appellate counsel claim

Petitioner asserts as his first claim that he received ineffective assistance of counsel when his appellate counsel failed to raise both ineffective assistance of trial counsel and the Flores claim on direct appeal. As discussed above, to establish ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 687 (1984), a habeas petitioner must satisfy a two-part test. First, he must show that his attorney's performance "fell below an objective standard of reasonableness," id. at 688, and second, he must show that there is a "reasonable probability" that but for counsel's error, the outcome would have been different, id. at 694. Failure to establish either prong of the Strickland

standard will result in denial of relief. Id. at 696. In the instant case, Petitioner fails to satisfy the Strickland standard as to either claim.

As determined in Part A, above, appellate counsel's failure to raise the Flores claim on direct appeal does not constitute deficient performance under Strickland. Appellate counsel need not advance every argument on appeal urged by a defendant, regardless of merit. Evitts v. Lucey, 469 U.S. 287, 394 (1985). Therefore, as a substantive matter, appellate counsel's failure to raise ineffective assistance of trial counsel and the Flores claim on direct appeal does not constitute ineffective assistance of counsel. 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

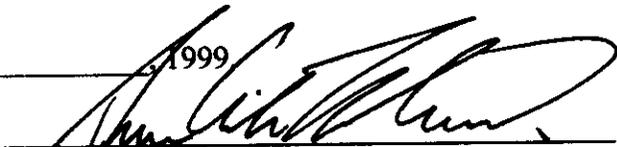
After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States. The petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is **denied**. Petitioner's motion for speedy disposition (#18) is **moot**.

IT IS SO ORDERED.

This 11th day of August

1999


Sven Erik Holmes
United States District Judge

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

NORMA H. HATCHER,)
)
 Plaintiff,)
)
 v.)
)
 KENNETH S. APFEL,)
 Commissioner, Social)
 Security Administration,)
)
 Defendant.)

AUG 11 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-579-M ✓

ENTERED ON DOCKET

DATE AUG 12 1999

ORDER

On May 10, 1999, this Court remanded this case to the Commissioner for further administrative action. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 412(d), and defendant's response, the parties have stipulated that an award in the amount of \$2,001.50 for attorney fees and no costs for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees in the amount of \$2,001.50 and no costs under EAJA. If attorney fees are also awarded under 42 U.S.C. § 406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

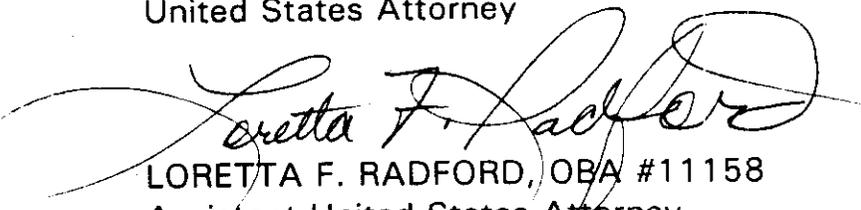
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It is so ORDERED THIS 11th day of August 1999.


FRANK H. McCARTHY
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney


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

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

AUG 9 1999

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
CHARLES F. LEONARD,)
)
Defendant.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 90-CR-74-C

99CV651C(E)

ENTERED ON DOCKET

DATE AUG 12 1999

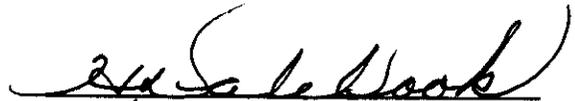
ORDER

Currently pending before the Court is the motion filed by defendant, Charles Leonard, styled "Motion for Relief from Judgment under Federal Rules of Civil Procedures 60(b)(4) and (6)". However, since Leonard is essentially seeking to attack his sentence and conviction, the Court will treat Leonard's present motion as one brought under 28 U.S.C. § 2255. See Adam v. United States, 274 F.2d 880, 882 (10th Cir.1960) (holding that, while a prisoner is in federal custody, § 2255 is the exclusive means for challenging his conviction).

The Court notes at the outset that Leonard has previously filed a § 2255 motion, which this Court denied in January 1998. The Court further notes that § 2255, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, requires that a "second or successive motion . . . be certified as provided in section 2244 by a panel of the appropriate court of appeals . . ." The "second or successive" requirements of § 2255 clearly apply to Leonard's present motion, as it was filed after the amendments to § 2255 went into effect. See, Nunez v. U.S., 96 F.3d 990, 991 (7th Cir.1996) (district court has no option other than to deny defendant's second § 2255 petition since the Circuit is the only court that may authorize the commencement of a second or successive petition).

Accordingly, based upon the 1996 amendments to § 2255, this Court lacks authority to consider Leonard's present § 2255 motion. Leonard must seek certification from the Circuit before this Court may entertain his present motion. Rather than dismiss his motion, however, the Tenth Circuit has instructed that when "a second or successive . . . § 2255 motion is filed in the district court without the required authorization by [the Circuit], the district court should transfer the . . . motion to [the Circuit] in the interest of justice pursuant to [28 U.S.C.] § 1631." Coleman v. U.S., 106 F.3d 339, 341 (10th Cir.1997). Leonard's present § 2255 motion is therefore transferred to the Tenth Circuit for certification.

IT IS SO ORDERED this 5th day of August, 1999.



H. Dale Cook
Senior U.S. District Judge

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

FILED

AUG 11 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DELTAsoft, INC., an Oklahoma
corporation, and ROBERT G.
KOURTIS, president,

Plaintiffs,

vs.

THE LEARNING COMPANY, INC.,
a Delaware corporation, THE
LEARNING COMPANY PROPERTIES,
INC., a wholly-owned subsidiary
of The Learning Company Inc.,
and INTERNATIONAL MICROCOMPUTER
SOFTWARE, INC., a California
corporation, Both jointly
and severally,

Defendants.

Case No. 99-CV-358-BU(J) /

ENTERED ON DOCKET
AUG 12 1999
DATE

ORDER

This matter comes before the Court upon the Motion to Dismiss or Stay Pending Arbitration filed by Defendants, The Learning Company, Inc., The Learning Company Properties, Inc. and International Microcomputer Software, Inc. Plaintiffs, DeltaSoft, Inc. and Robert G. Kourtis, have responded to the motion and Defendants have replied thereto. Upon due consideration of the parties' submissions, the Court makes its determination.

In their motion, Defendants seek an order dismissing Plaintiffs' Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), Fed. R. Civ. P., or staying this action pursuant to the Federal Arbitration Act, 9 U.S.C. § 3, pending arbitration of the claims alleged in Plaintiffs' Complaint. Defendants assert that on or about November 8, 1994, Plaintiffs

entered into a Software License and Marketing Agreement ("the 1994 Agreement") with SoftKey Multimedia, Inc., the predecessor of Defendants, The Learning Company, Inc. and The Learning Company Properties, Inc. ("TLC"). According to Defendants, the 1994 Agreement bound the parties to arbitrate any disputes arising out of or in connection with the 1994 Agreement in Boston, Massachusetts. Section 16.1 of the 1994 Agreement provides in pertinent part:

Any dispute, controversy, or claim arising out of or in connection with this Agreement shall be determined and settled by arbitration in Boston, Massachusetts pursuant to the rules then in effect of the American Arbitration Association; and Licensor [DeltaSoft, Inc.] hereby consents to the jurisdiction thereof. . . .

Despite the requirements of section 16.1, Defendants state that Plaintiffs filed the instant action. Defendant assert that the nine causes of action alleged in Plaintiffs' Complaint are based upon Defendants' purported creation and distribution of a new upgraded version of Key CAD software. According to Defendants, Plaintiffs have generally alleged in the Complaint that TLC, through its agent, International Microcomputer Software, Inc., "reverse engineer[ed] and/or decompil[ed]" Plaintiffs' old software, licensed to TLC under the 1994 Agreement, to create a new "Key CAD Deluxe" version. Plaintiffs complain, according to Defendants, that by replacing Plaintiffs' old software with the new software and distributing the new version, Defendants have violated the copyright laws and injured Plaintiffs in the marketplace. Defendants, however, assert that the 1994 Agreement expressly provides that TLC owns the name "Key CAD" and that TLC is permitted

to modify Plaintiffs' software, if necessary. Defendants contend that the 1994 Agreement specifically addresses the parties' relationships with respect to ownership and distribution of Plaintiffs' software. Consequently, because Plaintiffs' claims arise out of or in connection with the 1994 Agreement, Defendants contend that they are subject to arbitration under section 16.1.

