UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
NOV 24 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 99CV0776E(J)
	)	
NANCY HAYNES,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET
DATE NOV 30 1999

DEFAULT JUDGMENT

This matter comes on for consideration this 24TH day of November, 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, Nancy Haynes, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Nancy Haynes, was served with Summons and Complaint on September 14, 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, Nancy Haynes, for the principal amounts of $1,375.00 and $1,684.40, plus

accrued interests of $1,588.73 and $788.87, plus administrative charges in the amount of $8.02, plus interest thereafter at the rates of 9.13% and 8% per annum until judgment, plus filing fees in the amount of $150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.471 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

MT

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

RON STEVENS,	)	
Plaintiff,	)	ENTERED ON DOCKET DATE NOV 30 1999
v.	)	
KTUL TV, INC., *(sic)*	)	
Defendant.	)	No. 98-CV-0809K (E)

FILED
NOV 24 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff Ron Stevens and Defendant KTUL, LLC hereby file this Joint Stipulation of Dismissal with Prejudice, pursuant to Fed. R. Civ. P. 41(a)(1)(ii).

Plaintiff Ron Stevens hereby dismisses with prejudice any claims filed by Ron Stevens or that could have been filed by Ron Stevens against defendant KTUL, LLC.

All costs shall be paid by the party that incurred the particular cost item.

Respectfully submitted,

Jeff Nix
OBA #6688
NIX & SCROGGS
601 S. Boulder, Suite 610
Tulsa, OK 74119
Telephone: (918) 587-3193
Telecopier: (918) 587-3491

COUNSEL FOR PLAINTIFF
RONALD W. STEVENS

5312882

23

CJ

Ronald W. Stevens, Plaintiff

Randall G. Vaughan, OBA #11554
PRAY, WALKER, JACKMAN,
WILLIAMSON & MARLAR
900 ONE OK Plaza
100 West 5th Street
Tulsa, Oklahoma 74103-4218
(918) 581-5500
(918) 581-5599 (Facsimile)

T.J. Wray , TX Bar No. 22015200
M. Carter Crow, TX Bar No. 05156500
FULBRIGHT & JAWORSKI L.L.P.
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone: (713) 651-5151
Fax: (713) 651-5246

ATTORNEYS FOR DEFENDANT
KTUL, LLC

FILED

NOV 29 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

PEGGY HARDER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 99-CV-0159K
	)	
AMERICA'S RENT-TO-OWN CENTER, INC., d/b/a AMERICA'S SALES & LEASING,	)	ENTERED ON DOCKET DATE NOV 30 1999
	)	
Defendants.	)	

STIPULATION FOR DISMISSAL WITH PREJUDICE

COMES NOW Plaintiff, Peggy Harder, by and through her attorneys of record, Randall L. Iola, of the firm Law Offices of Randall L. Iola, P.L.L.C and R. Tom Hillis of the firm Titus, Hillis & Reynolds, joining with Defendants, America's Rent-to-Own Center, Inc. and America's Sales & Leasing, by and through their attorney of record, David B. Donchin, of the firm Durbin, Larimore and Bialick, and submit the following stipulation to the Court for an Order of Dismissal of the above-captioned matter.

It is stipulated and agreed by and between the parties that the Court may enter an Order dismissing the above-captioned matter with prejudice against the filing of a future action thereon, for the reason that the parties have entered into a compromise settlement, whereby Defendants, America's Rent-to-Own Center, Inc. and America's Sales & Leasing, and Plaintiff have agreed to settle this matter in exchange for a full, final and complete release of any and all claims that Plaintiff may have against Defendant, known or not known, and with the stipulation that each said party shall bear their own costs and attorney fees.

mail-copy rec'd
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Peggy Harder, Plaintiff

Randall L. Iola, OBA#13085
Law Offices of Randall L. Iola, P.L.L.C
First Place Tower
15 East Fifth Street, Suite 2750
Tulsa, Oklahoma 74103

and

R. Tom Hillis, OBA #12338
Titus, Hillis & Reynolds
First Place Tower
15 East Fifth Street, Suite 2750
Tulsa, Oklahoma 74103-6822
Attorneys for Plaintiff

David B. Donchin, OBA #10783
920 N. Harvey
Oklahoma City, Oklahoma 734102-2610
Telephone: (405) 235-9584
Fax: (405) 235-0551
Attorneys for Defendant
America's Rent-To-Own Center, Inc.,
d/b/a, America's Sales & Leasing

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

IN RE:	)	
	)	
JAMES M. SMART and JOHANNA SMART,	)	
	)	
LOCAL AMERICA BANK,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 99-CV-175-H(J)
	)	
JAMES M. SMART and JOHANNA SMART,	)	
	)	
Appellees.	)	

FILED
NOV 29 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE NOV 30 1999

ORDER

Before the Court for consideration is the Report and Recommendation of the United States Magistrate Judge filed August 3, 1999 (Docket # 7). In accordance with 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b), any objections to the Report and Recommendation had to be filed within ten (10) days of the receipt of the report. Appellant mistakenly filed its objections with the Bankruptcy Court instead of this Court, and therefore missed the ten day deadline. The Court entered an order adopting the Report and Recommendation on August 25, 1999. The Court did not consider Appellant's objections to the Report and Recommendation in making its ruling. Appellant filed a motion to vacate the order so that its objections could be considered. On October 12, 1999, the Court granted this motion and allowed Appellant to file its objections. The parties filed briefs, and the Court conducted a hearing on the matter on November 19, 1999.

After carefully reviewing the Report and Recommendation and the briefs of the parties,

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the Court finds that the Report and Recommendation of the Magistrate Judge should be adopted. Accordingly, the decision of the Bankruptcy Court is affirmed.

IT IS SO ORDERED.

This 24TH day of November, 1999.

Sven Erik Holmes
United States District Judge

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

PREVUE INTERACTIVE, INC., a Delaware corporation, and UNITED VIDEO SATELLITE GROUP, INC., a Delaware corporation, Plaintiffs, v. STARSIGHT TELECAST, INC., a California corporation, Defendant.	)	ENTERED ON DOCKET DATE NOV 30 1999 Civil Action No. 93-CV-934-H
STARSIGHT TELECAST, INC., a California corporation, Counterclaimant, v. UNITED VIDEO SATELLITE GROUP, INC., a Delaware corporation, PREVUE INTERACTIVE, INC., a Delaware corporation, and PREVUE NETWORKS, INC., a Delaware corporation, Counterdefendants.	)	FILED NOV 29 1999 Phil Lombardi, Clerk U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

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Upon consideration of the parties' Joint Application for entry of an Order administratively closing this case, and for good cause shown, it is hereby ORDERED that the Clerk shall 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 further ORDERED to supplement their Joint Application, or to otherwise advise the Court as to the continued need to maintain the administrative closure of this action, within 9 months of the date of this Order, or by August 24TH, 2000.

ORDERED this 24TH day of November, 1999.

Sven Erik Holmes, District Judge

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

FILED
NOV 29 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHANE SPITLER and CAMIE SPITLER,	)	
Plaintiffs,	)	
v.	)	Case No. 98-CV-758-H
ADVANCED SYSTEMS, INC. a New Jersey Corporation	)	
Defendant.	)	

ENTERED ON DOCKET
DATE NOV 30 1999

JUDGMENT

This matter came before the Court on a Motion for Summary Judgment by Defendant. The Court duly considered the issues and rendered a decision in accordance with the order filed on November 19, 1999.

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

IT IS SO ORDERED.

This 24TH day of November, 1999.

Sven Erik Holmes
United States District Judge

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

FILED

NOV 23 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HAWKINS-SMITH, an Idaho General Partnership Plaintiff, v. SSI, INC., UNITED STATES FIDELITY & GUARANTY COMPANY, and INTERNATIONAL ROOFING, INC., Defendants. SSI, INC., Third-Party Plaintiff, v. MULE-HIDE PRODUCTS CO., INC., and LARRY KESTER d/b/a ARCHITECTS COLLECTIVE Third-Party Defendants.	)	Case No: 95-C-006-H

ENTERED ON DOCKET
DATE NOV 30 1999

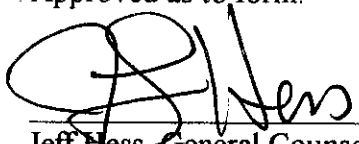
STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW the Third-Party Plaintiff, SSI, Inc., by and through its attorney of record, and dismisses the above cause of action against Mule Hide Products Co., Inc., with prejudice to the refilling of same.

Robert L. Magrini, OBA # 12385
Evan Gatewood, OBA# 13412
1220 N. Walker
P.O. Box 60140
Oklahoma City, OK 73146-0140
(405) 235-9922
Attorneys for Defendants SSI, Inc. And United States Fidelity & Guaranty

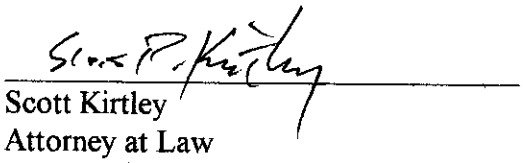
O/J

Approved as to form:



Jeff Hess, General Counsel for Hawkins-Smith
8645 W. Franklin
Bosie, Idaho 83709

Approved as to form:



Scott Kirtley
Attorney at Law
502 W. 6th Street
Tulsa, OK 74119

Approved as to form:

I. Michele Drummond

Richard D. Wagner
I. Michele Drummond
Wagner, Stuart, & Cannon P.L.L.C.
902 S. Boulder Ave.
Tulsa, OK 74119-2034

CERTIFICATE OF MAILING

I certify that a true copy of the Stipulation of Dismissal was mailed, with postage attached, on this 23 day of November, 1999, to the following attorney(s) of record:

Jeff Hess, General Counsel for
Hawkins-Smith
8645 W. Franklin
Bosie, Idaho 83709

John Tucker
Rhodes, Hieronymus, Jones,
Tucker & Gable
400 ONEOK Plaza
100 W. 5th Street
Tulsa, OK 74119

Scott Kirtley
Attorney at Law
502 W. 6th Street
Tulsa, OK 74119

James K. Secrest, II
Roger Butler
Secrest, Hill & Folluo
7134 S. Yale, Ste. 900
Tulsa, OK 74136

Richard D. Wagner
I. Michele Drummond
Wagner, Stuart, & Cannon P.L.L.C.
902 S. Boulder Ave.
Tulsa, OK 74119-2034

Robert L. Magrini,
Evan Gatewood,

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 24 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHAWN SMITH,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 98-CV-575-B (M)
	)	
VALMONT INDUSTRIES, INC.,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET
DATE NOV 29 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff, Shawn Smith, and the Defendant, Valmont Industries, Inc., by and through their counsel, and pursuant to Fed. R. Civ. P. 41(a)(1)(i), hereby stipulate to the dismissal of the above captioned and numbered action, with prejudice.

DATED this 24th day of November, 1999.

