

FILED

JAN 7 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

JOHN R. RUDY,

Plaintiff,

vs.

No. 99-C-8-B

MS LIFE INSURANCE COMPANY, a
foreign insurance company;
MS FINANCIAL, INC.; FLEET BANK,
N.A.; and LOAN SERVICING
ENTERPRISE,

Defendants.

ENTERED ON DOCKET
DATE JAN 10 2000

ORDER

Before the Court is Plaintiff John R. Rudy's oral motion to dismiss his claim against defendant Loan Servicing Enterprise, made at the November 12, 1999 pretrial conference, for failure to serve the defendant with summons.

The Court hereby dismisses without prejudice Plaintiff John R. Rudy's claim against defendant Loan Servicing Enterprise. As all other defendants have been dismissed, this dismissal terminates this action.

IT IS SO ORDERED, this 7th day of January, 2000.

For James D. Brett
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 7 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 99CV0850B(E)
)	
LAURA M. JONES,)	
)	
Defendant.)	

ENTERED ON DOCKET
DATE JAN 10 2000

DEFAULT JUDGMENT

This matter comes on for consideration this 7th day of January, 2000, 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, Laura M. Jones, appearing not.

The Court being fully advised and having examined the court file finds that Defendant, Laura M. Jones, was served with Summons and Complaint on November 15, 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, Laura M. Jones, for the principal amount of \$827.02, \$1,981.91, and

\$2,830.40, plus accrued interest of \$624.55, \$1,822.79, and \$1,990.86, plus administrative charges in the amount of \$15.60, plus interest thereafter at the rate of 8, 9.13, and 8 percent per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.997 percent per annum until paid, plus costs of this action.

United States District Judge
for Thomas R. Brett, 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/jmo

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 10 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLES VERL KENNEDY,)
)
)
 Plaintiff,)
)
 v.)
)
)
 KENNETH S. APFEL,)
)
 Commissioner of Social Security)
 Administration,)
)
)
 Defendant.)

Case No. 99-CV-167-J ✓

FILED ON DOCKET

JAN 10 2000

ORDER

On October 15, 1999, this Court remanded this case to the Commissioner for further administrative action. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney fees under the EAJA, 28 U.S.C. § 2412(d), filed on or around November 15, 1999, the parties have stipulated that an award in the amount of \$1,582.70 for attorney fees and \$15.00 for costs for all work done before the district court is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney fees of \$1,547.70 and costs of \$15.00 for a total award of \$1,597.70 under the Equal Access To Justice Act.


SAM A. JOYNER
United States Magistrate Judge

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

JAN 10 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SULLIVAN SUPPLY, INC.,
Plaintiff,

vs.

BUEL JOBE,
Defendant.

Case No. 98-CV-430-H(M) ✓
ENTERED ON DOCKET

DATE JAN 10 2000

CORRECTED REPORT AND RECOMMENDATION

On November 3, 1999, the undersigned United States Magistrate Judge issued a report and recommendation [Dkt. 81] which contained scrivener's errors. Those errors have been corrected in this corrected report and recommendation.¹ In all other respects the report remains the same.

The parties are competitors in the livestock supply business. Each publishes a catalog to advertise its products. Plaintiff, Sullivan Supply, alleged Defendant's catalog infringed its copyrights. Judgment has been entered pursuant to the terms of a Rule 68 Offer of Judgment which Plaintiff accepted. [Dkt. 61]. A preliminary injunction was entered on August 11, 1999, which enjoins Defendant from publishing, distributing, or preparing derivative works in any form based on 62 separately enumerated product descriptions which are set out in the preliminary injunction. [Dkt. 73]. The parties have agreed to the inclusion of 24 of the enumerated product descriptions in the terms of the permanent injunction, and to the exclusion of 10

¹ The text to be enjoined with respect to ¶ B-48 "Knee Pads" has been corrected. See p. 8, *infra*. The product listings summarized in the conclusion have been corrected to comport with the text of the report. See p. 12, *infra*.

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enumerated product descriptions from the permanent injunction. This report and recommendation addresses which of the remaining 28 disputed product descriptions should be included in the terms of the permanent injunction.

A casual comparison of the 28 disputed product descriptions reveals that, for the most part, the subject product descriptions are identical. However, liability for copyright infringement will attach only where *protected* elements of a copyrighted work are copied. *Country Kids 'N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1284 (10th Cir. 1996). The court must determine whether the copied product descriptions contain protected elements. It is therefore necessary to engage in a brief discussion of the fundamental copyright principles applicable to this case.