Defendants, in their briefing, acknowledge that section 16.2 of the 1994 Agreement specifically reserves the right for the parties to seek judicial relief for breaches of certain sections of the 1994 Agreement. These sections include section 2 (license and rights), section 9 (representations and warranties) and section 14 (confidentiality).¹ However, Defendants argue that Plaintiffs' Complaint on its face admits that it does not implicate sections 2, 9 or 14. Moreover, Defendants contend that there are no allegations in Plaintiffs' Complaint that Defendants violated sections 2, 9 or 14. Thus, because none of the contractual exceptions to arbitration set forth in section 16.2 apply and all of Plaintiffs' claims are subject to arbitration, Defendants argue that Plaintiffs have no right to bring the instant action.

In response, Plaintiffs contend that their claims are not

¹ Section 16.2 provides in pertinent part:

The parties hereto further agree that any breach of sections 2, 9 or 14 of this Agreement is likely to result in irreparable injury to the other and each party agrees that the other shall be entitled, if it so elects, to institute and prosecute proceedings in any court of competent jurisdiction . . . to obtain damages for such breach of this Agreement

subject to arbitration because the 1994 Agreement was terminated, rescinded or nullified by Defendants by virtue of a letter dated February 3, 1998. Plaintiffs state that in the February 3, 1998 letter, Defendants forfeited all rights in Plaintiffs' software product known as Key CAD 3D. According to Plaintiffs, the subject of the 1994 Agreement was the Key CAD 3D software. Because Defendants forfeited their rights to that software, Plaintiffs contend that Defendants effectively terminated the 1994 Agreement. As the 1994 Agreement does not provide for the survivability of the arbitration provision upon termination and none of the other agreements between the parties contain an arbitration provision, Plaintiffs contend that their claims may proceed in this Court.

Alternatively, Plaintiffs argue that should the Court find the 1994 Agreement was not terminated by the February 3, 1998 letter, they are still entitled to proceed with this action. Plaintiffs contend that they have alleged violations of sections 2 and 9 in their Complaint, and consequently, section 16.2 of the Agreement permits them to proceed with those claims. They also contend that because the 1994 Agreement only dealt with the Key CAD 3D software, they may proceed in this action with any claims not related to the Key CAD 3D software.

Upon review, the Court finds that the February 3, 1998 letter did not terminate the 1994 Agreement between the parties. Although the 1994 Agreement originally addressed the Key CAD 3D software, the November 28, 1995 Amendment and the November 25, 1996 Agreement to the 1994 Agreement added Key CAD Complete and Key CAD Pro

software to the definition of "Program" in the 1994 Agreement. In the February 3, 1998 letter, the parties agree that Defendants retain their rights to the Key CAD Pro and Key CAD Complete software and extend the 1994 Agreement for five years with respect to these software products. Defendants' allegedly wrongful conduct involves the Key CAD Complete and Key CAD Pro software products. Therefore, the Court finds that the 1994 Agreement was not terminated by the February 3, 1999 letter and the arbitration provision of section 16.1 is effective.

The Court rejects Plaintiffs' argument that it has asserted violations of section 2 and section 9 of the 1994 Agreement. The Complaint itself states in paragraph 13 that "Paragraphs numbered 4.2, 5.4, 6.1 of the [1994 Agreement] . . . would appear to be the springboard of this dispute and the nexus of all claims contained in this Complaint." Although Plaintiffs requests the Court to infer that they have alleged violations of section 2 and section 9, the Court finds that such violations may not reasonably be inferred from the Complaint. Therefore, the Court finds that Plaintiffs' claims are not excluded from arbitration under section 16.2.

As to the ancillary claims of non-payment of royalties and failure to submit sales audit reports, the Court finds that such claims fall within the arbitration provision. As previously stated, the November 28, 1995 Amendment and the November 25, 1996 Amendment include Key CAD Complete and Key CAD Pro software in the definition of "Program" in the 1994 Agreement. These amendments to the 1994 Agreement provide that the software will be subject to the

terms and conditions of the 1994 Agreement. They also provide terms for the payment of royalties for the software products. Claims relating to the non-payment of royalties and failure to submit sales audit reports in regard to the Key CAD Pro and Key CAD Complete software clearly arise out of or in connection with the 1994 Agreement. Thus, the Court finds that these claims are subject to arbitration as well.

In their briefing, Plaintiffs agree that a valid arbitration provision mandates that this Court either dismiss this action for want of subject matter jurisdiction or stay this action pending arbitration. Herein, this Court has determined that the arbitration provision of section 16.1 is effective and that the claims alleged in Plaintiffs' Complaint are subject to arbitration under that provision. The Court therefore finds the arbitration provision enforceable under the Federal Arbitration Act, 9 U.S.C. § 2.²

Defendants, in their motion, request either dismissal of Plaintiffs' Complaint for lack of subject of jurisdiction or stay

² Section 2 of Title 9 of the United States Code provides in pertinent part:

A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable and enforceable

of this action pending arbitration. Upon due consideration, the Court concludes that Defendants' request for stay should be granted. A stay pending arbitration is statutorily provided for in 9 U.S.C. § 3. That section specifically provides:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (Emphasis Added). Because the stay is statutorily authorized and Defendant has alternatively requested such relief, the Court concludes that a stay should be granted. Although the Court finds that stay should be granted, the Court, for statistical purposes, shall direct the Clerk of the Court to administratively close this matter in his records pending resolution of the arbitration proceedings.³

Based upon the foregoing, all of Plaintiffs' claims alleged in the Complaint against Defendants, The Learning Company, Inc., The Learning Company Properties, Inc. and International Microcomputer Software, Inc., are referred to arbitration in accordance with the terms of the arbitration provision set forth in section 16.1 of the

³ In their briefing, Defendants discuss their entitlement to an award of attorneys' fees under section 16.1 of the 1994 Agreement. As Defendants do not specifically request an award of attorneys' fees but simply reserve their right to make such request, the Court shall not address Defendants' entitlement to an award of attorneys' fees.

Software Licensing and Marketing Agreement dated November 8, 1994. The Motion to Dismiss filed by Defendants (Docket Entry #2-1) is DENIED. The Motion to Stay Pending Arbitration (Docket Entry #2-2) is also GRANTED. For statistical purposes, the Court ORDERS the Clerk of the Court to administratively close this matter in his records pending arbitration of this matter. The parties are DIRECTED to notify the Court upon resolution of the arbitration so that the Court may obtain a final resolution of this litigation, if necessary.

Entered this 11th day of August, 1999.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

MT

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

FILED

AUG 11 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARIAN E. SEXTON,

Plaintiff,

vs.

BP AMOCO CORPORATION,

Defendant.

Case No. 99-CV-0449H(E) ✓

ENTERED ON DOCKET

DATE AUG 11 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Fed.R. Civ.P. 41(a)(1), Marian Sexton stipulates that this action may be dismissed with prejudice. This dismissal does not apply to future requests for documents or to future claims for benefits allegedly accrued in the past or future.

Respectfully submitted,



David B. McKinney, OBA #6032
Of BOESCHE, McDERMOTT & ESKRIDGE, L.L.P.
100 West Fifth, Suite 800
Tulsa, OK 74103-4216
(918) 583-1777

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I certify that on the 11 day of ^{August} ~~July~~, 1999, I mailed a copy of foregoing document by certified United States mail, postage prepaid thereon, to the following:

Mark Casciari
SEYFARTH, SHAW
55 East Monroe, Suite 4200
Chicago, IL 60603



David B. McKinney

CT

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

FILED

AUG 11 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

THRIFTY RENT-A-CAR SYSTEM, INC.)
)
Plaintiff,)
)
vs.)
)
THE HERTZ CORPORATION,)
)
Defendant.)

Case No. 99 CV 0255B(E) ✓

ENTERED ON DOCKET

DATE AUG 11 1999

DISMISSAL WITHOUT PREJUDICE

Thrifty Rent-A-Car, Inc. hereby dismisses its action against The Hertz Corporation without prejudice.

Respectfully submitted,



Michael J. Gibbens, OBA #3339
CROWE & DUNLEVY
321 South Boston Ave.
500 Kennedy Building
Tulsa, Oklahoma 74103
(918) 592-9800
(918) 592-9801

ATTORNEYS FOR PLAINTIFFS
THRIFTY RENT-A-CAR SYSTEM, INC.

OF COUNSEL

Samuel D. Littlepage
Marc A. Bergsman
Dickinson Wright PLLC
1901 "L" Street, N.W. Suite 800
Washington DC 20036
Tel: 202-457-0160
Fax: 202-659-1559

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MT

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

FILED

AUG 11 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLENE AL-YAMI,

Plaintiff,

vs.