R. Scott Scroggs, OBA #16889
The Scroggs Law Firm
403 South Cheyenne, Suite 1100
Tulsa, Oklahoma 74103
Phone (918) 583-5111
Fax (918) 583-1117
Attorney for Plaintiff Shawn Smith

John M. Hickey, OBA #11100
Joe M. Fears, OBA #2850
BARBER & BARTZ
One Ten Occidental Place
110 West Seventh St., Suite 200
Tulsa, Oklahoma 74119-1018
Phone: (918) 599-7755
Fax: (918) 599-7756
Attorneys for Defendant Valmont Industries, Inc.

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MT

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

FILED

NOV 2 9 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES WALTER SPEARMAN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case NO. 99-CV -0377E (J)
	)	
U-HAUL COMPANY OF MISSOURI, a Missouri corporation,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET

DATE NOV 29 1999

NOTICE OF DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff James Walter Spearman, and gives notice of his dismissal without prejudice of Plaintiffs' claims against Defendant U-Haul Company of Missouri, pursuant to Rule 41 of the Federal Rules of Civil Procedure.

Respectfully submitted,

Sandra L. Tolliver, OBA #11117
P.O. Box 14271
Tulsa, OK 74159-1271
(918) 488-8922
(918) 488-9277 FAX
ATTORNEY FOR PLAINTIFF

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CJ

MT

FILED

NOV 24 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 99CV0911K(E)
	)	
JAMES M. GRIFFIN,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET

DATE NOV 29 1999

NOTICE OF DISMISSAL

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

Dated this 24th day of November, 1999.

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

Phil Pinnell

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

CERTIFICATE OF SERVICE

This is to certify that on the 24th day of November, 1999, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: James M. Griffin, 205 Oak Ave., Broken Arrow, OK 74012.

for Ann L. Hankins
Libbi L. Felty
Paralegal Specialist

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
NOV 24 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ALEXIS KIM SCHRADER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 99-CV-0703-K (E)**
	)	
DR. FRED A. RAY, M.D., P.C.,	)	
an Oklahoma Professional Corporation,	)	ENTERED ON DOCKET
	)	
Defendant.	)	DATE NOV 2 0 1999

REPORT AND RECOMMENDATION

The Court has referred to the undersigned for Report and Recommendation defendant's motion to dismiss (Docket #2). For the reasons stated herein, the undersigned recommends that the motion to dismiss be **DENIED**.

I. Background

Plaintiff, Alexis Kim Schrader, alleges that defendant, Dr. Fred A. Ray, M.D., P.C., her employer, discriminated against her because of her disability in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. Specifically, plaintiff claims that she was discriminatorily discharged because of her disability in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.

Defendant moved to dismiss under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction on the ground that defendant has fewer than 15 employees, relying on an attached affidavit of Fred A. Ray, M.D. (Docket #3, Affidavit, ¶ 6). Defendant moved to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim on the grounds that defendant's business is not a "program or activity" under the Rehabilitation Act, that defendant does not receive any federal funding, and that the alleged discrimination was not related to any federally-funded program or activity. (Docket #3, at 4-6)

II. Standard for Dismissal Pursuant to *Fed. R. Civ. P.* 12(b)(1) and (6)

A court may dismiss a complaint for lack of subject matter jurisdiction under Rule 12(b)(1) if the allegations in the complaint are insufficient to show that the federal court has jurisdiction over the subject matter of the case. If federal question jurisdiction is alleged, plaintiff must show that she has alleged a claim under federal law and that the claim is not frivolous. Bell v. Hood, 327 U.S. 678, 682, 66 S. Ct. 773, 90 L. Ed. 939 (1946).

A court may dismiss a complaint for failure to state a claim under Rule 12(b)(6) only if it is clear that the plaintiff can prove no set of facts in support of her claim entitling her to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L. Ed. 2d 80 (1957); Ramirez v. Oklahoma Dept. of Mental Health, 41 F.3d 584, 586 (10th Cir. 1994). For purposes of making this latter determination, a court must "accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." Ramirez, 41 F.3d at 586; Ash Creek Mining Co. v. Lujan, 969 F.2d 868, 870 (10th Cir. 1992); Williams v. Meese, 926 F.2d 994, 997 (10th Cir. 1991). Additionally, granting a motion to dismiss "is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." Morgan v. City of Rawlins, 792 F.2d 975, 978 (10th Cir. 1986).

III. Discussion

A. Rule 12(b)(1) Motion:

The Court must determine whether it has subject matter jurisdiction over this action. Plaintiff alleges federal question jurisdiction under 28 U.S.C. § 1331 for a claim arising under the laws of the United States. Specifically, plaintiff alleges discrimination in violation of the Rehabilitation Act. Defendant alleges jurisdictional deficiency based on defendant's failure to meet an alleged 15

employee threshold of the Rehabilitation Act. The issue is whether failure to meet such a threshold, if it exists, implicates subject matter jurisdiction. The undersigned proposes a finding that it does not.

The alleged failure to have the requisite number of employees goes to whether plaintiff has stated a claim, not whether the Court has power to adjudicate a Rehabilitation Act case:

> [T]he absence of a valid (as opposed to arguable) cause of action does not implicate subject matter jurisdiction, i.e., the courts' statutory or constitutional power to adjudicate the case.

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 118 S. Ct. 1003, 1010, 140 L. Ed. 2d 210 (1998). Jurisdiction is not defeated by the possibility that plaintiff may have failed to state a claim on which she could actually recover. Bell v. Hood, 327 U.S. 678, 682, 66 S. Ct. 773, 90 L. Ed. 2d 939 (1946). If a complaint is drawn to seek recovery directly under the Constitution or laws of the United States, the federal court must entertain the suit with two exceptions. Id. at 681-82. The two exceptions are

> where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.

Id. at 682-83. See Cardtoons, L.C. v. Major League Players Assoc., 95 F.3d 959, 965 (10th Cir. 1996). If the applicability of the federal statute (here, the Rehabilitation Act) is genuinely at issue, the federal court has subject matter jurisdiction and should reach the merits of the claim. Cf. Steel Co., 118 S. Ct. at 1010. Plaintiff's claim is neither immaterial nor insubstantial -- she alleges employment discrimination based on disability under the Rehabilitation Act. Therefore, the undersigned proposes a finding that the Court has subject matter jurisdiction and recommends that defendant's Rule 12(b)(1) motion be denied. The issue of the 15 employee threshold will be analyzed as part of the Rule 12(b)(6) motion.

B. Rule 12(b)(6) Motion:

The motion to dismiss for failure to state a claim has four components: failure to meet the 15 employee threshold; failure to sue a "program or activity" under the Rehabilitation Act; failure to sue an entity which receives federal funding; and failure to establish relationship between the alleged discrimination and a federally-funded program or activity.

Defendant's motion was supported with an affidavit. Rule 12(b) gives the Court two options if a Rule 12(b)(6) motion presents matters outside the pleading. First, the Court may exclude any matters outside the pleadings asserted by the defendant, and may treat the motion as one to dismiss. Second, the Court may consider the additional material, and convert the motion into one for summary judgment. If the Court chooses the second option, the parties must be given a reasonable opportunity to present all pertinent material.

The decision of whether to exclude extraneous material or convert a motion to dismiss into a summary judgment motion is discretionary. Donovan v. Gingerbread House, Inc., 536 F. Supp. 627, 630 (D. Colo. 1982). Although ordinarily it is desirable to consider all available factual material that will assist in the resolution of a dispute, in this situation the undersigned recommends that the Court find that, for the reasons discussed below, the facts contained in the affidavit are irrelevant. The undersigned recommends that the motion be treated as a motion to dismiss.

1. Employee Threshold

The affidavit submitted by defendant, which the undersigned deems irrelevant,[1] states that from 1995 to the present, defendant has never had more than 14 employees at any time. Defendant

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[1] The irrelevance is the result of the proposed finding herein that number of employees is not implicated in the Rehabilitation Act.

argues for dismissal on the ground that the Rehabilitation Act requires that an employer regularly employ 15 or more persons in order to be covered by the Act. The starting point for this proposition is Section 504(d) of the Rehabilitation Act, which provides:

> The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

29 U.S.C. § 794(d). In turn, the referenced sections of the Americans with Disabilities Act (ADA) contain the following definition:

> The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, . . .

42 U.S.C. § 12111(5)(A). Defendant relies on this definition to read the 15 employee threshold into the Rehabilitation Act. Plaintiff disagrees that the Act contains such a threshold. There are cases supporting each position. Compare Romand v. Zimmerman, 881 F. Supp. 806, 811 (N.D.N.Y. 1995), and Haltek v. Park Forest, 864 F. Supp. 802, 805 (N.D. Ill. 1994) (Rehabilitation Act requires employer with 15 or more employees),[2] with Johnson v. New York Hospital, 897 F. Supp. 83, 86 (S.D.N.Y. 1995) (Rehabilitation Act contains no exception for entities with fewer than 15 employees).

Although the undersigned finds the analysis of Johnson more persuasive, none of these cases focuses on the logical flaw inherent in defendant's position: the relevant sections of the Rehabilitation

---

[2] The other cases cited by defendant address the issue of whether there is individual liability under the Rehabilitation Act, which is not at issue here.

Act do not use the term "employer;" thus, the definition of employer from the ADA is inapplicable.[3] The relevant sections of the Rehabilitation Act pertain to a "program or activity," which term is defined in the Rehabilitation Act. 29 U.S C. § 794(b). The relevant portion of this definition as it relates to defendant is:

> For purposes of this section, the term "program or activity" means all of the operations of--
>
> * * *
>
> (3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--
>
> * * *
>
> (ii) which is principally engaged in the business of providing . . . health care . . .
>
> * * *
>
> any part of which is extended Federal financial assistance.

Id. § 794(b)(3)(A)(ii). Although an employer such as defendant may meet this definition, the Rehabilitation Act is not limited to the employment context. It prohibits discrimination based on disability in any program or activity receiving federal financial assistance:

> [T]he Rehabilitation Act provides a broader prohibition than one limited to discrimination that takes place in the employment setting; in addition, the Rehabilitation Act protects those "excluded from the participation in, . . . denied the benefits or, or . . . subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). Accordingly, the Rehabilitation Act protects, for example, students at educational institutions and patients at medical facilities, with no explicit exception for entities with less than 15 employees.

Johnson, 897 F. Supp. at 86.

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[3] Defendant relies on Huck v. Mega Nursing Serv., Inc., 989 F. Supp. 1462 (S.D. Fla. 1997), for the proposition that the ADA definition of employer applies to the Rehabilitation Act. There the court stated, relying on Romand, that in both the ADA and the Rehabilitation Act "the definition of an employer includes 'any agent of such person.'" Id. at 1464. The undersigned respectfully suggests that there is no definition of employer in the Rehabilitation Act.

The courts in Romand and Haltek, in holding that the ADA definition of "employer" is applicable to the Rehabilitation Act, ignored the fact that the term "employer" is not used in the Act.[4] This anomaly is created by the Act's language in Section 504(d) which adopts the standards of title I of the ADA as the standards for determining whether Section 504 has been violated. However, it is not logical to include, in the standards for a discrimination determination, the definition of a term (employer) not used in the Act itself.