COPYRIGHT PRINCIPLES

"It is an axiom of copyright law that the protection granted to a copyrightable work extends only to the particular expression of an idea and never to the idea itself." *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 615 (7th Cir. 1982) quoting *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90 (2nd Cir.) *cert. denied*, 429 U.S. 980, 97 S.Ct. 492, 50 L.Ed.2d 588 (1976). *See also Feist Publications, Inc., v. Rural Telephone Service Company, Inc.*, 499 U.S. 340, 345, 111 S.Ct. 1282, 1287, 113 L.Ed.2d 358 (1991)(The most fundamental axiom of copyright law is that no author may copyright his ideas or the facts he narrates). Thus, copyright protection does not extend to the idea of describing a product for a catalog. Copyright protection may, however, extend to the manner of describing a product.

It is said that "the sine qua non of copyright is originality." *Feist*, 111 S.Ct. at 1287. So, to qualify for copyright protection a work must be original to the author. That is, the work must be independently created by the author, rather than copied from other works, and it must possess at least some minimal degree of creativity. However, the level of creativity required is low. *Id.* As applied to this case, Defendant may copy the "idea" of describing the subject products, but he may not copy Plaintiff's description, provided some minimal degree of originality/creativity has been applied to Plaintiff's description. It is well recognized that "there is no litmus paper test by which to apply the idea-expression distinction, the determination is necessarily [a] subjective," ad hoc one. *Atari*, 672 F.2d at 615, *Country Kids*, 77 F.3d at 1285 ("Because the idea/expression distinction is somewhat elusive, courts often adopt an ad hoc approach, eschewing the application of any bright line rule or any clear formula").

Occasionally an idea and its expression will be indistinguishable. This concept, known as idea-expression unity, occurs when the expression of an idea provides nothing new or additional over the idea. *Id.* at 616, quoting *Sid and Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1168 (9th Cir. 1977). In the context of literary works, this idea is expressed as *scenes a faire*, which refers to characters and situations which are indispensable or standard in the treatment of a given topic. Stock literary devices are not protectable by copyright so that similarity of expression is not actionable where the similarity necessarily results from the fact that the common idea is only capable of expression in a stereotypical form. *Id.* 616 quoting 3 M.Nimmer, *Nimmer on Copyright* § 13.03 [A][1], at 13-28 (1981).

In addressing which of the disputed descriptions should or should not be included in the permanent injunction, the court has examined each accused product description, comparing it to Plaintiff's description to discern the similarity of the descriptions. The court has also examined each of Plaintiff's product descriptions to determine whether it was copied from a third party source, or whether the similarity of Defendant's description necessarily results from the attempt to describe the particular product. In other words, the court has viewed the product descriptions with an eye toward discerning the presence of a minimal degree of originality or creative content.

DESCRIPTIONS INCLUDED IN PERMANENT INJUNCTION

The undersigned recommends that the following product descriptions be included in the terms of the permanent injunction:

¶ **B-1²**: **Blue Ribbon Show Supply catalog's description of its "EXHIBITOR'S NUMBER HARNESS,"** page 4, in the Blue Ribbon Show Supply catalog, Volume 12. While there may only be so much that can be said about an exhibitor's harness, the precise text used by Sullivan is not strictly dictated by the subject matter. The court finds that Sullivan's description contains the slight amount of originality/creativity required to confer copyright protection.

¶ **B-7**: **Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S NECK TIES,"** page 4, in the Blue Ribbon Show Supply catalog, Volume 12. It is a

² Paragraph designations refer to paragraphs in the preliminary injunction entered August 11, 1999. [Dkt. 73].

close call whether this description contains the requisite amount of originality/creativity. There is not much to be said about an adjustable animal neck restraint, however Sullivan's description contains a minimal level of originality/creativity.

¶ **B-8: Blue Ribbon Show Supply catalog's description of its "COTTON NOSE PADS,"** page 4, in the Blue Ribbon Show Supply catalog, Volume 12. The description contains a minimal degree of originality/creativity and was obviously copied from Sullivan's.

¶ **B-10: Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S SINGLE MISTER,"** page 17, in the Blue Ribbon Show Supply catalog, Volume 12. The description contains a minimal degree of originality/creativity and was obviously copied from Sullivan's.