TMD TEMPORARIES, INC.,

Defendant.

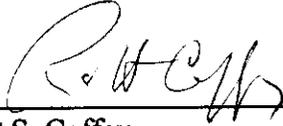
Case No. 98-CV-849C(M) ✓

Judge Dale H. Cook

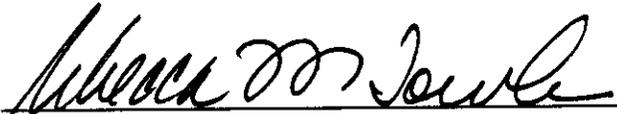
DATE AUG 11 1999

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Fed.R.Civ.P. 41(a)(1), the parties hereto hereby stipulate that the above styled action should be dismissed in its entirety with prejudice, each party to bear its own costs and attorneys' fees.



Robert S. Coffey
1927 S. Boston Ave.
Tulsa, Oklahoma 74119
Attorney for Plaintiff



Rebecca M. Fowler, OBA No. 13682
DOERNER, SAUNDERS, DANIEL
& ANDERSON, L.L.P.
320 South Boston, Suite 500
Tulsa, Oklahoma 74103
(918) 582-1211
(918) 591-5360 (Fax)

Attorneys for Defendant, TMD Temporaries, Inc.

MT
6-99

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

DON SIGMON,)
)
Plaintiff,)
)
vs.)
)
COMMUNITYCARE HMO, Inc., an)
Oklahoma corporation, d/b/a)
COMMUNITY CARE BEHAVIORAL)
HEALTH SERVICES EAP;)
MITCHELL GODI, an individual;)
and THE CITY OF TULSA,)
OKLAHOMA, a municipal corporation,)
)
Defendants.)

ENTERED ON DOCKET

DATE AUG 11 1999

Case No. 97-CV-845-K ✓
Judge Terry C. Kern

F I L E D

AUG 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT UPON AGREED SETTLEMENT

NOW ON this 9 day of ~~July~~ ^{August} 1999, this matter comes on for hearing before the undersigned judge. Plaintiff appears by and through his attorney of record, Steven R. Hickman, and Defendant City of Tulsa appears by and through its attorney of record, Larry V. Simmons, Deputy City Attorney and Elien R. Hinchee, Sr. Assistant City Attorney.

The Court, having reviewed the allegations set forth in plaintiff's Complaint and, upon being advised that City's Mayor has authorized entry of a consent judgment in the sum of Twenty Thousand Dollars and no/100 (\$20,000.00) and the Court being satisfied that plaintiff fully understands the nature of this action with regard to its finality which precludes additional or further compensation for damages as against City arising from the occurrence of the event identified in plaintiff's Complaint and, upon being further advised by plaintiff that it is his desire to settle the entirety of all claims and causes of action relating to the events identified in his

Complaint as against City, including costs and fees, upon payment in the sum of Twenty Thousand Dollars and no/100 (\$20,000.00) the Court finds:

1. That the Court has jurisdiction over the subject matter of this lawsuit and the parties hereto;

2. That plaintiff is fully aware of his rights in this matter and it is plaintiff's desire to compromise his right to trial by jury;

3. That plaintiff desires to accept as full, final and complete settlement the sum of Twenty Thousand Dollars and no/100 (\$20,000.00) for any and all damages, losses, fees and expenses he sustained as a result of the events identified in plaintiff's Complaint as against City;

4. That by agreement of the parties, defendant City's payment to him will stand as full compensation to plaintiff and preclude any further or separate action by plaintiff against City of Tulsa, a municipal corporation, or any of its employees, arising from or relating to the events described in plaintiff's Complaint;

5. That City's Mayor has formally authorized settlement of plaintiff's lawsuit in the sum of Twenty Thousand Dollars and no/100 (\$20,000.00);

6. That all parties request this court to approve and finalize their mutual settlement;

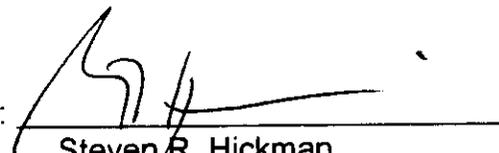
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that plaintiff have and recover from the defendant City of Tulsa, Oklahoma, damages in the sum of Twenty Thousand Dollars and no/100 (\$20,000.00) as full, final and complete compensation for any and all damages, losses and expenses incurred or sustained by plaintiff

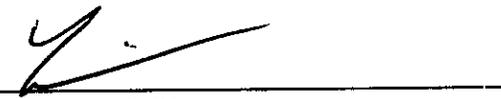
incident to the events described in plaintiff's Complaint as against City. Plaintiff reserves all rights as against City's co-defendants.

IT IS FURTHER ORDERED BY THE COURT that payment to plaintiff by defendant City will preclude any further or separate action by plaintiff against any employee of defendant City of Tulsa arising from or pertaining to the events described in plaintiff's Complaint.


Judge

APPROVED AS TO FORM AND CONTENT:

By: 
Steven R. Hickman
Attorney for Plaintiff

By: 
Larry V. Simmons
Ellen R. Hincee
Attorneys for Defendant City

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

FILED

AUG 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LARRY CHARLES BLACK,)
)
Petitioner,)
)
vs.)
)
RON CHAMPION,)
)
Respondent.)

Case No. 98-CV-743-K (M) ✓

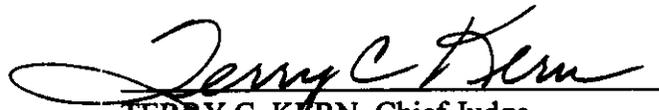
ENTERED ON DOCKET
DATE AUG 11 1999

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 without prejudice to refiling same, for failure to obtain authorization from the Tenth Circuit Court of Appeals prior to filing a second 28 U.S.C. § 2254 petition for writ of habeas corpus.

SO ORDERED THIS 9 day of August, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

ENTERED ON DOCKET

DATE AUG 11 1999

LARRY CHARLES BLACK,)
)
Petitioner,)
)
vs.)
)
RON CHAMPION,)
)
Respondent.)

Case No. 98-CV-743-K (M) ✓

F I L E D

AUG 10 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 a second or successive petition (#5). Petitioner has filed a response to the motion (#7). For the reasons discussed below, the Court finds Respondent's motion should be granted and the petition should be dismissed without prejudice as a second or successive petition.

BACKGROUND

Petitioner is currently incarcerated pursuant to a conviction entered in Tulsa County District Court, Case No. CRF-83-352. He is serving two (2) consecutive life sentences after being convicted on two (2) counts of First Degree Murder. In this action, Petitioner raises one ground of error, alleging that he "is being denied his Fourteenth Amendment rights to equal protection of the law." (#1). In his supporting brief, Petitioner explains that he "feels disadvantaged" because "[i]n April of 1997,¹ the Governor of the State of Oklahoma signed into law the Oklahoma Truth in Sentencing

¹The Court notes that the Oklahoma Truth in Sentencing Act was not enacted until June 30, 1999, with an effective date of July 1, 1999.

Act . . . [which] alters the 'Life' sentence from a previously indeterminate sentence, with a release date based solely on parole, to a determinate, dischargable sentence of eighteen (18) to sixty (60) years." (#2 at 2). Petitioner argues that failure to modify or adjust his sentence under the terms of "the Act" will constitute a violation of the Constitution's equal protection clause.

In his brief in support of the motion to dismiss (#6), Respondent indicates that Petitioner has challenged his convictions from Tulsa County District Court, Case No. CRF-83-352, in a previous habeas corpus petition, Case No. 90-C-970-E. Therefore, Respondent contends the instant petition is a successive habeas corpus petition. Citing 28 U.S.C. § 2244(b)(3)(A), requiring a habeas corpus applicant to move in the appropriate court of appeals for an order authorizing the district court to consider claims brought in a second or successive petition, Respondent argues that because Petitioner did not receive authorization from the Tenth Circuit Court of Appeals prior to filing this petition, it must be dismissed.

In his response to the motion to dismiss, Petitioner argues that in his first habeas petition, he presented claims directly related to his trial and conviction of First Degree Murder. In contrast, in this petition he challenges the administration of his sentence. Petitioner asserts that the claim presented in the instant petition did not exist at the time he filed his previous habeas petition attacking his conviction and that, therefore, it should not be dismissed. See #7.