> In enacting the 1992 amendment of the Rehabilitation Act, Congress intended that the standard of "reasonable accommodations" that employers must make under the ADA would serve as the standard in actions alleging Rehabilitation Act violations in the employer-employee context. 42 U.S.C. § 12112(b)(5)(A).
>
> * * *
>
> The Rehabilitation Act's application to the employment context was similarly not dependent on an entities' number of employees, and did not become so as a result of the 1992 amendment. The language of the amendment states that the ADA's standards are to be used only "to determine whether [the Rehabilitation Act] has been violated." 29 U.S.C. § 794(d). What the amendment does not state is that the standards of the ADA are to be used to determine whether an employer is even subject to the Rehabilitation Act in the first instance.

Johnson, 897 F. Supp. at 86. Thus, an employer can be liable under the Rehabilitation Act while exempt from liability under the ADA. Id.

The undersigned proposes a finding that the Rehabilitation Act applies to an employer which meets the definition of "program or activity" (regardless of the number of employees) and which receives federal financial assistance. Accordingly, the undersigned recommends that the motion to dismiss on this ground be denied.

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[4] Surely Romand and Haltek do not stand for the proposition that the Rehabilitation Act applies to any private employer with 15 or more employees regardless of whether such employer meets the definition of program or activity, and regardless of whether that private employer receives federal financial assistance.

2. Program or Activity

Although defendant admits that it treats patients who receive Medicare or Medicaid, it claims that its business is not a federal program or activity. The undersigned disagrees.

Prior to the amendment of the Rehabilitation Act by the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), there was no definition of "program or activity" as that term is used in Section 504(a) of the Rehabilitation Act, 29 U.S.C. § 794(a). Thus, the Supreme Court held that Section 504(a) applied only to the specific program or activity receiving federal funds. Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 104 S. Ct. 1248, 79 L. Ed. 2d 568 (1984). See also Grove City College v. Bell, 465 U.S. 555, 104 S. Ct. 1211, 79 L. Ed. 2d 516 (1984) (program or activity under Title IX). The Restoration Act expanded the concept of "program or activity" to cover all of the operations of the corporation or entity which receives federal funds. 29 U.S.C. § 794(b); Grimes v. Superior Home Health Care of Middle Tenn., 929 F. Supp. 1088, 1091-92 (M.D. Tenn. 1996).

> Section four of the Restoration Act added section 504(b) to the Rehabilitation Act, which provides in pertinent part: "For purposes of this section, the term 'program or activity' means all of the operations of -- . . . (2)(A) a college, university, or other postsecondary institution. . . ." [citation omitted]. This language overturns the program-specific interpretation of "program or activity" developed in Grove City and Consolidated Rail. In the context of a university, the term "program or activity" now refers to all of the operations of the university.

DeVargas v. Mason & Hanger-Silas Mason Co., Inc., 911 F.2d 1377, 1384 (10th Cir. 1990). All of the operations of defendant's business thus meet the Rehabilitation Act definition of program or activity. 29 U.S.C. § 794(b). The undersigned recommends that the motion to dismiss on this ground be denied.

3. Federal Funding

Likewise, defendant meets the definition of program or activity because a part of defendant's business is extended federal financial assistance. 29 U.S.C. § 794(b). Defendant admits that he treats patients who "receive" Medicare or Medicaid. Plaintiff alleges in her Complaint that defendant receives Medicare and Medicaid reimbursements. The receipt of Medicare and Medicaid reimbursements qualifies as federal financial assistance. United States v. Baylor University Medical Center, 736 F.2d 1039, 1042 (5th Cir. 1984); Grimes, 929 F. Supp. at 1091 n. 1; Glanz v. Vernick, 756 F. Supp. 632, 636 (D. Mass. 1991). The undersigned recommends that the motion to dismiss on this ground be denied.

4. Discrimination Related to Program or Activity

Defendant urges dismissal on the grounds that plaintiff was neither a recipient nor an intended beneficiary of the federal financial assistance received by her employer, Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1227 (7th Cir. 1980); Lemmo v. Willson, 583 F. Supp. 557 (D. Colo. 1984), and that plaintiff failed to allege that she was subject to discrimination under the program or activity for which those funds were received. United States Dep't of Trans. v. Paralyzed Veterans, 477 U.S. 597, 106 S. Ct. 2705, 91 L. Ed. 2d 494 (1986); Bachman v. American Soc. of Clinical Pathologists, 577 F. Supp. 1257, 1262 (D.N.J. 1983). Defendant's reliance on these cases is misplaced, as they predate the 1987 amendment to the Rehabilitation Act which expanded the definition of program or activity so as to require only that a part of the program or activity receive federal financial assistance in order for all operations to be covered.[5]

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[5] Defendant also cites Huck for the proposition that a plaintiff must allege that she was an intended beneficiary of the federal funds. 989 F. Supp. at 1464. Huck relies on Simpson. Although Huck was decided in 1997, it ignores the 1987 amendment and cases decided since then.

Since the 1987 amendment, there is no requirement that a plaintiff plead that she is an intended beneficiary of a federally-funded program or activity in which the defendant is alleged to have participated. Fobbs v. Holy Cross Health System Corp., 29 F.3d 1439, 1447 (9th Cir. 1994), cert. denied, 513 U.S. 1127, 115 S. Ct. 936, 130 L. Ed. 2d 881 (1995); Grimes, 929 F. Supp. at 1091-92; Hodges v. Public Bldg. Comm'n, 864 F. Supp. 1493, 1504-05 (N.D. Ill. 1994). To state a claim, plaintiff must allege the elements of: discrimination against a qualified individual with a disability, by reason of her disability, under a program or activity receiving federal financial assistance. 29 U.S.C. § 794; see Wagner v. Fair Acres Geriatric Center, 49 F.3d 1002, 1009 (3d Cir. 1995). Plaintiff has so alleged. The undersigned recommends that the motion to dismiss on these grounds be denied.

IV. Conclusion

Based upon the foregoing, the undersigned recommends that defendant's motion to dismiss (Docket #2) be **DENIED**.

V. Objections

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review, the District Judge will consider the parties' written objections to the Report and Recommendation. A party wishing to file objections must file them with the Clerk of the District Court within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(1); and § 2254, Rules 8, 10; see also Fed. R. Civ. P. 72(b). **The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or**

adopted by the District Court. See Thomas v. Arn, 474 U.S. 140 (1985); Haney v. Addison, 175 F.3d 1217 (10th Cir. 1999).

DATED this 24th day of November, 1999.

Claire V. Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

The foregoing [illegible] true copy of the foregoing [illegible] was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 24th Day of November, 1999.

C. Portelly, Deputy Clerk

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

FILED
NOV 23 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

LINDA ANNETTE DRUMMOND (formerly CAMPBELL),	)	
Plaintiff,	)	Case No. 99-CV-0627BU(E)
vs.	)	
JIM HOUK SEAMLESS GUTTERING AND SUPPLY, INC., an Oklahoma corporation,	)	ENTERED ON DOCKET DATE NOV 29 1999
Defendant.	)	

STIPULATION FOR DISMISSAL WITH PREJUDICE

The Plaintiff and Defendant Jim Houk Seamless Guttering and Supply, Inc. stipulate that the Complaint and the action may be dismissed with prejudice to the bringing of another action upon the same cause or causes for the reason that all issues existing in the action have been compromised and settled by agreement between the parties.

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JIM HOUK SEAMLESS GUTTERING AND SUPPLY, INC.

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O/K

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

FILED
NOV 23 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

MICHAEL RAY HUDELSON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 98-C-867-B(E)
	)	
ANNA MARIE COWDREY, in her individual capacity; RICK PHILLIPS, in his individual capacity,	)	
	)	
Defendants.	)	

ENTERED ON DOCKET
DATE NOV 24 1999

ORDER

Comes on for consideration Defendant Cowdrey's Motion for Summary Judgment (Docket #39) and the Court finds as follows.

Litigation History

Plaintiff seeks damages from Defendant Ana Marie Cowdrey ("Cowdrey") and Tulsa Police officer Rick Phillips ("Phillips") in his individual capacity for violations of his constitutional rights arising out of Plaintiff's arrest which occurred late on the night of November 29, 1998 and into the early morning hours of the next day. Cowdrey was also a Tulsa Police officer but was off duty that night. It was Cowdrey's complaint which brought about the arrest of Plaintiff. Phillips was one of the responding officers and Plaintiff alleges he was injured by

Phillips' use of excessive force in the arrest process.[1]

Cowdrey moves for summary judgment as to Plaintiff's claims against her asserting that Plaintiff cannot proceed in his §1983 claims against her under the Fifth and Ninth amendments, that she was not acting under color of law, that there was no constitutional violation by her because Plaintiff was arrested for probable cause, that she is entitled to qualified immunity which bars liability, that she was not the cause of any alleged fall or excessive force and is therefore not liable as a matter of law and that there is no basis for punitive damages.

Summary Judgment Standard

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

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

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita v. Zenith*, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most

[1]Phillips has not moved for summary judgment.

favorable to the nonmoving party. *Conaway v. Smith*, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. *Norton v. Liddel*, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

> Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."
>
> * * *
>
> A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

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

<u>Undisputed Material Facts</u>

The Court has reviewed the record submitted by both parties and concludes the undisputed material facts which form the basis of this Order are:

1. On the night of November 29, 1998, Plaintiff and Cowdrey were both present at a Tulsa club called The Drink.

2. Cowdrey began moving through the crowded club toward the women's restroom

when she felt a hand go up her miniskirt, cupping her vaginal area and attempting to penetrate her with fingers. She reached for the offending hand, held onto it, and hit the back of the head of the person she determined to be the hand's owner with the butt of her hand. The person had turned his head and was laughing. Cowdrey states she is sure the Plaintiff, the person she struck, was the person who had violated her. Plaintiff said nothing to Cowdrey.

3. Plaintiff admits he was the person struck by Cowdrey three times. The first hit felt like a slap and the other two felt like punches. He was not knocked out or staggered.

4. Cowdrey then grabbed Plaintiff's arm and jacket and escorted him to talk to the security guard, at some point saying to him, "let's go see the security guard." Plaintiff said nothing and they had no other conversation. Plaintiff made no protest. He was not injured or hurt at all by the move to the door.

5. Upon reaching the door and the outside of the club, Cowdrey told the security guard that her genitals had been groped and asked him to summon the police. She identified herself as a police officer, told the guard to take Plaintiff into custody and to handcuff him, which he did. Cowdrey then went back inside the club. There is a dispute of fact as to whether Cowdrey flashed her badge.

6. The security guard remained outside with Plaintiff and Plaintiff's friend, Shane Mitchell, until the on-duty officers arrived, at which time he turned Plaintiff over to the police.

7. Cowdrey made a victim's report to the security guard but never tried to handcuff Plaintiff herself. She was not involved in the changing of the handcuffs from those belonging to the security guard to the officers'.

8. Two on-duty officers and two police cars arrived at the club parking lot. Officer

Rohloff told the security guard to put Plaintiff in Officer Phillips' car.