¶ **B-14: Blue Ribbon Show Supply catalog's description of its "RUBBER MAT,"** page 5, in the Blue Ribbon Show Supply catalog, Volume 12. The court finds that Sullivan's description contains the slight amount of originality/creativity required to confer copyright protection.

¶ **B-20: Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S BASE COAT,"** page 7, in the Blue Ribbon Show Supply catalog, Volume 12. This description is nearly identical to the description of Sullivan's Base Coat. Defendant claims Sullivan's description was copied from a third party source, but has not identified that source. Based on the record before it, the court finds the description to be original to Sullivan and subject to copyright protection.

¶ **B-41: Blue Ribbon Show Supply catalog's description of its "LAMB DRENCH GUN,"** page 13, in the Blue Ribbon show Supply catalog, Volume 12. This description satisfies the copyright requirement of a slight amount of originality/creativity.

¶ **B-58: Blue Ribbon Show Supply catalog's description of its "RICE ROOT BRUSH,"** page 17, in the Blue Ribbon show Supply catalog, Volume 12. Once again, there may be little to be said in describing a rice root brush. However, Sullivan's description is not completely dictated by the idea of such a description and contains the slight amount of originality/creativity required to invoke copyright protection.

¶ **B-59: Blue Ribbon Show Supply catalog's description of its "RICE ROOT MIX BRUSH,"** page 17, in the Blue Ribbon Show Supply catalog, Volume 12. This description contains the slight amount of originality/creativity required to invoke copyright protection.

DESCRIPTIONS PARTIALLY INCLUDED IN PERMANENT INJUNCTION

The undersigned recommends that portions of the following product descriptions be included in the terms of the permanent injunction:

¶ **B-19: Blue Ribbon Show Supply catalog's description of its product "MAGIC,"** page 6, in the blue Ribbon Show Supply catalog, Volume 12. The first sentence, "Popular with dairy showmen for top lines" contains the slight amount of originality/creativity necessary for copyright protection, and use of that sentence should be enjoined. The remainder of the description is not original to Sullivan.

¶ **B-43: Blue Ribbon Show Supply catalog's description of its "MESH LAMB MUZZLE,"** page 13, in the Blue Ribbon Show Supply catalog, Volume 12. The

following portion of the description contains the requisite degree of originality/creativity and its use should be enjoined: "One piece elastic strap holds muzzle in place. No buckles or strings to tie." The remainder of the description is not original to Sullivan, having appeared in the Valley Vet Fall 1990 Catalog.

¶ **B-45: Blue Ribbon Show Supply catalog's description of its "ANDIS GROOM CLIPPER,"** page 14 in the Blue Ribbon Show Supply catalog, Volume 12. Much of the information contained in this description first appeared in product literature distributed by the Andis Company. However, Sullivan has re-phrased and organized the information so that except for the phrase "14,400 cutting strokes per minute," the description contains the minimal degree of originality/creativity necessary for copyright protection. Defendant's use of the description should be enjoined, except for use of the phrase "14,400 cutting strokes per minute."

¶ **B-46: Blue Ribbon Show Supply catalog's description of its "ANDIS 2-SPEED DETACHABLE PLUS +,"** page 14 in the Blue Ribbon Show Supply catalog, Volume 12. Some of the text of this description first appeared in product literature distributed by the Andis Company. However, the following text is original to Sullivan as it contains the minimal amount of originality/creativity necessary for copyright protection, and Defendant's use should be enjoined: "Detachable blades for ease of changing and cleaning. Model A-5 Oster blades fit this clipper and with slight modification Oster Groom-Master blades can also be used."

¶ **B-48: Blue Ribbon Show Supply catalog's description of its "KNEE PADS,"** page 15 in the Blue Ribbon Show Supply catalog, Volume 12. A portion of the text

of this description is not original to Sullivan, having first appeared in the Valley Vet Fall 1989 Catalog. However, the following text is original to Sullivan and Defendant's use should be enjoined as it contains the minimal amount of originality/creativity necessary for copyright protection, and Defendant's use should be enjoined: "A quality knee pad with the same outside leather design as the deluxe knee pad."