ANALYSIS

A proceeding involving a second or successive petition for writ of habeas corpus is addressed in 28 U.S.C. § 2244 as follows:

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

* * *

(b)(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

28 U.S.C. § 2244(a), (b). In other words, under the terms of the statute, a habeas corpus petitioner who wishes to file a second or successive petition in the district court must first demonstrate to the appropriate circuit court of appeals that his claims satisfy one of the exceptions defined in § 2244(b)(2) and obtain authorization from the circuit court of appeals to file his petition in the district court.

Petitioner in this case asserts that he has satisfied the exceptions defined in § 2244(b)(2) and that his petition should not be dismissed. Nonetheless, Petitioner has not obtained authorization

from the Tenth Circuit Court of Appeals necessary for this Court to have jurisdiction to consider Petitioner's instant claim. Therefore, because this Court lacks jurisdiction to consider a second habeas corpus petition in the absence of authorization from the Tenth Circuit Court of Appeals, Respondent's motion to dismiss should be granted and the petition should be dismissed.

CONCLUSION

Petitioner has failed to obtain authorization from the Tenth Circuit Court of Appeals prior to filing his second habeas corpus petition in this Court. Therefore, Respondent's motion to dismiss for filing a second or successive petition should be granted and the petition for writ of habeas corpus should be dismissed without prejudice to refiling should Petitioner receive the necessary authorization.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss second or successive petition (#5) is **granted**.
2. The petition for writ of habeas corpus is **dismissed without prejudice** for failure to obtain authorization from the Tenth Circuit Court of Appeals before filing second petition for writ of habeas corpus.

SO ORDERED THIS 9 day of August, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

LAWRENCE WALKER,

Petitioner,

vs.

STEVE HARGETT,

Respondent.

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ENTERED ON DOCKET
DATE AUG 11 1999

Case No. 98-CV-588-K (M) ✓

F I L E D

AUG 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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.

SO ORDERED THIS 9 day of August, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

LAWRENCE WALKER,)
)
 Petitioner,)
)
 vs.)
)
 STEVE HARGETT,)
)
 Respondent.)

ENTERED ON DOCKET
DATE AUG 11 1999

Case No. 98-CV-588-K (M) ✓

F I L E D

AUG 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Respondent's motion to dismiss petition for habeas corpus as time barred by the statute of limitations (Docket #9). Petitioner has filed a response to the motion to dismiss (#11). Respondent's motion 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.

BACKGROUND

On January 11, 1996, Petitioner was convicted after entering a plea of guilty to two (2) counts of Assault and Battery on a Police Officer, After Former Conviction of a Felony, in Tulsa County District Court, Case No. CF-95-2977. He was sentenced to fifteen (15) years on Count 1 and to ten (10) years on Count 2, to be served concurrently. Petitioner did not perfect a direct appeal.

On January 16, 1998, Petitioner filed an application for post-conviction relief in Tulsa County District Court, alleging that he had been denied a direct appeal through no fault of his own.

The state district court found that although Petitioner had been advised of his appeal rights, nothing in the record indicated he took any steps after sentencing to contact his attorney to discuss and determine if an appeal was truly desirable and warranted. (#10, Ex. A). As a result, the district court denied the requested relief on March 18, 1998. (Id.). On April 29, 1998, Petitioner filed a petition in error in the Oklahoma Court of Criminal Appeals (#10, Ex. B). On June 29, 1998, the state appellate court affirmed the denial of post-conviction relief (#10, Ex. C).

On August 7, 1998, Petitioner filed the instant petition for writ of habeas corpus asserting that he was denied a direct appeal through no fault of his own due to the failure of counsel and the trial court to advise him of his appeal rights (#1).

ANALYSIS

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

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

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

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

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

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

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

28 U.S.C. § 2244(d). Because the limitations period generally begins to run from the date on which a prisoner's direct appeal from his conviction became final, a literal application of the AEDPA limitations language would result in the preclusion of habeas corpus relief for any prisoner whose conviction became final more than one year before enactment of the AEDPA. Recognizing the retroactivity problems associated with that result, the Tenth Circuit Court of Appeals has held that for prisoners whose convictions became final before April 24, 1996, the one-year statute of limitation does not begin to run until April 24, 1996. United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997). In other words, prisoners whose convictions became final before April 24, 1996, the date of enactment of the AEDPA, have been afforded a one-year grace period within which to file for federal habeas corpus relief.

The Tenth Circuit Court of Appeals has also ruled that the tolling provision of 28 U.S.C. § 2244(d)(2) applies in § 2254 cases 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, his conviction became final ten (10) days after entry of his Judgment and Sentence, or on January 21, 1996. See Rule 4.2, Rules of the Court of Criminal Appeals (requiring the defendant to file an application to withdraw guilty plea within ten (10) days from the date of the pronouncement of the Judgment and Sentence in order to commence an appeal from any conviction of a plea of guilty). Therefore, Petitioner's conviction became final before enactment of the AEDPA. As a

result, his one-year limitations clock began to run on April 24, 1996, when the AEDPA went into effect. Under Simmonds, 111 F.3d at 746, Petitioner had until April 23, 1997, to submit a timely petition for writ of habeas corpus.

Although the running of the limitations period would be tolled or suspended during the pendency of any post-conviction proceedings properly filed during the grace period, 28 U.S.C. § 2244(d)(2); Hoggro, 150 F.3d at 1226, Petitioner's application for post-conviction relief was not filed in the state district court until after expiration of the grace period. Thus, the post-conviction proceedings cannot toll the limitations period in this case. Petitioner did not file his federal petition until August 7, 1998, more than a year beyond the April 23, 1997 deadline. Therefore, absent a tolling event, this action is time-barred.

In his response to the motion to dismiss, Petitioner argues that the state's limitations argument is incorrect and frivolous. He further argues that the factual predicate underlying his claim could not have been discovered prior to January, 1998. Therefore, under § 2244(d)(1)(D), the limitations period did not "kick in" until the trial court's errors were discovered by Petitioner in January, 1998, and his petition, filed August 7, 1998, was timely. See #11.

Petitioner's argument that § 2244(d)(1)(D) extends the limitations period requires the Court to review the "factual predicate" of Petitioner's habeas claims to determine whether they could have been discovered prior to when his conviction became final. Petitioner claims in this case that he was denied a direct appeal due to the failure of his counsel and the trial court judge to advise him of his appeal rights. Specifically, Petitioner complains that the trial court judge failed to advise him that "he could have a written record at public expense and that the appeal could be prosecuted at public expense." (#7 at 3). Even if Petitioner's allegations are true, the fact that the trial court judge failed

to inform Petitioner that an appeal could be prosecuted at public expense was readily discoverable at the time of Petitioner's sentencing. The legal significance, if any, of the alleged omission may not have been "discovered" by Petitioner until much later. Nonetheless, the factual predicate of Petitioner's claim could have been discovered prior to when his conviction became final. Therefore, the Court is unwilling to apply § 2244(d)(1)(D) to extend the limitations period in this case and concludes that the petition for writ of habeas corpus is untimely. Respondent's motion to dismiss this petition as time-barred should be granted.

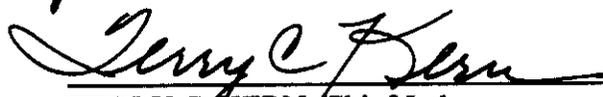
CONCLUSION

Because Petitioner failed to file his petition for writ of habeas corpus within the one-year grace period as defined in United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997), Respondent's motion to dismiss for failure to file within the limitations period 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 (#9) is **granted**.
2. The petition for writ of habeas corpus is **dismissed with prejudice**.

SO ORDERED THIS 9 day of August, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

WORLDBLINK GAMING CORP.,
an Oklahoma corporation,

Plaintiff,

versus

NETWORK GAMING INTERNATIONAL CORP.,
a Canadian corporation,

and

HENRY JUNG,

a citizen or subject of
the Dominion of Canada,

Defendants.

ENTERED ON DOCKET

DATE AUG 11 1999

No. 97-CV-406-H ✓

FILED

AUG 11 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MONETARY JUDGMENT

The Partial Judgment herein of July 8, 1998, which bifurcated and reserved the question of monetary recovery, is now augmented by the Parties' own settlement, compromise and resolution of that monetary matter. Accepting the Parties' own settlement in that regard as properly constituting the Judgment of this Court,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED By the Court that the Plaintiff, WorldLink Gaming Corp., shall have monetary judgment against the Defendants, Network Gaming International Corp. ("NGI") and Mr. Henry Jung, jointly and severally, in the amount of Fifteen Thousand United States Dollars (US \$15,000.00), which amount shall include all prayers either demanded or demandable by WorldLink (through the date of this Judgment) for costs, attorney's fees, pre-judgment interest, and the like, as well as for both actual and exemplary damages, and which amount shall draw interest at the rate of eight per cent per annum, compounded monthly until paid. This sum shall not include the Two Thousand Dollars (US \$2,000.00) which the Defendants may still presently

owe for their own contribution to the fees and expenses incurred through the Parties' joint retention of the independent software expert herein, Mr. William Smith.