9. As the officer or officers attempted to change the handcuffs from those belonging to the security guard to handcuffs belonging to the officers in the parking lot, Plaintiff hit his head on the parking lot pavement, although how this occurred is disputed. Cowdrey had no part in these events.

10. There was an outstanding warrant for Plaintiff's arrest for violation of a protective order which could have resulted in his arrest upon any contact with law enforcement, even for a traffic stop, that night.

11. Cowdrey did not injure Plaintiff or Plaintiff's arm as they walked to the security guard. Plaintiff made no complaint of injury at all to the security guard as to Cowdrey's slapping him or escorting him to the security guard. The first injury of which Plaintiff complains is the head injury which occurred in the parking lot by the police cars.

12. It was officer Phillips, not Cowdrey, who informed Plaintiff that he was under arrest. Phillips checked for warrants on Plaintiff on his police radio and found a warrant was out for his arrest. The security guard was the person who turned over physical custody of Plaintiff to the police. Officer Rohloff talked to Cowdrey, took information as to the factual allegations and filled out the police report.

13. Cowdrey was not involved in getting Plaintiff in and/or out of the police car or with the transport to jail or to the hospital.

14. Plaintiff admitted he had consumed at least 4-5 beers during the evening up to the time of the alleged groping incident and also admitted he had not eaten any food since lunch. He estimated it takes 5-6 beers for him to become drunk.

15. Officer Phillips recognized Cowdrey by sight and knew of her as a fellow officer of the police department who had worked at the same precinct. Officer Rohloff knew of Cowdrey as a fellow police officer.

16. Plaintiff had a preliminary hearing and arraignment on charges of sexual battery and resisting arrest and was bound over for trial under the applicable legal standard. He was tried by a jury on February 10, 1999 and acquitted of both charges following a two day trial.

Arguments and Authority

Cowdrey first asserts Plaintiff's claims for violations of his Ninth and Fifth Amendment rights are unsupported because the Ninth Amendment does not confer substantive rights in addition to those governed by other governing law. Because Plaintiff seeks redress under §1983 and under the Fourth and Fourteenth Amendments, he has no right to proceed under a Ninth Amendment claim as well. *Gibson v. Matthews*, 926 F.2d 532, 537 (6th Cir. 1991).

Additionally, Plaintiff's claims under the Fifth Amendment are more properly raised by his claims under the Fourteenth Amendment. *See Canadian Transport Co. v. United States*, 663 F.2d 1081 (D.C. Cir.1980). This Court finds Plaintiff may not as a matter of law proceed under these theories.

Next, Cowdrey urges she was not acting under color of law because she was off duty and in civilian clothes and had as much right as any citizen to report a crime when she is victimized.

The Court finds fact issues exist which preclude entry of summary judgment as to this claim. Specifically, while Cowdrey claims she did not flash a badge or even have one on her that night, she admits she identified herself to the security guard as a police officer and directed him to hold the Plaintiff, handcuff him and call the police. There is an inference in Plaintiff's favor

that the security guard may not have placed the Plaintiff in handcuffs and called the police had Cowdrey not identified herself as a police officer. In addition to her admission that she identified herself an as officer when she approached the security guard, Plaintiff claims she also flashed a badge at the time. There is nothing in the record to show whether the guard would have called the police and handcuffed Plaintiff had Cowdrey not so identified herself. Plaintiff has the burden to establish this but there is sufficient evidence that Cowdrey's identification of herself as an officer caused the guard to respond as he did. *See Norton v. Liddell*, 620 F.2d 1375 (10th Cir.1980).

The Court finds summary judgment should also be denied as to Cowdrey's assertion that there was no constitutional violation involved in bringing about the arrest of Plaintiff. The fact issues which prevent summary judgment include whether Cowdrey held onto the Plaintiff the entire time so that she knew she had the person who had groped her or if, in the admittedly crowded bar, she let go and grabbed the wrong person, as Plaintiff claims.

However, summary judgment should be granted as to any constitutional violations alleged beyond the point where the other officers arrived and took over and Cowdrey was no longer involved. There is no evidence she acted in concert with or directed the officers to use excessive force. Further, there is no evidence of a conspiracy.

Based upon the fact issues remaining herein, summary judgment must also be denied as to the issues of qualified immunity and punitive damages. The Court notes however that it is questionable whether the evidence now before the Court is sufficient to establish a basis for punitive damages to go to the jury when this issue is revisited at the conclusion of Plaintiff's evidence.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant

Cowdrey's Motion for Summary Judgment (Docket # 39) is granted in part and denied in part as set forth herein.

DONE THIS 23rd DAY OF NOVEMBER, 1999.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

NCMIC INSURANCE COMPANY, formerly known as NATIONAL CHIROPRACTIC MUTUAL INSURANCE COMPANY, an Iowa corporation, Plaintiff, vs. JAY P CRAIG, D.C., an individual, CRAIG CHIROPRACTIC, P.C., an Oklahoma professional corporation, MALINDA M. SIMMONS, a/k/a MALYNDA M. SIMMONS, an individual, PATRICIA MERCER, an individual, and LINDY ANNE FUTTER, a/k/a LINDY ANNE FUTTER, an individual, and JANICE RIDGEWAY, an individual, Defendants.	Case No. 99-CV-253B(M)

ENTERED ON DOCKET
DATE NOV 24 1999

FILED
NOV 23 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITHOUT PREJUDICE

This matter comes before the Court on the Joint Stipulation of Dismissal Without Prejudice by the parties. The parties represent to the Court they have entered into an agreement for the entry of this Order of Dismissal.

IT IS THEREFORE ORDERED that this matter is dismissed without prejudice. Each party shall bear their own attorney fees and costs.

Dated this 19th day of Nov., 1999.

JUDGE OF THE DISTRICT COURT

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

K.E. ROSS,	)	
	)	
PLAINTIFF,	)	
	)	97CV 675 (Ea)
J.D. BALDRIDGE, individually	)	
and as Sheriff of Craig County, Oklahoma,	)	
WAYNE "MOOSE" FOWLER,	)	
individually, and THE BOARD OF	)	
COUNTY COMMISSIONERS OF	)	
CRAIG COUNTY, OKLAHOMA	)	

FILED
NOV 22 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE NOV 23 1999

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, Plaintiff, Kevin Ross, and Defendants, collectively, stipulate by and through their respective attorneys that all claims for relief and all causes of action of Plaintiff for legal, equitable and injunctive relief against Defendants, collectively are hereby Dismissed with Prejudice.

So stipulated this 19 day of November, 1999.

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cpy ret'd
C/J

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918/341-3164

Attorney for Defendants

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 22 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BILLY D. BAUCOM,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 99-CV-661-J
	)	
KENNETH S. APFEL, Commissioner of the Social Security Administration,	)	ENTERED ON DOCKET
	)	
Defendant.	)	DATE ~~NOV 23 1999~~

ADMINISTRATIVE CLOSURE ORDER

Pursuant to N.D. LR 41.0, the Court Clerk is directed to administratively close this case. At the request of the parties, the Court has remanded this case for further administrative action pursuant to sentence 6 of 42 U.S.C. § 405(g). The case may be reopened by either party once Defendant has completed its additional administrative action.

IT IS SO ORDERED.

Dated this 22nd day of November 1999.

Sam A. Joyner
United States Magistrate Judge

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

FILED
NOV 22 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Nationscredit Commercial Corp,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 99-cv-599-C
	)	
	)	ENTERED ON DOCKET
EMG,Inc, et al,	)	
	)	DATE NOV 23 1999
Defendants.	)	

ADMINISTRATIVE CLOSING ORDER

The defendants EMG, now merged with Get & Associates, having filed its petition in bankruptcy and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

IF, within 45 days of a final adjudication of the bankruptcy proceedings, the parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED this 22nd day of November, 1999.

United States District Judge

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

ENTERED ON DOCKET
DATE NOV 2 8 1999

BECKEY DAWN ALSPACH,	)	
Plaintiff,	)	
v.	)	Case No. 99-CV-0535K(E)
VALLEYLAB, INC.,	)	
Defendant.	)	

FILED
NOV 2 [illegible] 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes on before the Court upon the stipulation of all parties and the Court being fully advised in the premises, orders, adjudges and decrees that all claims asserted herein by Plaintiff, Beckey Dawn Alspach, against the defendant, Valleylab, Inc. are hereby dismissed with prejudice.

Dated this 19 of November, 1999.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

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Attorney for Defendant

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE NOV 22 1999

SHANE SPITLER and CAMMIE SPITLER, Plaintiffs,	)	98-CV-758-H(J)
v.	)	
ADVANCED SYSTEMS, INC., a New Jersey Corporation, Defendant.	)	

FILED
NOV 22 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on the Motion for Summary Judgment of Defendant Advanced Systems, Inc. ("ASI") (Docket # 21). In the hearing held in this case on October 15, 1999, the Court granted partial summary judgment for ASI on Plaintiffs' manufacturer's product liability claim. At that hearing, the Court directed that parties to submit supplemental authority on Plaintiffs' negligence claim, specifically addressing whether ASI is entitled to summary judgment on this claim under the doctrine of supervening cause. Based upon a careful review of the record, the Court concludes that Defendant's motion should be granted.

I

For the purposes of the instant motion, the following facts are uncontroverted:

1. A fire occurred in May 1994 at the Heinz Bakery Products commercial bakery in Vinita Oklahoma, doing substantial damage to an Adamatic Line No. 4 automatic bakery line.
2. After the fire, ASI was asked by Heinz to rebuild bakery line No. 4.
3. ASI did so and added its own label which read "Remanufactured by Advanced Systems, Inc." It also attached warning labels to all guard panels reading, in part, "Danger - Do Not Operate this Machine Without Guards." At Heinz's request, during the rebuilding

process, Defendant added a Woods Inverter (a device to permit easier regulation of line output speed) to the bakery line. Electrical conduits to and from the inverter resulted in the lowering of the intermediate proofer guard panel approximately 1.5 to 2 inches. The method of attaching the guard panel remained the same as before the fire. The panel was suspended from two bolts toward the top of the frame.

4. The drive assembly runs along the lower part of the automatic bakery line, behind various guard panels. The drive assembly is comprised of various gears, sprockets and chains, many of which were contained behind the intermediate proofer guard panel. The control switch, a red button which shuts off the power for the entire bakery line, is located on the intermediate proofer.

5. During normal operation of the bakery line, flour and dough will fall past the drive chains and sprockets and collect in a catch pan beneath the intermediate proofer, which is to be emptied periodically by the line operator.

6. On August 29, 1996, the catch pan was not emptied as necessary and flour and dough built up under the intermediate proofer. The build-up of flour and dough caused the intermediate proofer guard panel to protrude outward. The problem was called to the attention of Plaintiff Shane Spitler, the night Production Supervisor, who was in charge of the night shift operations. Mr. Spitler was also at that time a member of the Heinz Central Safety Committee.