DESCRIPTIONS EXCLUDED FROM PERMANENT INJUNCTION

The undersigned recommends that the following product descriptions be excluded from the terms of the permanent injunction:

¶ **B-3: Blue Ribbon Show Supply catalog's description of its "COMB HOLDER,"** page 4, in the Blue Ribbon Show Supply catalog, Volume 12. Both Defendant and Sullivan's description include the typographical error of including an apostrophe where there should not be one in the word "exhibitor's." The inclusion of this typographical error indicates that Defendant copied the text directly from Sullivan. However, the court finds that the description is necessarily dictated by the idea of describing the subject matter, a comb holder, that the description does not contain the slight amount of originality/creativity necessary for copyright protection.

¶ **B-5: Blue Ribbon Show Supply catalog's description of its "LEATHER ROLLED NOSE SHOW HALTER,"** page 4, in the Blue Ribbon Show Supply catalog, Volume 12. Sullivan asks that the court enjoin the use of weight ranges assigned to each size of halter. The court finds that the weight ranges are dictated by the function of the item and facts not subject to copyright protection.

¶ **B-6: Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S ROPE HALTERS,"** page 4 in the Blue Ribbon Show Supply catalog, Volume 12. The court finds that the description is necessarily dictated by the idea of describing the subject and the description does not contain the slight amount of originality/creativity necessary for copyright protection.

¶ **B-9: Blue Ribbon show supply catalog's description of its "BLUE RIBBON'S BLOCKING & GROOMING CHUTE,"** page 5, in the Blue Ribbon Show Supply catalog, Volume 12. The court finds that the similarities between Sullivan's description and Defendant's description are dictated by the design and function of the item and the idea of describing it, not the result of copying.

¶ **B-34: Blue Ribbon Show Supply catalog's description of its "FEED SCOOP,"** page 9, in the Blue Ribbon Show Supply catalog, Volume 12. The court finds that the description is necessarily dictated by the idea of describing the subject, a feed scoop, and the description does not contain the slight amount of originality/creativity necessary for copyright protection.

¶ **B-36: Blue Ribbon Show Supply catalog's description of its "BLUE RIBBON'S TURBINE LIVESTOCK FAN,"** page 11, in the Blue Ribbon Show Supply catalog, Volume 12. Defendant's description is much shorter than Sullivan's and contains only a small amount of text identical to Sullivan's. The court finds that the similarities between Sullivan's description and Defendant's description are dictated by the design and function of the item and the idea of describing it, not the result of copying.

¶ **B-37: Blue Ribbon Show Supply catalog's description of its "BARNSTORMER FAN,"** page 11, in the Blue Ribbon Show Supply catalog, Volume 12. The court finds that the similarities between Sullivan's description and Defendant's description are dictated by the design and function of the item and the idea of describing it, not the result of copying. Further, the description does not contain the slight amount of originality/creativity necessary for copyright protection.

¶ **B-47: Blue Ribbon Show Supply catalog's description of its "LEATHER CLIPPER GUARDS,"** page 15 in the Blue Ribbon Show Supply catalog, Volume 12. Both Defendant and Sullivan's description include a misspelling of the word snugly as "snuggly." The inclusion of this misspelling indicates that Defendant copied the text directly from Sullivan. However, the court finds that the description is necessarily dictated by the idea of describing the attributes of the subject matter and does not contain the slight amount of originality/creativity necessary for copyright protection.

¶ **B-51: Blue Ribbon Show Supply catalog's description of its "BR-20TBC,"** page 16, in the Blue Ribbon Show Supply catalog, Volume 12. Both catalogs contain identical descriptions: "20-tooth blocking comb cuts on edge with sharp tip." Some of the language, "20-tooth blocking comb," is not original to Sullivan having first appeared in the Stewart by Oster © 1985 Catalog. The inventory control number is the model number assigned to the item by the manufacturer, Oster. The remainder of the description is necessarily dictated by the idea of describing the attributes of the subject matter and does not contain the slight amount of originality/creativity necessary for copyright protection.

¶ **B-52: Blue Ribbon Show Supply catalog's description of its "BR-P7112,"** page 16, in the Blue Ribbon Show Supply catalog, Volume 12. Both catalogs contain identical descriptions: "20-tooth goat comb with dull tip." Some of the language, "20-tooth blocking comb," is not original to Sullivan having first appeared in the Stewart by Oster © 1985 Catalog. The inventory control number is the model number assigned to the item by the manufacturer, Oster. The remainder of the description is necessarily dictated by the idea of describing the attributes of the subject matter and lacks the slight amount of originality/creativity necessary for copyright protection.