IN ADDITION, the stated judgment amount(s) shall be augmented by WorldLink's reasonable attorney's fees and litigation expenses disbursed or incurred in collecting these judgment amounts, if WorldLink should have to resort to legal process to enforce and/or collect the same.

AND FURTHER, by agreement of the Parties, this Court shall retain subject-matter and personal jurisdiction, and venue, over this Cause, and all Parties hereto, for the purpose of enforcing, if necessary, the remaining portions of the Parties' settlement agreement which is not involved in, or a part of, this instant Judgment, and for resolving such future disputes over the said settlement agreement as may hereafter arise.

IT IS SO ORDERED, this 10TH day of August, 1999.


UNITED STATES DISTRICT JUDGE

APPROVED:


Fred P. Gilbert
Attorney for WorldLink


Laurence L. Pinkerton
Attorney for NGI and Mr. Jung

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

RECEIVED

AUG 3 1999

U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DIANE M. MCDANIEL aka
DIANE M. MORRISON,

Defendant.

ENTERED ON DOCKET

DATE AUG 11 1999

CASE NO. 99-CV-576-HV

FILED

AUG 11 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AGREED JUDGMENT AND ORDER OF PAYMENT

Plaintiff, the United States of America, having filed its Complaint herein, and the defendant, having consented to the making and entry of this Judgment without trial, hereby agree as follows:

1. This Court has jurisdiction over the subject matter of this litigation and over all parties thereto. The Complaint filed herein states a claim upon which relief can be granted.

2. The defendant hereby acknowledges and accepts service of the Complaint filed herein.

3. The defendant hereby agrees to the entry of Judgment in the principal amounts of \$3,337.11 and \$1,363.15 and \$3,960.42, plus accrued interest of \$1,541.33 and \$697.59 and \$2,026.74, plus interest thereafter at the rates of 8% and 9.13% per annum until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the legal rate of 4.966 per annum until paid, plus costs of this action, until paid in full.

4. Plaintiff's consent to the entry of this Judgment and Order of Payment is based upon certain financial information which defendant has provided it and the defendant's express representation to Plaintiff that she is unable to presently pay the amount of indebtedness in full and the further representation of the defendant that Diane M. McDaniel aka Diane M. Morrison will well and truly honor and comply with the Order of Payment entered herein which provides terms and conditions for the defendant's payment of the Judgment, together with costs and accrued interest, in regular monthly installment payments, as follows:

Am (a) Beginning on or before the ~~first~~ ^{*Am*} 15th day of ~~August~~ ^{*September*}, 1999, the defendant shall tender to the United States a check or money order payable to the U.S. Department of Justice, in the amount of ^{*Am*} \$100⁰⁰, and a like sum on or before the ^{*Am*} 15th ~~first~~ day of each following month until the entire amount of the Judgment, together with the costs and accrued postjudgment interest, is paid in full.

(b) The defendant shall mail each monthly installment payment to: United States Attorney, Financial Litigation Unit, 333 West 4th Street, Suite 3460, Tulsa, Oklahoma 74103-3809.

(c) Each said payment made by defendant shall be applied in accordance with the U.S. Rules, i.e., first to the payment of costs, second to the payment of postjudgment interest (as provided

by 28 U.S.C. § 1961) accrued to the date of the receipt of said payment, and the balance, if any, to the principal.

(d) The defendant shall keep the United States currently informed in writing of any material change in her financial situation or ability to pay, and of any change in her employment, place of residence or telephone number. Defendant shall provide such information to the United States Attorney at the address set forth above.

(e) The defendant shall provide the United States with current, accurate evidence of her assets, income and expenditures (including, but not limited to her Federal income tax returns) within fifteen (15) days for the date of a request for such evidence by the United States Attorney.

5. Default under the terms of this Agreed Judgment will entitle the United States to execute on this Judgment without notice to the defendant.

6. The parties further agree that any Order of Payment which may be entered by the Court pursuant hereto may thereafter be modified and amended upon stipulation of the parties; or, should the parties fail to agree upon the terms of a new stipulated Order of Payment, the Court may, after examination of the defendant, enter a supplemental Order of Payment.

7. The defendant has the right of prepayment of this debt without penalty.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendant, Diane M. McDaniel aka Diane M. Morrison, in the principal amounts of \$3,337.11, \$1,363.15 and \$3,960.42, plus accrued interest in the amounts of \$1,541.33, \$697.59 and \$2,026.74, plus interest at the rates of 8% and 9.13% per annum until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the current legal rate of 4.966 percent per annum until paid, plus the costs of this action.


UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Stephen C. Lewis
United States Attorney


PHIL PINNELL, OBA #7169
Assistant United States Attorney


DIANE M. MCDANIEL AKA
DIANE M. MORRISON

PEP/11f

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

MARK E. LEWIS,)
)
Petitioner,)
)
vs.)
)
BOBBY BOONE,)
)
Respondent.)

F I L E D

AUG 10 1999

Case No. 98-CV-715-K (J) Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE AUG 11 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.

SO ORDERED THIS 9 day of August, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

F I L E D

AUG 10 1999

MARK E. LEWIS,)
)
Petitioner,)
)
vs.)
)
BOBBY BOONE,)
)
Respondent.)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-715-K (J) ✓

ENTERED ON DOCKET

DATE AUG 11 1999

ORDER

Before the Court is Respondent's motion to dismiss petition for writ of habeas corpus (Docket #10). Petitioner has filed a response to the motion (#12). Respondent's motion to dismiss is premised on the allegation that Petitioner, a state inmate appearing *pro se*, failed to file this petition for writ of habeas corpus within the one-year limitations period prescribed by 28 U.S.C. § 2244(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). For the reasons discussed below, the Court finds that the petition is untimely filed and Respondent's motion to dismiss should be granted.

BACKGROUND

Petitioner was convicted by a jury of First Degree Rape (4 counts), Forcible Sodomy (1 count), and Larceny from a House (1 count), in Tulsa County District Court, Case No. CF-89-3106. He was sentenced to 105 years imprisonment on each of the rape and sodomy convictions and to 3 years imprisonment on the larceny conviction, all to be served consecutively. Petitioner appealed his judgment and sentence to the Oklahoma Court of Criminal Appeals where, on March 25, 1993, his convictions were affirmed (#11, Ex. A). Nothing in the record indicates Petitioner sought *certiorari* review in the United States Supreme Court.

Petitioner sought post-conviction relief in the state district court (see #11, Ex. B). The date Petitioner filed the application is, however, unclear. Respondent points to the petition in error filed in the Oklahoma Court of Criminal Appeals where the date of filing in the district court was identified as September 3, 1997. See #11, Ex. B. Petitioner provides the "Index of Contents" from the Tulsa County District Court's docket sheet showing the post-conviction application was filed April 29, 1997 (#12, Ex. L). Petitioner has provided a copy of the state district court's order denying the requested relief dated October 20, 1997 (#5, Ex. G). On December 4, 1997, Petitioner appealed the denial of post-conviction relief (#11, Ex. B). Respondent failed to provide a copy of the Oklahoma Court of Criminal Appeals's order resolving Petitioner's post-conviction appeal. However, based on Petitioner's affidavit provided in support of his petition, it appears his post-conviction appeal may have been dismissed as untimely filed. See #5, Ex. D.

Respondent has also provided a copy of an order entered by the Oklahoma Court of Criminal Appeals on May 31, 1996 denying an application for a writ of mandamus filed by Petitioner on April 18, 1996. (#11, Ex. C). In that action, Petitioner sought restoration of revoked earned credits based on his allegation that he was denied due process during a prison disciplinary hearing.

Petitioner filed the instant petition for writ of habeas corpus on September 18, 1998 (#1).

ANALYSIS

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

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

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

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

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

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

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

28 U.S.C. § 2244(d). Because the limitations period generally begins to run from the date on which a prisoner's direct appeal from his conviction became final, a literal application of the AEDPA limitations language would result in the preclusion of habeas corpus relief for any prisoner whose conviction became final more than one year before enactment of the AEDPA. Recognizing the retroactivity problems associated with that result, the Tenth Circuit Court of Appeals has held that for prisoners whose convictions became final before April 24, 1996, the one-year statute of limitation does not begin to run until April 24, 1996. United States v. Simmonds, 111 F.3d 737, 744-46 (10th Cir. 1997). In other words, prisoners whose convictions became final before April 24, 1996, the date of enactment of the AEDPA, were afforded a one-year grace period within which to file for federal habeas corpus relief.