7. Upon arrival at the intermediate proofer, Mr. Spitler could not remove the catch pan beneath the intermediate proofer as a result of the volume of flour and dough which had accumulated. Mr. Spitler sat down on the floor in front of the intermediate proofer guard

panel and pushed against it with both feet. This caused the panel to be disconnected from the frame. Mr. Spitler set the panel aside.

8. Mr. Spitler observed what he termed "a wall of flour," which came to the top of the area which had been covered by the guard panel. The wall of flour covered the drive chain sprockets and gears.

9. Mr. Spitler did not look at the conveyer to his left or right, or to the moving machinery above the wall of flour. He began removing flour and dough with his hands until his left hand was caught in a portion of the moving drive assembly severing four fingers and a portion of his left hand.

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 (1986), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

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

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment"). "Factual disputes that are

irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

III

In its supplemental brief, ASI asserts that its acts were not the direct cause of the injury, rather that Mr. Spitler's own actions amounted to a supervening cause. In contrast, Plaintiffs argue that Mr. Spitler's injury was foreseeable and therefore the requirements for supervening cause have not been satisfied.

It is settled law in Oklahoma that in order to qualify as a supervening cause, which insulates an original negligent actor from liability, a cause must satisfy three requirements: (1) it must be independent of the original act; (2) it must be adequate of itself to bring about the result and (3) it must not have been a reasonably foreseeable event. See Minor v. Zidell Trust, 618 P.2d 392 (Okla. 1980); Gaines-Tabb v. ICI Explosives, USA, Inc., 160 F.3d 613, 620 (10th Cir.1998).

Plaintiffs do not contest the existence of the first two requirements. However, Plaintiffs assert that because ASI placed a guard panel in front of the intermediate proofer and warning stickers on that guard panel, Mr. Spitler's injury was foreseeable. Plaintiffs then argue that "[d]ue to the foreseeability of the injury sustained by Mr. Spitler, Defendant cannot meet the third prong requirement to show a supervening cause." The Court notes, however, that the third inquiry under Minor is not whether the injury is be foreseeable, but rather, whether the supervening cause was a reasonably foreseeable event. In this case, therefore, the question is whether Mr. Spitler's actions were reasonably foreseeable and thus constituted a supervening cause.

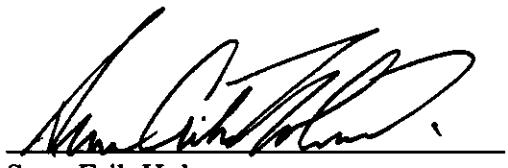
In short, to prevail on summary judgment, ASI must show that it was not foreseeable the Mr. Spitler, a member of the Heinz Central Safety Committee, would disregard a warning label reading "Danger - Do Not Operate this Machine Without Guards," set aside the intermediate proofer guard panel, reach into a running piece of machinery and attempt to remove flour and dough from the moving drive assembly with his bare hands. Furthermore, under Hutchins v. Silicone Specialties, Inc., 881 P.2d 64, 67 (Okla. 1993), ASI was entitled to assume that Mr. Spitler, a trained supervisor and member of the Central Safety Committee, would heed the

warnings placed by ASI on the guard panel. Applying this standard, the Court finds that Mr. Spitler's removal of the guard panel without first shutting down the power to the bakery line and his subsequent attempts to dislodge the flour and dough from the moving drive assembly with his bare hands were not foreseeable as a matter of law. Accordingly, Mr. Spitler's actions constituted a supervening cause of his injury, and ASI may not be held liable in negligence for that injury.

Based on the above, Defendants' Motion for Summary Judgment is hereby granted as to Plaintiffs' remaining claim for negligence.

IT IS SO ORDERED.

This 19TH day of November, 1999.



Sven Erik Holmes
United States District Judge

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

FILED
NOV 22 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARY BIG ELK and SAM McCLANE,	)	
Plaintiffs,	)	
vs.	)	No. 96-C-0087-B
DONNA KASTNING, individually and in her official capacity as a Deputy Sheriff for Osage County, Oklahoma, et.al.,	)	
Defendants,	)	

ENTERED ON DOCKET
DATE NOV 22 1999

ORDER

Comes on for consideration Plaintiffs' Motion to Review Taxation of Costs (Docket #186), Plaintiffs' Application For Attorneys' Fees (Docket #190) Defendants' Motion for Leave to File Supplemental Authority and Defendants' Objection to Supplemental Affidavit of D. Michael McBride, and the Court finds as follows:

Plaintiffs' Motion to Review Taxation of Costs seeks reconsideration of the Court's October 8, 1998 Judgment in which individual defendants Hively and Penland were awarded their costs as prevailing parties following jury verdicts entered in their favor. The Clerk awarded plaintiffs $6645.26 and these two defendants $4,552.82. Plaintiffs assert the award of all costs to these two defendants is at odds with the substantial relief achieved by plaintiffs in vindicating their civil rights because the Court Clerk had no

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discretion but to award all allowable costs under 28 U.S.C.§ 1920 and because these two defendants recovered costs incurred by all defendants, including the non-prevailing defendants.[1] Plaintiffs assert this creates an inequity which this Court should correct. Plaintiffs state a more equitable recovery would be for the two prevailing defendants to recover only those costs unique to their defense and not common to the defense of all the defendants.

Plaintiffs also seek additional costs for three subpoenaed witnesses who did not testify because phone outages during trial prevented contacting them. The Court was aware of the phone outages but was equally aware that numerous persons in the courthouse had cellular phones which were being used almost continuously during the outage. Further, plaintiffs did not bring their inability to contact these witnesses to the attention of the Court but chose to proceed without their testimony.

The Court finds the motion should be denied. Defendants were prevailing parties and are entitled to recover their costs even where that recovery may indirectly benefit co-defendants. By bringing this action against all the defendants under the same causes of action, plaintiffs run the risk of just such a result. The Court Clerk's award is appropriate in this case under 28 U.S.C. §1928.

Plaintiffs Application for Attorneys' Fees seeks attorneys' fees pursuant to 42

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[1]Plaintiffs state they have also requested injunctive relief in an apparent attempt to bolster the degree of success achieved in this litigation, however, injunctive relief has been denied during the pendency of this motion.

U.S.C. §1988 ("Fees Act") in the amount of $264,196.50 (including paralegal fees of $8,410) and also seeks to recover $2,149.32 in expenses denied pursuant to 28 U.S.C. §1928 by the Court Clerk and an additional $10,192.33 in litigation expenses normally charged or billed to clients. Plaintiffs total request is in the amount of $276,538.15. Plaintiffs also reserve the right to amend to seek fees for pursuit of this application.

Defendants object, asserting the fees and costs are excessive, both in hourly rate requested, and the number of hours sought.

The Court has reviewed the hourly rates of the various counsel and support personnel and the affidavits in support of both positions and finds that the hourly rates charged are reasonable based upon the experience and expertise of counsel. The Court concludes however that the total attorneys' fees should be reduced. While there is no question that plaintiffs were prevailing parties as to their claims against two named defendants, the history of this litigation does not support the fees sought even after the voluntary reduction by plaintiffs' counsel prior to submission of their application to the Court.

The case was originally brought against 10 named defendants and a John Doe on February 7, 1996. The defendant who primarily set in motion the events which lead to this litigation and two additional defendants entered into a settlement with plaintiffs for $3,125.00 and were dismissed from the case by August, 1996. At that time, there were 28 docket entries on 9 pages of docket. Attorney Michael McBride had 50 pages of attorney

time recorded.[2]

A default judgment was taken against defendant Jana Welch in October, 1996 in which the Court, following hearing, entered a judgment in favor of plaintiff Mary Big Elk for actual damages of $12, 350, $2,000 in emotional distress, $4,928.95 in state court expenses and $1000 in punitive damages. The amount of the settlement with the three already dismissed defendants served to offset the award in the amount of $3,125. Default judgment was entered in favor of plaintiff Sam McClane in the amount of $2,100 actual damages and $1000 punitive damages. There were 47 docket entries and 11 pages of docket at that time and attorney McBride had 59 pages of attorney fee entries.

Following the entry of default judgment, the Court denied five summary judgment motions filed by the various defendants on the issue of qualified immunity in December of 1996 as the Court's initial trial schedule approached. The defendants requested certification of interlocutory appeal. The Court stayed the proceedings upon motion of the parties and granted summary judgment to District Attorney Larry Stuart but denied reurged motions for summary judgment as to the other defendants. Throughout the proceedings the Court encouraged settlement discussions and made the Court's settlement conference procedures available to the parties.

The Tenth Circuit Court of Appeals dismissed the appeal on the ground that it did

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[2]The Court's reference to attorney McBride's billing records is illustrative of the billing records submitted. At this point in time, attorney Salem had 6 pages of billing entries.

not fall into the category of orders denying qualified immunity which are immediately appealable and remanded for trial on April 1, 1998. In the Order remanding the case, the court of appeals included a factual summary of the case which reflected the positions of the parties from the commencement of the action. This summary is virtually identical to that which was ultimately presented to the jury.

At trial, after offset by the Court of the earlier settlement, plaintiff Mary Big Elk obtained a jury verdict from only one of the individually-named remaining three defendants in the amount of $18,825 for actual damages and $5,000 in punitive damages. Plaintiff Sam McClane received an award of $3,500 in actual damages and $5000 in punitive damages. The County defendant was found jointly liable for the actual damages but cannot, as a matter of law, be held liable for payment of any punitive damages. This represents a difference of $6,671.05 above the amount awarded by the Court to plaintiff Big Elk in the earlier default hearing and a difference of $5,400.00 above the amount awarded by the Court in the earlier default hearing to plaintiff McClane.

At the conclusion of the case, almost three years from its inception, there are 30 pages of docket entries, 140 pages of attorney fee entries from attorney McBride, 33 pages of attorney fee entries for attorney Salem and over 1700 hours of total attorney and paralegal time for plaintiffs. This represents approximately one full year of an attorney's time devoted to this case.

Total attorney time expended by counsel for the defense was 713 hours. If the

Court were to apply the highest rate sought by plaintiffs of $175 an hour, the defense would have cost approximately $125,000. By use of this hypothetical, the Court in no way implies that the amount of time expended nor the hourly rate charged by opposing parties should be equal. Civil rights litigation inherently and customarily requires more investment of time by Plaintiff's counsel. Nevertheless, the expenditure of more than twice the amount of time by attorneys whose affidavits represent themselves as having extensive experience in this field must be noted by this Court and suggests a negative commentary where the dollar amount recovered represents not much more than the damages found by the Court against a defaulting party early in the case. *See Gudenkauf v. Stauffer Communications, Inc.*, 158 F.3d 1074 (10th Cir. 1998).