¶ **B-53: Blue Ribbon Show Supply catalog's description of its "LISTER HAIRHEAD BLADES,"** page 16, in the Blue Ribbon Show Supply catalog, Volume 12. The product code numbers and literal descriptions for the blades are not original to Sullivan, having been assigned to the products by the manufacturer.

¶ **B-54: Blue Ribbon Show Supply catalog's description of its "OSTER CLIPMASTER BLADES,"** page 16, in the Blue Ribbon Show Supply catalog, Volume 12. The inventory control numbers are the model numbers assigned to the blades by the manufacturer, Oster. The remainder of the description is necessarily dictated by the idea of describing the attributes of the subject matter and lacks the slight amount of originality/creativity necessary for copyright protection.

¶ **B-55: Blue Ribbon Show Supply catalog's description of its "LISTER SHEEPHEAD BLADES,"** page 16, in the Blue Ribbon Show Supply catalog, Volume 12. The inventory control numbers are the model numbers assigned to the blades by the manufacturer, Lister. The remainder of the description is necessarily dictated by the

idea of describing the attributes of the subject matter and lacks the slight amount of originality/creativity necessary for copyright protection.

¶ **B-56: Blue Ribbon Show Supply catalog's description of "SPEED-O-GUIDE,"** PAGE 16 IN THE Blue Ribbon Show Supply catalog, Volume 12. The description is necessarily dictated by the idea of describing the attributes of the subject matter and does not contain the slight amount of originality/creativity necessary for copyright protection.

CONCLUSION

For the reasons set out herein, the undersigned United States Magistrate Judge **RECOMMENDS** the following disposition for the remaining 28 disputed product descriptions:

The product descriptions identified at the following paragraphs in the preliminary injunction should be included in the permanent injunction: B-1, B-7, B-8, B-10, B-14, B-20, B-41, B-58, and B-59.

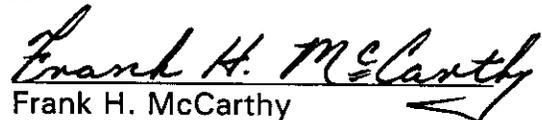
Portions of the product descriptions identified at the following paragraphs in the preliminary injunction should be included in the permanent injunction, as specified herein: B-19, B-43, B-45, B-46, and B-48.

The product descriptions identified at the following paragraphs in the preliminary injunction should be excluded from the permanent injunction: B-3, B-5, B-6, B-9, B-34, B-36, B-37, B-47, B-51, B-52, B-53, B-54, B-55, and B-56.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the District Court for the Northern District of Oklahoma within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right

to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Haney v. Addison*, 175 F.3d 1217, 1219-20 (10th Cir. 1999), *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 10th Day of January, 2000.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

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

10th Day of January, 2000
C. Portillo, a Deputy Clerk

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

CARRELL WAUGH,

Plaintiff,

v.

BANK ONE, OKLAHOMA, N.A., and
WILLIAM BELL,

Defendant.

ENTERED ON DOCKET

DATE JAN 10 2000

No. 98-CV-733-K ✓

FILED

JAN 10 2000 SA ✓

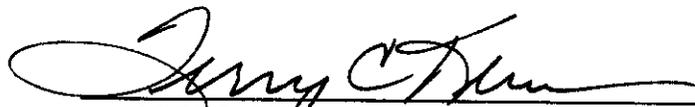
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of Defendants' Motion to Dismiss/Motion for Summary Judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Defendants Bank One, Oklahoma and William Bell, and against the Plaintiff, Carrell Waugh.

ORDERED this 7 day of January, 2000.



TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

CARRELL WAUGH,)
)
 Plaintiff,)
)
 vs.)
)
 BANK ONE, OKLAHOMA, et al.,)
)
)
 Defendants.)

ENTERED ON DOCKET
DATE JAN 10 2000

No. 98-CV-733-K

FILED

JAN 10 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is the motion of the defendants for partial summary judgment. Plaintiff alleges that she was an employee of the defendant Bank and was discriminated against on the basis of her race and her gender. She brings four claims: (1) race discrimination in violation of Title VII; (2) race discrimination in violation of 42 U.S.C. §1981; (3) discrimination in violation of 42 U.S.C. §1983; (4) gender discrimination in violation of Title VII. Although titled a motion for partial summary judgment, defendants actually move for judgment on all claims.