The Tenth Circuit Court of Appeals also ruled that the tolling provision of 28 U.S.C. § 2244(d)(2) applies in § 2254 cases 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 while

pursuing state post-conviction proceedings properly filed during the grace period.

Application of these principles to the instant case leads to the conclusion that this habeas petition fails to meet the one-year limitations period. Petitioner's conviction became final on or about June 24, 1993, after the 90 day time period for filing a petition for writ of *certiorari* in the United States Supreme Court had lapsed. See Caspari v. Bohlen, 510 U.S. 383, 390 (1994). Therefore, his conviction became final before enactment of the AEDPA and, as a result, his limitations clock began to run on April 24, 1996, when the AEDPA went into effect. Petitioner had one year, or until April 23, 1997, to file his petition for writ of habeas corpus.

Although the time during the grace period when Petitioner had "a properly filed application for State post-conviction or other collateral review" would serve to toll the limitations period, § 2244(d)(2), the Court finds that in this case, Petitioner did not file his application for post-conviction relief until after expiration of the grace period. A collateral petition filed in state court after the limitations period has expired no longer serves to toll the statute of limitations. Rashad v. Khulmann, 991 F. Supp. 254, 259 (S.D. N.Y. 1998). Based on the record provided by Petitioner, the application for post conviction relief was filed in the state district court on April 29, 1997, or six (6) days after the April 23, 1997 deadline. As a result, the limitations period was not tolled during the pendency of Petitioner's post-conviction proceedings. Therefore, unless Petitioner can demonstrate that he is entitled to other statutory or equitable tolling of the limitations period, his petition filed September 18, 1998 is clearly untimely.

In both his brief in support of petition (#4) and his response to the motion to dismiss (#12), Petitioner relies on § 2244(d)(1)(B) and argues that the limitations period should be extended because the state created an impediment to his ability seek habeas corpus relief. Specifically,

Petitioner complains that inmate legal assistants were not provided training on the significance of the AEDPA's changes to the habeas corpus statutes until after the expiration of the grace period. As a result, Petitioner asserts he was denied access to courts in violation of Bounds v. Smith, 430 U.S. 817 (1977), *modified by* Lewis v. Casey, 518 U.S. 343 (1996). But in order for this Court to find a constitutional violation of Petitioner's right of access to the courts under Lewis, he must show that he diligently pursued his federal claims but was prevented from doing so as a result of deficiencies in the prison library. Lewis, 518 U.S. at 349. Petitioner in this case waited more than four (4) years, and after expiration of the judicially created grace period, before exhausting his federal claims in state post-conviction proceedings. He also waited almost one year after rejection of his post-conviction claims by the state district court before filing his federal petition. In the absence of an adequate explanation for these delays,¹ the Court concludes that Petitioner did not diligently pursue habeas corpus relief. Furthermore, as illustrated by the state mandamus action filed during the limitations grace period (see #11, Ex. C), Petitioner was able to access the courts to pursue other legal matters during this period. Therefore, the Court must reject Petitioner's argument that the limitations period should be extended because he was denied access to courts in violation of the Constitution.

Lastly, although § 2244(d) is not jurisdictional and as a limitation may be subject to equitable tolling, Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998) (indicating equitable tolling principles apply only where a prisoner has diligently pursued federal habeas claims), the Court is not persuaded by Petitioner's attempts to justify his late filing. As discussed above, Petitioner did not diligently

¹Petitioner admits he relied on advice from inmate legal assistants who erroneously believed that the one year limitations period began to run after resolution of state post-conviction proceedings.

pursue his federal habeas corpus claims. Petitioner's lack of diligence in pursuing these claims precludes equitable tolling in this case. See Davis v. Johnson, 158 F.3d 806, 811 (5th Cir.1998) (one-year limitation period of AEDPA will be equitably tolled only "in rare and exceptional circumstances"); Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618-19 (3d Cir.1998) (equitable tolling applies only where prisoner has diligently pursued claims but has in some "extraordinary way" been prevented from asserting rights). In addition, neither Petitioner's *pro se* status nor his unfamiliarity with the law is sufficient cause to excuse his untimeliness. See, e.g., Rodriguez v. Maynard, 948 F.2d 684, 687 (10th Cir.1991) (cause and prejudice standard applies to *pro se* prisoner's lack of awareness and training on legal issues); Saahir v. Collins, 956 F.2d 115, 118 (5th Cir.1992) (actual knowledge of legal issues not required by *pro se* petitioner).

Because the limitations period should not be extended or equitably tolled in this case, the Court concludes that Respondent's motion to dismiss should be granted and the petition for writ of habeas corpus should be dismissed with prejudice.

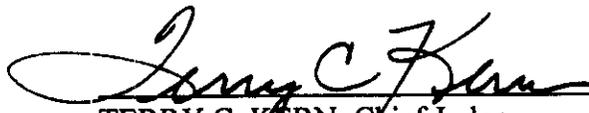
CONCLUSION

Petitioner failed to file his petition for writ of habeas corpus within the one-year limitations period. Therefore, 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 (#10) is **granted**.
2. The petition for writ of habeas corpus is **dismissed with prejudice**.

SO ORDERED THIS 9 day of August, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

TIMOTHY DODD HARVEY,

Petitioner,

vs.

RITA MAXWELL,

Respondent.

ENTERED ON DOCKET

DATE AUG 11 1999

Case No. 98-CV-680-K (E) ✓

FILED

AUG 10 1999

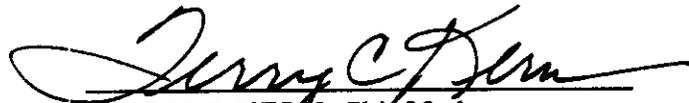
Phil Lombardi, Clerk
U.S. DISTRICT COURT

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 without prejudice to refile same, for failure to exhaust state remedies.

SO ORDERED THIS 9 day of August, 1999.



TERRY C. KEEN, Chief Judge
UNITED STATES DISTRICT COURT

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

TIMOTHY DODD HARVEY,)
)
 Petitioner,)
)
 vs.)
)
 RITA MAXWELL,)
)
 Respondent.)

ENTERED ON DOCKET
DATE AUG 11 1999

Case No. 98-CV-680-K (E) ✓

F I L E D

AUG 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Respondent's motion to dismiss petition for writ of habeas corpus for failure to exhaust state remedies (#6). Petitioner has filed a response to the motion (#9). For the reasons discussed below, the Court finds Respondent's motion should be granted and the petition should be dismissed without prejudice for failure to exhaust state remedies.

BACKGROUND

Petitioner is currently incarcerated pursuant to a conviction entered in Tulsa County District Court, Case No. CRF-86-228. In this action, however, Petitioner does not challenge the constitutionality of his conviction, but instead challenges the administration of his sentence. Petitioner contends that the Department of Corrections has not properly awarded earned credits and that he would be entitled to immediate release if he were awarded all of the earned credits to which he is entitled.

Respondent concedes that Petitioner would be entitled to immediate release if he were in fact entitled to the additional earned credits. However, Respondent argues that Petitioner has not

presented his instant claims to the Oklahoma Court of Criminal Appeals and that, as a result, he has failed to exhaust available state remedies. According to Respondent, Petitioner has challenged the computation of his sentence in Muskogee County District Court via a "Motion for Emergency Writ of Habeas Corpus." (#7, Ex. B). On July 15, 1998, the state district court denied the relief requested. (#7, Ex. D). However, Petitioner failed to appeal the district court's denial of relief to the Oklahoma Court of Criminal Appeals. As a result, Respondent contends Petitioner has failed to exhaust available state remedies and the instant petition should be dismissed.

In his response, Petitioner claims that he has exhausted state remedies and that he did file a notice of intent to appeal the district court's decision. (#9 at 3).¹

ANALYSIS

Habeas corpus relief cannot be granted under § 2254 unless the Petitioner satisfies 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

¹Petitioner attaches his "Notice of Intent to Appeal" filed in Muskogee County District Court on July 22, 1998. In his notice, Petitioner states he "files herewith in open Court his Notice of Intent to Appeal to the United States District Court for the Eastern District of Oklahoma, from the Order rendered herein on the 15th day of July, 1998, in favor of the Respondent's (sic) against this Petitioner." Thereafter, on August 27, 1998, Petitioner filed the instant habeas corpus petition in the United States District Court for the Eastern District of Oklahoma. The petition was transferred to this district court on September 3, 1998.