Nevertheless, the Court recognizes the public interest in pursuing constitutional claims and that monetary recovery may not reflect the degree of success achieved. In those instances, attorneys' fees which appear hugely disproportionate may be justified. However, the Court cannot find this is a case which was necessarily resolved in plaintiffs' favor because the body politic was offended and outraged by the County's stand-by policy causing damage to these citizens. The fact that at least one remaining defendant was related by marriage to the settling initiator of the events added an extraordinary element. It is conceivable that the jury in this case concluded the County's stand-by policy was unconstitutional because it was inappropriately applied to aide the sister-in-law and not simply to keep the peace in this limited instance. The Court addressed these concerns in

denying injunctive relief following the trial. On the other hand, the seemingly technical victory achieved as to these defendants is not so insignificant that the Court can conclude plaintiffs are entitled to no fee. *See Farrar v. Hobby*, 506 U.S.103, 113 S.Ct.566, 121 L. Ed.2d. 494 (1992). Public purpose was served if future application of a policy designed to keep the peace is applied in a nondiscriminatory manner to protect the rights of all citizens.

Most claims such as the ones raised herein are strongly defended, forcing some attorney time to be incurred solely from the positions urged. The Court was advised in attorney Mc Bride's affidavit in support of this substantial request for fees that defendants refused to make a settlement offer in the settlement conference, however, the Court is not privy to the communications, positions and demands by plaintiffs which may have caused this position to be taken and is not in a position to determine if the postures taken by either side may have forced a trial over settlement and therefore compelled the accrual of additional attorneys' fees. That this case was hotly contested is further evidenced by the filing of Defendants' Motion for Leave to File Supplemental Authority, which is granted and Defendants' Objection to Supplemental Affidavit of D. Michael McBride, which is hereby denied, both without need for further comment.[3] The Court has read and thoroughly considered all submissions of counsel.

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[3]Both parties have been intent on having the last word throughout this litigation when wisdom dictates silence.

Because the early settlement amount was placed in the record as an offset to the default judgment entered, defendants were aware early in the litigation that the initiating actor had settled for an amount considered nominal in most federal litigation. Numerous factors could have come into play and this Court will not speculate as to what those are nor invite side litigation to resolve them. Rather, this Court considers the overall recovery and the attorneys' time expended to achieve same and finds the circumstances simply cannot justify the disparity.[4]

Additionally, the Court takes into account the fact that plaintiffs did not prevail as to three of the five defendants remaining following settlements and default judgment and the time reflected on the billings includes time expended pursuing unsuccessful claims.[5]

The Court concludes that an appropriate attorney fee for plaintiffs in this matter is $191,840. The Court finds paralegal time in these matters should be encouraged, particularly where some of the tasks charged by attorneys could arguably have been performed by paralegals, and therefore awards the full amount of $8,410.00 for this request.[6]

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[4]The Court agrees with plaintiffs' position that some time was unnecessarily accrued by virtue of excessive submissions of witness lists and exhibits which required court intervention to fully resolve and takes this into account in its calculations.

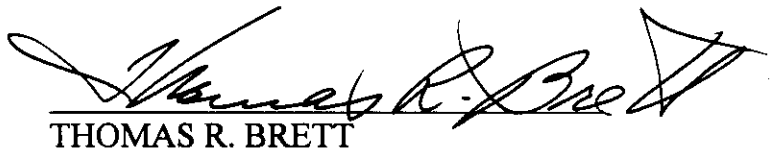
[5]This includes summary judgment granted to the district attorney

[6]In reviewing the billings, it appears that many of the voluntary reductions taken by plaintiffs' counsel prior to submission of their application recognize tasks which could have been performed by paralegals and other office personnel. Tasks not reduced or insufficiently reduced include, but are not limited to, preparation of deposition summaries, telefaxing letters and

The Court further concludes the expenses sought in the Bill of Costs of $2,149.32 should be awarded to plaintiffs but that those expenses normally charged or billed to clients in the amount of $10,192.33 should be denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion to Review Taxation of Costs (Docket #186) is denied, Defendants' Motion for Leave to File Supplemental Authority is granted and Defendants' Objection to Supplemental Affidavit of D. Michael McBride is denied. Plaintiffs' Application For Attorneys' Fees (Docket #190) is granted in the amount of $191,840.00. Paralegal fees are granted in the amount of $8,410.00. Expenses sought in the Bill of Costs of $2,149.32 are awarded to plaintiffs but that those expenses normally charged or billed to clients in the amount of $10,192.33 are denied. Post judgment interest shall accrue at the rate of 5.471% from the date of this Order.

DONE THIS 22nd DAY OF NOVEMBER, 1999.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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documents, transmitting copies to clients, managing document discovery and hosting depositions.

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

JOSEPH DAVIS, KEVIN McGINN, and all others similarly situated,	)	
Plaintiffs,	)	ENTERED ON DOCKET DATE NOV 22 1999
v.	)	**Case No. 96-CV-426-K (E)**
SUN REFINING AND MARKETING COMPANY, SUN REFINING COMPANY, SUN-TULSA REFINERY, SUN COMPANY, INC., and/or any other entity named or similarly situated in Tulsa County, under the direct control of SUN COMPANY, INC., TULSA REFINERY,	)	FILED IN OPEN COURT NOV 19 1999 Phil Lombardi, Clerk U.S. DISTRICT COURT NORTHERN DISTRICT OF OKLAHOMA
Defendants.	)	

ORDER

Before the Court are the Status Report of William E. Sparks, attorney for Plaintiffs, and Defendants' Supplemental Report to the Court. On August 8, 1996, the Court granted the agreed motion to stay or hold case in abeyance pending the resolution of Sun Company's ("Sun's) primary employer status in Oklahoma's Workers' Compensation Court. If Sun were so found, the above-captioned suit would be subject to dismissal due to the exclusive nature of the workers' compensation remedy. On October 27, 1998, the Court granted William E. Sparks leave to withdraw as Plaintiffs' counsel, effective upon the appearance of substitute counsel or Plaintiffs' statement that they wished to represent themselves. However, the Court never received notice of either substitute counsel or self-representation, nor did the parties filed anything else after that date.

On October 20, 1999, the Court ordered that the parties submit a status report within

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ten days. The Status Report from William E. Sparks indicates that he has had no contact with Plaintiffs for 18 months and has been unable to reach them at their last known points of contact.

Defendants requested further time to research the case, and on November 17, 1999, filed their Supplemental Report to Court. In that Report, Defendants note that, on November 8, 1996, the Oklahoma Workers' Compensation Court entered two Orders Nunc Pro Tunc in which it found that it had jurisdiction over Defendant Sun in both Joseph Davis and Kevin McGinn's cases. On December 9, 1997, William E. Sparks withdrew as attorney of record before the Workers' Compensation Court in both cases. After that date, there has been no further action in the cases. As a result of these facts, Defendants ask the Court to dismiss the above-captioned case, as it is barred by the exclusive remedy clause of the Workers' Compensation Act. *See* Okla. Stat. tit. 85 § 12.

Due to the new information provided by Defendant Sun,

IT IS THEREFORE ORDERED that the above-captioned case is DISMISSED as barred by the Plaintiffs' exclusive remedy under the Oklahoma Workers' Compensation Act.

ORDERED THIS 19 DAY OF NOVEMBER, 1999.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

NOV 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BONNIE L. CAMPBELL, SSN: 444-44-6081	)	
Plaintiff,	)	
v.	)	No. 98-CV-818-J
KENNETH S. APFEL, Commissioner of Social Security Administration,	)	ENTERED ON DOCKET
Defendant.	)	DATE NOV 22 1999

JUDGMENT

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

It is so ordered this 19th day of November 1999.

Sam A. Joyner
United States Magistrate Judge

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

ENTERED ON DOCKET
DATE NOV 22 1999

DWAYNE GARRETT,	)	
	)	
Plaintiffs,	)	
	)	No. 99-CV-717-K
v.	)	
	)	
STATE OF OKLAHOMA, et al.,	)	
	)	
Defendants.	)	

FILED
IN OPEN COURT
NOV 19 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

Before the Court are the motions to dismiss of defendants Jot Hartley and James Sontag. The Plaintiffs in this case have failed to respond to defendants' motions to dismiss. Pursuant to N.D. LR 7.1(C), all claims asserted in a motion may be considered confessed when the opposing party has failed to respond. The Court has, nevertheless, reviewed the Defendants' motions to dismiss and, through an independent inquiry, has determined that they should be granted.

Hartley is named only in a single count alleging a RICO violation. The statute of limitations for RICO actions is four years. Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 156 (1987). Defendant Hartley asserts (and plaintiff has not disputed) that plaintiff's cause of action is based upon acts committed in 1986. The action is time-barred.

Defendants Sontag, an Associate District Judge of Nowata County, moves for dismissal for insufficient service. Again, plaintiff has not disputed the facts asserted. Moreover, the Court hereby raises sua sponte the doctrine of judicial immunity, which would bar any action based upon conduct in the course of Judge Sontag's official duties, which are the complaint's

allegations.

For the reasons stated herein, defendant Jot Hartley's Motion to Dismiss (# 2) and defendant James Sontag's Motion to DISMISS (#4) are hereby GRANTED and all claims in the above-captioned action against Defendants Hartley and Sontag are DISMISSED.

ORDERED this 19 day of November, 1999.

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

BONNIE L. CAMPBELL, SSN: 444-44-6081 Plaintiff, v. KENNETH S. APFEL, Commissioner of Social Security Administration, Defendant.	)))))))))))	FILED NOV 19 1999 Phil Lombardi, Clerk U.S. DISTRICT COURT No. 98-CV-818-J ENTERED ON DOCKET DATE NOV 22 1999

ORDER[1/]

Plaintiff, Bonnie L. Campbell, 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 he did not give appropriate weight to the opinions of Plaintiff's examining and treating physicians. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff initially applied for social security benefits in 1993. Plaintiff asserted that she was disabled due to degenerative joint disease, arthritis, and problems with her back, hip, and feet. [R. at 38]. Plaintiff's claim was denied and Plaintiff appealed to the District Court. The District Court, Magistrate Judge Wagner, reversed the

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

[2/] Administrative Law Judge James D. Jordan (hereafter "ALJ") concluded that Plaintiff was not disabled on February 27, 1998. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review.

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decision of the Commissioner. Plaintiff received an additional hearing before the Administrative Law Judge, and Plaintiff's application for benefits was denied. Plaintiff appealed to the Appeals Council which affirmed the decision of the ALJ. Plaintiff subsequently appealed to this Court.

Plaintiff was born November 24, 1945, and was 51 years old at the time of her hearing before the ALJ. [R. at 183, 575]. Plaintiff completed the eighth grade and began but did not finish the ninth grade. [R. at 576]. Plaintiff did not obtain her GED.

In November of 1993, Plaintiff reported that she did some cooking and cleaning but that she could not stand to do dishes or vacuum. [R. at 45]. Plaintiff noted that she sometimes drove, that she helped to take care of her mother, that she watched some television, that she played scrabble and cards and that she regularly saw family members. [R. at 45].

An RFC completed by Paul Woodcock on November 18, 1993, indicates that Plaintiff can occasionally lift 50 pounds, frequently lift 25 pounds, stand or walk six out of eight hours, and sit six out of eight hours. [R. at 54]. Dr. Woodcock noted that Plaintiff asserted that she suffered from arthritis, and that Plaintiff's X-rays did show some degenerative changes in her knees but that examinations have indicated no joint deformities or swelling. He additionally reported that Plaintiff exhibited a good range-of-motion. [R. at 55]. This RFC assessment was "affirmed as written" on February 23, 1994, by Thurma Fiegel, M.D.

A Psychiatric Review Technique Form was completed November 22, 1993, by Carolyn Goodrich, Ph.D. [R. at 62]. Dr. Goodrich indicated that Plaintiff did not have

a severe impairment. Plaintiff had "no" restrictions of activities of daily living, "no" difficulties in maintaining social functioning, "no" deficiencies of concentration, and "no" episodes of deterioration or decompensation in work-like settings. [R. at 69]. This assessment was "affirmed as written" by R.E. Smallwood, PhD., on February 23, 1994. [R. at 63].

Plaintiff completed a "pain questionnaire" and noted that she read a lot, watched some television, and tried to walk around the yard. [R. at 95]. Plaintiff indicated that she was stiff and achy and experienced constant pain. [R. at 95]. Plaintiff complained of pain in her lower back, both knees, her hands, and her elbow. According to Plaintiff, standing, sitting, or walking increases the pain. Plaintiff noted that she could sit for approximately twenty to thirty minutes before experiencing severe pain. [R. at 95-96].

In a disability interview completed in early 1994, Plaintiff indicated that she was unable to work, socialize or do household chores due to her pain. [R. at 97]. According to Plaintiff she slept approximately four to five hours each night. Plaintiff noted that she lived in a travel trailer. Plaintiff acknowledged that she was sometimes able to do some dishes. Plaintiff wrote that she could not sit for long due to her knee and back pain. [R. at 97-98].

In October of 1993, Plaintiff, who is 5'4" tall, weighed 246 pounds.[3/] [R. at 106]. X-rays of Plaintiff's knees on July 12, 1993 indicated that Plaintiff's joint

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[3/] The records indicate that Plaintiff's weight was consistently in the 240 to 250 range from 1993 through 1997. [R. at 225-227, 538, 575].

spaces were well maintained. [R. at 116]. The X-rays were interpreted by Don Hughes, D.O., as showing osteoarthritis of both knees. [R. at 116].

Plaintiff was examined by Donald R. Inbody, M.D. on February 3, 1994. [R. at 126]. He noted that Plaintiff showed no signs of clinical anxiety but did appear to be depressed.

At the October 1994 hearing before the ALJ, Plaintiff testified that the pain in her knees and back and her degenerative joint disease prevented her from working. [R. at 186]. According to Plaintiff, she could sit for only twenty to thirty minutes. [R. at 190]. Plaintiff stated she could stand for approximately five to ten minutes, and could not lift over five pounds. [R. at 190]. Plaintiff additionally stated that, at times, she could not move her hands. [R. at 188]. Plaintiff stated that she had to use crutches approximately once each month. [R. at 189].

According to Plaintiff, on an average day (in October 1994), she woke up around 7:30 or 8:00 a.m. and did nothing until approximately 10:00 a.m. Plaintiff stated that she visited her niece who was about five or six blocks away, drank coffee, watched television, rested, and went to bed at approximately 10:00 p.m. [R. at 193]. Plaintiff testified that she was capable of sweeping a very small area of her trailer floor. [R. at 193].

X-rays of Plaintiff's knees taken November 2, 1995, were interpreted as showing "adult type osteochondritis desiccans" in both knees. [R. at 527].

Plaintiff was admitted on July 15, 1996 complaining of cardiac pain. Plaintiff was discharged on July 18, 1996. [R. at 227]. Subsequent testing was interpreted

as normal with regard to Plaintiff's cardiac condition, and revealed no cardiac problems. X-rays indicated that Plaintiff had a normal chest, but showed a large gallstone in Plaintiff's gallbladder. [R. at 249]. Plaintiff was discharged with a diagnosis of chololithisasis, or the presence of concretions in the gallbladder. [R. at 227]. Plaintiff had surgery for the gallstone on August 20, 1996. [R. at 287].

Plaintiff was also examined by G. Raymond Denny, D.O., on June 18, 1996, and on July 15, 1996. In his June 18, 1996 letter, Dr. Denny wrote that he saw Plaintiff "today" in initial evaluation. [R. at 423]. Dr. Denny noted that Plaintiff indicated some locking and crepitance but denied any true injury episodes. [R. at 423]. Dr. Denny additionally wrote that he discussed the possibility of arthroscopic debridement with Plaintiff, and the probability that she would eventually need total knee replacements. [R. at 423-24]. Dr. Denny wrote in a letter dated July 15, 1996, that Plaintiff has some relief with Naprosyn, but did not have much pain relief with bilateral knee injections. [R. at 422]. According to Dr. Denny, Plaintiff denied any history of locking, catching or giving way of her knees, but states she had overall achiness and discomfort which increased in accordance with her level of activities. He reported that Plaintiff had "severe pitting edema up to the level of the tibial plateaus." Plaintiff's range-of-motion was described as "full." [R. at 422]. He noted that he wanted Plaintiff to "undergo a rheumatology workup with a general chemistry profile, rheumatoid factor, CBC and a Sed Rate." [R. at 422]. He concluded that "at this time, I feel that she has severe degenerative joint disease, most likely a rheumatoid type. She will require total knee replacements." [R. at 422]. He

additionally noted that he had reviewed her x-rays and that they revealed a "severe loss of medial joint spacing with arthritic spurring and system formation within the medial femoral condyles." [R. at 422].

Plaintiff was examined by Ruth Miller, D.O., on August 11, 1996, with regard to Plaintiff's "complaints of heart problems, difficulty breathing, pain in her joints, depression," diabetes, and high blood pressure. [R. at 469]. Dr. Miller noted that Plaintiff complained of constant pain in both of her knees and complained of her left knee "locking up." She indicated that Plaintiff's lumbar X-rays from May 30, 1995 indicated "degenerative osteophytes" and disc space narrowing at all levels. [R. at 470]. She noted that a report from Dr. Denny revealed degenerative joint disease of the knees. She reviewed Plaintiff's July 16, 1996 echocardiogram and wrote that Plaintiff had a left ventricular ejection fraction of 60% and a tricuspid valve which showed mild regurgitation. [R. at 470]. Dr. Miller diagnosed Plaintiff with congestive heart failure, chronic hypertension, degenerative osteoarthritis, rheumatoid arthritis, chronic gastritis, hypoestrogenism, chronic obstructive pulmonary disease, diabetes, knee and shoulder bursitis, and depression. [R. at 470]. Dr. Miller concluded that Plaintiff was unable to work due to her permanent impairments of cardiac disease, congestive heart failure, rheumatoid arthritis, osteoarthritis, bilateral knee problems, and lumbar degenerative disc disease. [R. at 470].

Dr. Miller wrote a "follow-up" letter in regard to Plaintiff's disability claim on February 2, 1997. [R. at 487]. Dr. Miller noted that Plaintiff's heart exhibited a regular rate and rhythm. [R. at 487]. Dr. Miller indicated that Plaintiff's fingers

showed a decrease in manual dexterity and grip strength. [R. at 487]. Plaintiff had "3+ pitting edema of the bilateral pre-tibial extremities." Plaintiff's gait was reported as labored but without a foot drag or limp. [R. at 487]. Dr. Miller noted that Plaintiff could stand for only ten minutes at a time before experiencing severe pain, could walk for only five minutes due to shortness of breath, back and knee pain, and the locking of her left knee. [R. at 487]. According to Dr. Miller, Plaintiff can sit comfortably for only fifteen minutes and can lift no more than ten pounds. [R. at 488].

On March 3, 1997, Plaintiff's bilateral hands and wrists were examined. The examiner reported, with regard to Plaintiff's hands, that "no radiographic evidence" supported a specific arthritis, that there was no evidence of recent fracture or dislocation and the joint spaces appeared relatively well maintained. [R. at 489]. With regard to Plaintiff's wrists, the examiner reported no evidence of recent fracture or dislocation, and joint spaces maintained, with articular spaces smooth. The examiner did note an elevation of the "pronator quadratus fat pad bilaterally which can suggest soft tissue swelling or occult bone injury." [R. at 489].

Plaintiff was examined on July 8, 1997, by E. Joseph Sutton, II., D.O. [R. at 538]. He wrote that Plaintiff complained primarily of arthritis, hypertension, heart failure, and chronic obstructive pulmonary disease. [R. at 538]. He noted that Plaintiff had a prior diagnosis of osteoarthritis/degenerative joint disease, and that Plaintiff additionally claimed to have rheumatoid arthritis, but that the rheumatoid test was negative. [R. at 538]. He noted that Plaintiff had a history of hypertension, but that it was well controlled with medication. [R. at 538]. He observed that Plaintiff

reported a history of congestive heart failure, but that nothing in the records verified it. [R. at 538, 540]. Plaintiff had "an essentially normal range of motion." [R. at 540]. In addition, Plaintiff's fine motor coordination was normal as was her grip strength. Dr. Sutton observed no muscle atrophy, redness, or joint deformity. [R. at 542].

Dr. Sutton suspected that degenerative joint disease was the cause of Plaintiff's pain. He also noted that Plaintiff had a "history of" rheumatoid arthritis, but that the history was not supported by his examination. [R. at 542]. He concluded that Plaintiff could sit for four hours at one time, stand and walk for one to two hours at a time, sit for eight hours in an eight hour day, and stand or walk for four hours in an eight hour day. [R. at 542]. Plaintiff could not lift and carry over 26 pounds, and could lift or carry 11 to 25 pounds. [R. at 544]. Plaintiff had no restriction of the use of her hands for repetitive movement or fingering and had good grip strength and fine motor coordination. [R. at 544]. Dr. Sutton noted that he based these restrictions "mostly on the patient's size and her quite subjective complaints, rather than on any objective abnormalities seen on the examination. . . . Mostly, the patient is restricted because of her weight rather than any objective findings." [R. at 544].

At the November 21, 1997 hearing, Plaintiff testified that she currently lived with her mother. [R. at 585]. Plaintiff stated that she was unable to walk, that she mopped one very small area one time each week, and that her back hurts every day. [R. at 586-588]. According to Plaintiff, she can stand for approximately five minutes before her knees burn and she has to sit or lie down. Plaintiff complained that her

knees pop when she walks, and sometimes lock up. [R. at 591]. Plaintiff testified that she has congestive heart failure, but that she takes medication for it. [R. at 595]. Plaintiff testified that her pain has been constant since 1993, that she used crutches, sometimes for two or three days at a time, and that she can walk only about 100 feet (to her brother's house) before she requires assistance. [R. at 601]. Plaintiff also stated that she was depressed and took medication for her depression.