(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)).

In this case, Petitioner has not presented the instant claims to the Oklahoma Court of Criminal Appeals. Furthermore, because Petitioner asserts that he would be entitled to immediate release if he were to be credited with the proper number of earned credits, he has an available remedy in the form of a petition for writ of habeas corpus. Canady v. Reynolds, 880 P.2d 391, 396-97 (Okla. Crim. App. 1994). Therefore, the Court finds Petitioner's claims are unexhausted and his petition must be dismissed without prejudice. The Court notes that because Petitioner failed to appeal to the Oklahoma Court of Criminal Appeals from the Muskogee County District Court's denial of habeas corpus relief,² Petitioner should seek an appeal out of time in Muskogee County District Court in order to present his claims to the state appellate court.

CONCLUSION

Petitioner has failed to exhaust an available state remedy before seeking federal habeas corpus relief. Therefore, Respondent's motion to dismiss for failure to exhaust should be granted and the petition for writ of habeas corpus should be dismissed without prejudice.

²Based on the "Notice of Intent to Appeal" submitted by Petitioner (#9, attachment), it appears that Petitioner simply filed his "appeal" in the wrong court. Rather than pursuing an "appeal" in the Oklahoma Court of Criminal Appeals, Petitioner "appealed" to the United States District Court for the Eastern District of Oklahoma by filing the instant habeas corpus petition.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss for failure to exhaust state remedies (#6) is **granted**.
2. The petition for writ of habeas corpus is **dismissed without prejudice** for failure to exhaust state remedies.

SO ORDERED THIS 9 day of August, 1999.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

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

JULIA WHITETREE,
SSN: 447-48-0528,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

ENTERED ON DOCKET
DATE AUG 11 1999

Case No. 98-CV-461-H ✓

FILED

AUG 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court on the Report and Recommendation of Magistrate Judge McCarthy affirming the Commissioner's decision to deny benefits. By order dated June 24, 1999, this Court adopted the Report and Recommendation of the Magistrate.

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

IT IS SO ORDERED.

This 8TH day of August, 1999.


Sven Erik Holmes
United States District Judge

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

DUNLOP TIRE CORPORATION,)
)
 Plaintiff,)
)
 v.)
)
 I.M.E. OF MIAMI, INC.,)
)
 Defendant.)

ENTERED ON DOCKET
DATE AUG 11 1999
Case No. 98-CV-456-H ✓

FILED
AUG 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for a trial by jury on July 20-21, 1999. On July 21, 1999, the jury returned its verdict finding Plaintiff Dunlop Tire Company liable on Defendant I.M.E. of Miami's counterclaim of breach of contract, and awarding damages to I.M.E. in the amount of \$34,586.00.

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

IT IS SO ORDERED.

This 8TH day of August, 1999.


Sven Erik Holmes
United States District Judge

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

J.S.M.,

Plaintiff,

v.

INDEPENDENT SCHOOL DISTRICT
NO. 3, BROKEN ARROW, OKLAHOMA,

Defendant.

ENTERED ON DOCKET

DATE AUG 11 1999

Case No. 98-CV-193-H ✓

FILED

AUG 10 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

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

The parties are ordered to notify the Court within sixty days of 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 sixty-day period, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 8TH day of August, 1999.



Sven Erik Holmes
United States District Judge

21

and brief in support of summary judgment.

2. In July of 1996, Overcast went to work for Willbros as a computer programmer. *Pp. 20-27, 32 and Exhibit 1 of Overcast's deposition, attached to the motion for and brief in support of summary judgment.*

3. Overcast was hired and employed by Willbros to aid Tulsa and the other offices in the operation and maintenance of the computer system. He was primarily responsible for providing timely responses to Willbros employees concerning problems that they may encounter in the use of the computer system. *Id.; Paragraph 2 of Affidavit of Andrew Staub.*

4. When Overcast went to work at Willbros, his first direct supervisor was Larry Cannon ("Cannon"). *Pp. 36,44 and Exhibit 3 of Overcast's depo.*

5. During Overcast's employment with Willbros the company maintained a policy that employees should notify their supervisors in advance if they were going to be late for work or absent. *Pp. 116-17 of Overcast's depo.; paragraph 8 of Staub Affidavit.*

6. In December of 1996, Overcast received a reprimand from Cannon for excessive tardiness. Cannon stated that on several occasions Overcast had reported to work late without notifying him that he would not be on time, and that this practice should cease. He also informed Overcast that "[f]ailure to correct this situation will result in disciplinary action, up to and including termination." *Pp. 123-26 and Exhibit 7 of Overcast's depo.*

7. In January of 1998, Cannon issued Overcast another warning regarding "[e]xcessive and repeated tardiness without notification or reason." Cannon informed Overcast that it was important that Overcast report to work by 8:00 a.m. "every morning to support not only his Tulsa based [computer] users, but especially his international based users." As a result of this warning Overcast

was placed on probation. *Pp. 128-30 and Exhibit 8 of Overcast's depo.*

8. In February of 1998, Christina Smathers ("Smathers") became Overcast's direct supervisor. *Paragraph 1 of Affidavit of Christina Smathers, attached to the motion for and brief in support of summary judgment.*

9. In March of 1998, Smathers noticed that Overcast did not regularly report to work at 8:00 a.m., the normally scheduled time for the beginning of the work day. She was concerned about this habit, because it caused problems for Willbros computer users. Overcast's tardiness meant that users who needed help at the very start of the business day might have to wait until Overcast had arrived before they could begin work. In order to resolve this issue, she decided to speak to Overcast about this problem. *Paragraph 3 of Affidavit of Christina Smathers; P. 130, lns 8-20, Pp. 131-32, lns 13-1, of Overcast's depo.*

10. On or about March 13, 1998, Smathers discussed this tardiness issue with Overcast and reminded him that he should report to work no later than 8:00 a.m. At no time during the discussion did he indicate that his tardiness was related to any illness. *Paragraph 4 of Smathers Affidavit; P. 130, lns 8-20, Pp. 131-32, lns 13-1, of Overcast's depo.*

11. Only 3 days later, March 16, Overcast reported to work at 8:20 a.m. without contacting Smathers before arriving to work to explain that he was going to be late. Furthermore, he never indicate that he was tardy because he was ill. *Paragraph 5 of Smathers Affidavit.*

12. On March 18, Overcast did not show up for work and did not call to indicate that he would be late or absent. When Smathers tried to reach him at home on that date she discovered that the telephone number that he had provided Willbros was no longer a working number. She had no way of contacting him because the new number was unlisted. *Paragraph 6 of Smathers Affidavit.*

13. Later in the day on March 18, sometime after 11:00 a.m., Overcast's wife called Smathers to explain that he was sick with an ear infection and that he would not report to work that day. This was the first communication that Smathers had received regarding Overcast's absence. *Id.*

14. On March 20, Overcast called and stated that he would be at work by noon. However, he did not show up for work on that date. *Paragraph 7 of Affidavit of Staub.*

15. As a result of the tardiness issue and Overcast's inadequate communication, Smathers and Staub, Manager of Employment, decided that they should have another counseling session with Overcast. However, before they could have this meeting with Overcast he went on medical leave for what was described as mental stress. He did not return from leave until April 14, 1998. *Paragraph 8 of Staub Affidavit.*

16. Smathers encouraged Overcast to take the leave which ended just prior to April 14. On March 23, 1998, a Willbros employee notified Smathers that Overcast was incoherent and having difficulty walking. Smathers immediately went to Overcast's office to see if he was okay. As she approached Overcast and said hello, he did not respond. When he did respond, his speech was slurred. He appeared disoriented and confused. Smathers decided to telephone his wife to ask her to come and pick him up, since he did not appear to be in any condition to work or drive. She also made a copy of some information pertaining to the company's Employee Assistance Program, thinking that his condition suggested that he might be in need of professional help. She also provided him with information regarding the Willbros' medical leave policy in case he needed time off, and encouraged him to take time off to allow him to improve his condition. *Paragraph 7 of Smathers Affidavit.*