A medical doctor also testified at the hearing. He stated that he had reviewed the medical record and agreed with Dr. Sutton's conclusions with regard to Plaintiff's physical limitations. [R. at 611]. He noted that Plaintiff had an echocardiogram which was far above the minimum described in the Social Security Listing Regulations, and was "a pretty good projection faction." [R. at 607]. He observed that although Plaintiff took a heart tablet, there was no evidence of congestive heart disease. [R. at 608]. He noted that although some of her evaluators were concerned with rheumatoid arthritis, none of the medical documents discussed rheumatoid arthritis, and Plaintiff had negative rheumatoid factors in her previous examinations. [R. at 608]. He commented with regard to the X-rays of Plaintiff's back and hands. [R. at 609]. X-rays of Plaintiff's knees showed osteoarthritis but no acute or active abnormality. [R. at 609]. He testified that the "regenerator osteofites anteriorally and disc space narrowing are normally seen at" a person of Plaintiff's age. [R. at 609]. He observed that the X-rays indicated no evidence of bone destruction which one would find with either rheumatoid or severe osteoarthritis. [R. at 609]. He concluded that Plaintiff's RFC was based predominantly on subjective rather than objective

complaints of pain and could additionally be influenced by Plaintiff's depression. [R. at 609]. The medical expert commented that there was some evidence of osteoarthritis with regard to Plaintiff's lumbar spine, but no evidence or arthritis of Plaintiff's hands or of her knees. [R. at 613].

The medical expert was asked by the ALJ whether all of Plaintiff's limitations were based on Plaintiff's subjective complaints, or if she had any objective limitations. The examiner noted that Dr. Sutton found no objective findings supported Plaintiff's complaints, but that Plaintiff's weight would prohibit her from performing certain activities. [R. at 612].

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 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).

[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).

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

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when 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 found that Plaintiff could perform light work activity which did not require sitting more than four hours at one time or eight hours in an eight hour work day; standing more than one to two hours at one time or two to four hours during an eight hour day; walking more than one to two hours at one time or more than two to four hours in an eight hour day, lifting more than 10 pounds frequently, or 25 pounds

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[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."

occasionally. [R. at 344]. The ALJ noted that Plaintiff claimed disability as of June 28, 1993, and at that time Plaintiff was a "younger individual." The ALJ observed that Plaintiff, at the time of the hearing was "closely approaching advanced age" with a limited education. The ALJ initially applied the Grids and concluded that Plaintiff was not disabled. Based on the testimony of a vocational expert, the ALJ found that Plaintiff could perform work in the national economy and was therefore not disabled. [R. at 350-51].

IV. REVIEW

Plaintiff asserts as the sole error on appeal that the Commissioner failed to give appropriate weight to the opinions of Plaintiff's treating and examining physicians. Plaintiff notes that in 1995 she was 50 years old, and is presumptively disabled pursuant to the Grids if she is limited to only sedentary work. Plaintiff asserts that her treating and examining physicians' opinions are consistent with a finding that she can perform only sedentary work and that the ALJ therefore erred concluding that Plaintiff was not disabled.

Plaintiff initially addresses the opinion of Dr. Miller. Dr. Miller, on August 11, 1996, wrote that Plaintiff was unable to work due to her permanent impairments of cardiac disease, congestive heart failure, rheumatoid arthritis, osteoarthritis, bilateral knee problems, and lumbar degenerative disc disease. [R. at 470]. Dr. Miller, wrote a "follow-up" letter on February 2, 1997, with regard Dr. Miller's prior August 11, 1996 examination of Plaintiff. Dr. Miller noted that Plaintiff's heart exhibited a regular rate and rhythm, that Plaintiff's fingers showed a decrease in dexterity and grip

strength, and that Plaintiff had edema. [R. at 487]. Dr. Miller wrote that Plaintiff could stand for only ten minutes at a time, that she could walk for only five minutes at a time, and that she could sit for only fifteen minutes at a time. [R. at 487].

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

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

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

The ALJ outlined Dr. Miller's opinion. [R. at 349]. The ALJ concluded that he could not give controlling weight to Dr. Miller's opinion because it was not well supported by medically acceptable clinical and laboratory diagnostic techniques, and was inconsistent with the record. [R. at 349]. As noted above, Dr. Miller based her opinion that Plaintiff was disabled on Plaintiff's cardiac disease, congestive heart failure, rheumatoid arthritis, osteoarthritis, bilateral knee problems, and lumbar degenerative disc disease.[6/] The ALJ dealt specifically with several of these diagnoses and concluded that they were not supported by the record. The ALJ noted that the doctor who testified at the hearing stated that Dr. Miller's assessments were based on subjective findings because no objective findings in the record supported the doctor's assessments. [R. at 347]. The ALJ noted Dr. Goldman's testimony that Plaintiff's echocardiogram was above the listings and actually "pretty good," and that the records did not indicate that Plaintiff had congestive heart disease. [R. at 346, 607]. The ALJ observed that the Hillcrest Medical Center records dated August 1, 1996, prior to Plaintiff's surgery, indicated a normal electrocardiogram, normal cardiac enzymes, thallium and echocardiogram. [R. at 349]. The ALJ noted Dr. Goldman's testimony that X-rays indicated that Plaintiff had some degenerative changes in her lumbar spine, but that the changes were normal for Plaintiff's age and X-rays of her knees and hands indicated no arthritis. [R. at 349]. The ALJ noted that Plaintiff's

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[6/] The ALJ notes, in his opinion, that nothing supports Plaintiff's claims of cardiac disease, congestive heart failure, or rheumatoid arthritis. In addition, he wrote that Plaintiff's osteoarthritis was more limited than Plaintiff claimed, and that the X-rays depicting "degenerative disc disease" actually indicated disc space narrowing which was appropriate for Plaintiff's age.

diabetes was under control, and that although Plaintiff claimed to suffer from rheumatoid arthritis, no records supported that claim. [R. at 346]. The ALJ noted that the evidence suggested Plaintiff had hypertension which was effectively controlled by medications. [R. at 348].

The Court concludes that the ALJ gave adequate reasons for discounting the opinion of Dr. Miller.

Plaintiff additionally asserts that the ALJ erred in not giving more weight to the opinion of Dr. Denny. Plaintiff seems to suggest that the ALJ should have treated Dr. Denny's opinion as that of a treating physician. Plaintiff does not elaborate upon Dr. Denny's relationship with Plaintiff. The record indicates that Plaintiff saw Dr. Denny on June 18, 1996, and July 15, 1996. The Social Security regulations define a treating source as follows:

> Treating source means your own physician or psychologist who has provided you with medical treatment or evaluation and who has or has had an ongoing treatment relationship with you. Generally, we will consider that you have an ongoing treatment relationship with a physician or psychologist when the medical evidence establishes that you see or have seen the physician or psychologist with a frequency consistent with accepted medical practice for the type of treatment and evaluation required for your medical condition(s). We may consider a physician or psychologist who has treated you only a few times or only after long intervals (e.g., twice a year) to be your treating source if the nature and frequency of the treatment is typical for your condition(s).

The records indicate that Plaintiff was referred to Dr. Denny for an examination and that Dr. Denny examined Plaintiff twice. The Court concludes that the ALJ did not err in declining to treat Dr. Denny as a treating physician.

Dr. Denny examined Plaintiff on June 18, 1996, and on July 15, 1996. On July 15, 1996, Dr. Denny noted that Plaintiff had no complaints of knee locking. On July 18, 1996, Dr. Denny noted that Plaintiff had complaints of knee locking. Dr. Denny described Plaintiff's range-of-motion as "full." [R. at 422]. He noted that he wanted Plaintiff to "undergo a rheumatology workup. [R. at 422]. He concluded that "at this time, I feel that she has severe degenerative joint disease, most likely a rheumatoid type. She will require total knee replacements." [R. at 422].

Plaintiff asserts that the ALJ mentions Dr. Denny's reports but fails to discuss the reports in his analysis. Certainly more discussion by the ALJ on this issue would be of assistance, and would make the decision of whether or not to affirm the ALJ's conclusion that Plaintiff was not disabled easier. Under the specific facts and circumstances of this case, however, the Court concludes that the lack of additional discussion by the ALJ is not fatal and does not require reversal.

The ALJ's opinion does summarize Dr. Denny's reports and obviously indicates that Dr. Denny's reports were considered by the ALJ in his evaluation of Plaintiff's complaints. Dr. Denny does conclude that Plaintiff will eventually need total knee replacements. Dr. Denny does not, however, place any limitations on Plaintiff's abilities or suggest an RFC. Dr. Denny notes that he believes that Plaintiff has rheumatoid arthritis and he suggests testing, but nothing suggests that he reviewed

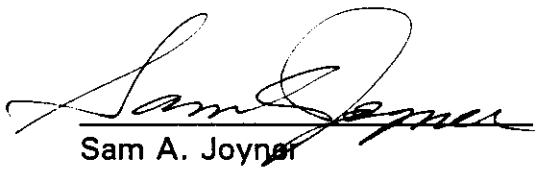
any such testing. Dr. Denny concludes that Plaintiff has degenerative joint disease.

Dr. Sutton, the examining doctor, who the ALJ relied upon, and Dr. Goldman, who testified at Plaintiff's hearing, both concluded that Plaintiff did have degenerative joint disease. These conclusions do not contradict the opinion of Dr. Denny. Both Drs. Sutton and Goldman, however, provided specific limitations upon Plaintiff's ability to perform certain work-related activity. Dr. Denny provided no specific limitations upon Plaintiff's ability to work. Certainly a "total knee replacement," as recommended by Dr. Denny, sounds debilitating. However, nothing in the record indicates what limitations, if any, that Dr. Denny believed Plaintiff currently has or will have if she has a total knee replacement.

The ALJ discounted the opinion of the treating physician because it was not supported by the medical record. The ALJ summarized and therefore considered the findings of Dr. Denny. Dr. Denny, however, provided no specific limitations with regard to Plaintiff's abilities. Dr. Sutton, who examined Plaintiff, summarized the medical record, noted that he based his RFC predominantly on Plaintiff's subjective complaints of pain, and concluded that Plaintiff could perform a certain range of light work. Dr. Goldman testified that he reviewed Plaintiff's medical record, including Plaintiff's X-rays (of her knees, hands, and wrists) and that he agreed with the opinion of Dr. Sutton with regard to Plaintiff's RFC. In addition, the record contains a RFC from 1994 indicating that Plaintiff can perform light work activity. Under the specific facts and circumstances of this case, the Court concludes that the ALJ's conclusion with regard to Plaintiff's RFC is supported by substantial evidence.

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

Dated this 19th day of November 1999.



Sam A. Joyner
United States Magistrate Judge

MT

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

FILED

NOV 19 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

BECKEY DAWN ALSPACH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 99-CV-0535K(E)
	)	
VALLEYLAB, INC.,	)	
	)	
Defendant.	)	

ENTERED ON DOCKET

DATE NOV 22 1999

STIPULATION OF DISMISSAL

Plaintiff, Beckey Dawn Alspach, by her attorneys of record, Clark O. Brewster and Jennifer L. De Angelis, Brewster, Shallcross & DeAngelis and the defendant, Valleylab, Inc. by its attorneys of record, Ronald A. White, Hall, Estill, Hardwick, Gable,Golden & Nelson, having fully settled all claims asserted by the plaintiff in this litigation hereby stipulates to, and requests entry by the court of, the order submitted herewith dismissing all such claims with prejudice.

Dated this 19th of November, 1999.

Jennifer L. De Angelis

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