17. On April 14, 1998, Smathers and Staub gave Overcast a written warning regarding procedures and policies that he should follow in the future. They reminded him that he should arrive by 8:00 a.m.; that if he could not be to work on time that he, not his wife, should call Smathers before 8:00 a.m. to inform her that he would not be to work on time; that his absence should be supported by a doctor's statement; that Smathers should be informed of any dangerous side affects that may be associated with any medication that he might be taking; that he must adhere to the company dress code and that he should not work overtime without prior approval from Smathers. *Pp. 137-40 and Exhibit 12 of Overcast's depo.; paragraph 8 of Staub Affidavit.*

18. On April 21 Smathers noticed that Overcast was at least 15 minutes late reporting to work, and he did not call to inform her that he would be tardy. The very next day, April 22, Overcast was again late for work. In both cases, Overcast never indicated that he was late due to any mental or physical illness. *Paragraph 9 of Staub Affidavit; paragraphs 2, 8 of Smathers Affidavit.*

19. On April 27, 1998, Overcast did not report to work until 8:47 a.m. On that date, Smathers again informed Overcast that it was important for him to show up to work on time. Overcast never indicated that he was late because of any mental or physical condition. *Paragraph 10 of Staub Affidavit; paragraphs 2 and 9 of Smathers Affidavit.*

20. Overcast also missed work on May 12 and 14. Overcast never indicated that those absences were related to any illness. *Paragraph 10 of Smathers Affidavit.*

21. On May 15, 1998, Overcast indicated that he may have been recently exposed to tuberculosis. Upon discovering this information, Staub notified Willbros' doctor, Dr. Phillip Hayes, M.D., to ascertain whether an employee exposed to tuberculosis could pose an immediate threat to other employees. He indicated that such exposure could cause infection which could be transferred

during ordinary contact with co-workers. Upon learning this information, Staub directed Overcast to go home and not to return to work without written verification from his doctor stating that he was not infectious. *Paragraph 11 of Staub Affidavit.*

22. On May 22, 1998, Overcast's wife, not Overcast, contacted Smathers and informed Smathers that Overcast had not tested positive for tuberculosis and that his doctor would provide confirmation of the test results, and that Overcast would be back at work on Tuesday May 25, the day after Memorial Day. Despite this assurance from his wife, Overcast did not return to work until June 1, 1998. *Paragraph 12 of Staub Affidavit; paragraph 2 of Smathers Affidavit.*

23. Overcast did not have tuberculosis. *Pp. 90-91 of Overcast depo.*

24. In May of 1998, there was no reason why Overcast could not have directly contacted Smathers to inform her when he would return to work. *Pp. 160-62 of Overcast's depo.*

25. On May 28, 1998, Staub instructed Overcast that when he returned to work he must bring with him his doctor's written verification indicating that he was not infectious. He did not report to work on June 1 until 8:30 a.m. and did not bring a note from his doctor. He was sent home to get the note, but did not return to work that day until after noon. *Paragraph 13 of Staub Affidavit.*

26. As a result of his repeated tardiness and failure to comply with personnel procedures Staub and Smathers decided to terminate Overcast's employment with Willbros. *Paragraph 14 of Staub Affidavit; paragraph 11 of Smathers Affidavit.*

II.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), and "the moving party is entitled to judgment as a matter of law," Fed.R.Civ.P. 56(c). In Celotex, the

Supreme Court stated:

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

477 U.S. at 322, 106 S.Ct. 2548.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific fact, Fed.R.Civ.P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) ("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248, 106 S.Ct. 2505.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250, 106 S.Ct. At 2511. The Supreme Court stated:

[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. Id. at 252, 106 S.Ct. At 2512. Thus, to defeat a summary judgment motion, the nonmovant "must do more than show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986); Anderson, 477 U.S. at 250, 106 S.Ct. At 2511 ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. [citation

omitted]. If the evidence is merely colorable, [citation omitted], or is not significantly probative, summary judgment may be granted.").

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250, 106 S.Ct. At 2511. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

III.

The analytical framework first pronounced in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973) guides the Court's review of Overcast's FMLA claim. Richmond v. Oneok, Inc., 120 F.3d 205, 208 (10th Cir. 1997); Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997). In the summary judgment context, a plaintiff initially must raise a genuine issue of material fact on each element of the prima facie case. Morgan, 108 F.3d at 1323.

After establishment of a prima facie case, the burden shifts to the employer to offer a legitimate nondiscriminatory reason for its employment decision. Id. If the employer offers such a reason, the burden then shifts back to the plaintiff to show that "there is a genuine dispute of material fact as to whether the employer's proffered reason for the challenged action is pretextual." Id. (quoting Randle v. City of Aurora, 69 F.3d 441, 451 (10th Cir. 1995)).

In order to establish a prima facie claim for FMLA retaliation, a plaintiff must show that : (1) he engaged in activity protected under the act; (2) he subsequently suffered adverse action by the employer; and (3) a causal connection existed between the employee's activity and the adverse

action. Richmond, at 208-09. A plaintiff can demonstrate pretext by showing "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's . . . reasons for its action," which "a reasonable fact finder could rationally find . . . unworthy of credence." Id. at 209. "Mere conjecture that the employer's reason is pretext, however, will not defeat a motion for summary judgment." Id.

In the instant case, in his complaint, Overcast alleged that he was discharged in violation of the FMLA because he took time off from work for treatment for a "nervous breakdown." *Paragraphs 4, 5 and 9 of the Complaint.* This leave began on March 23, 1999 and ended when he returned to work on April 14, 1999. *Affidavit of Overcast, attached to Plaintiff's Response To Defendant's Motion for Summary Judgment and Brief In Support (the "Response Brief").* When he filed the Response Brief, Overcast also alleged that he was dismissed in retaliation for seeking medical treatment for tuberculosis in May of 1998. *Paragraphs 10 and 12 of Affidavit of Overcast.*

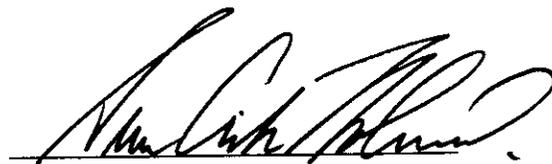
Assuming without deciding that Overcast proved a prima facie case of FMLA retaliation, he has not carried his burden of showing that Willbros' proffered reasons for his dismissal were pretextual. Willbros' stated reason for Overcast's dismissal was repeated tardiness and failure to comply with personnel procedures. Long before Overcast took leave for his "nervous breakdown", the last day of which was April 13, 1998, Overcast had been warned by Cannon and Smathers concerning excessive tardiness. *Pp. 123-26, 128-30 and Exhibits 7 and 8 of Overcast's depo.; and Paragraph 4 of Smathers Affidavit.* Indeed, as early as December of 1996, Cannon had warned Overcast that if he did not correct the tardiness problem he could face dismissal. *Pp. 123-26 and Exhibit 7 of Overcast's depo.* However, right up to the time of his dismissal, Overcast routinely reported to work late, or in some cases he did not even show-up. *See Paragraphs 9, 10, 12 and 13*

of Staub Affidavit; Paragraphs 2, 8, 9, and 13 of Smathers Affidavit. Furthermore, throughout his entire employment with the company he knew that he was required to give advance notice to his supervisor if he was going to be late for work. See Pp. 116-17 of Overcast's depo. And, with regard to the tuberculosis scare, he had been told to bring a written verification from his doctor that he was not infectious. See Paragraphs 11, 12 and 13 of Staub Affidavit. Yet, he failed to follow these procedures. See Pp. 123-26, 128-30, 160-62 and Exhibits 7 & 8 of Overcast's depo.; Paragraphs 2, 3, 5, 6 and 8 of Smathers Affidavit; Paragraphs 7, 9, 12 and 13 of Staub Affidavit.

Overcast can offer nothing but his conclusory and self-serving affidavit to refute these legitimate nondiscriminatory reasons for his dismissal - which is not enough to deny summary judgment. See Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991) ("the nonmovant's affidavits must be based upon personal knowledge and set forth facts that would be admissible in evidence; conclusory and self-serving affidavits are not sufficient."). Furthermore, to the extent that Overcast's affidavit contradicts his previous deposition testimony it cannot be considered. Bohn v. Park City Group, Inc., 94 F.3d 1457, 1463 (10th Cir. 1996). Overcast has simply failed to show that Willbros' proffered reason for his dismissal was one which a rational jury could find "unworthy of credence." Morgan, 108 F.3rd at 1323. Accordingly, Defendant's motion for summary judgment is hereby granted.

IT IS SO ORDERED.

Dated this 8TH day of August 1999.



Sven Erik Holmes
United States District Judge

Approved as to form:



Steven A. Broussard

Attorney for Defendant Willbros USA, Inc.



R. Scott Scroggs

Attorney for Plaintiff Cecil Overcast