A summary judgment is properly granted where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Rule 56(c) F.R.Cv.P. In applying this standard, the Court views the record in the light most favorable to the non-moving party. However, where the non-moving party will bear the burden of proof at trial on a dispositive issue, that party must go beyond the pleadings and designate specific facts so as to make a showing sufficient to establish the existence of an element essential to that party's case in order to survive summary judgment. Sorenson v. University of Utah Hospital, 194 F.3d 1084, 1086 (10th Cir.1999).

Plaintiff was hired by Liberty Bank in 1981 as a loan teller. During her tenure, she received

numerous raises and promotions. In January, 1998, she was an administrator in employment/employee relations with the title of Assistant Vice-President. Liberty Bank and Bank One merged on approximately June 1, 1997. Plaintiff elected to stay with Bank One at that time. She resigned on January 1, 1998 without explanation.

Plaintiff's first claim is for constructive discharge. In the context of a constructive discharge claim based upon race, plaintiff must show (1) she is a minority; (2) she was performing satisfactory work or was qualified to do the job; (3) defendant subjected her to working conditions that a reasonable person would view as intolerable because of her race; (4) her position was filled by a non-minority. Reynolds v. School Dist. No. 1, 69 F.3d 1523, 1533 (10th Cir.1995).

Plaintiff's claim fails on the third element. Plaintiff must present evidence that the employer by its illegal discriminatory acts made working conditions so difficult that a reasonable person in plaintiff's position would feel compelled to resign. Thomas v. Denny's, Inc., 111 F.3d 1506, 1514 (10th Cir.1997). Constructive discharge occurs when working conditions are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. Hammon v. DHL Airways, Inc., 165 F.3d 441, 450 n.10 (6th Cir.1999). Plaintiff has utterly failed in her burden of proof. The record reflects plaintiff to have been an employee who was well-treated, receiving periodic promotions and raises. She only made one complaint during her tenure to supervisors, regarding a racial comment by a co-employee. The incident was dealt with and the co-employee apologized. Plaintiff has fallen far short of demonstrating "intolerable" working conditions.

Plaintiff's claim under 42 U.S.C. §1981 is somewhat unclear. Plaintiff may be reiterating the constructive discharge allegations, but also describes a "plan or scheme designed to eliminate

Plaintiff's employment because of her race." The elements of a prima facie case are roughly similar as to those under Title VII. See Perry v. Woodward, 188 F.3d 1220, 1228 (10th Cir.1999). Again, plaintiff has offered vastly insufficient evidence of intolerable working conditions and equally lacking evidence of a scheme to eliminate her employment. As mentioned, she made only one complaint about employee conduct during her tenure. She did not file an EEOC complaint until after she had resigned. The incidents she cites in her deposition involve white men receiving promotions or raises, but she provides no detail (and apparently no discovery was taken) as to the decision processes made in those other incidents. The mere fact that a white male received a promotion does not demonstrate racial animus against plaintiff. She does not demonstrate that such promotions and raises were at her expense. No evidence of harassment or unjust treatment has been presented.

Plaintiff's claim under 42 U.S.C. §1983 fails on a different ground. In order to state a claim under §1983, it must be alleged and proven that defendants acted under "color of state law." See Northington v. Jackson, 973 F.2d 1518, 1523 (10th Cir.1992). Defendants are a private bank. The fact that banks are regulated by state law does not render their employment practices "state action." Count III will also be dismissed.

Finally, plaintiff brings another Title VII claim, based upon gender as opposed to race. Once more, even viewing the record in the light most favorable to plaintiff as required, the evidence is wholly insufficient to submit this claim to a jury. No prima facie case has been made out, and therefore the Court need not consider the further issue of pretext.

It is the Order of the Court that the motion of the defendants for summary judgment (#20) is hereby GRANTED.

ORDERED this 7 day of January, 2000.

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

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

ORVILLE B. NICHOLS, an Individual)
and Citizen of Oklahoma,)

Plaintiff,)

vs.)

JOHN COBB, an Individual and Citizen of)
California,)

Defendant.)

ENTERED ON DOCKET

DATE JAN 10 2000

Case No. 98-CV-00980-K(M)

FILED

JAN 10 2000 *SA*

ORDER FOR DISMISSAL

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NOW on this 7 day of January, 2000, the above styled and numbered cause comes on before the Court upon the Joint Stipulation of Dismissal filed herein by the parties hereto. It appearing to the Court that the matters in controversy have been settled.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above styled and numbered cause be and the same is hereby dismissed with prejudice.

IT IS SO STIPULATED.



TERRY C. KERN, CHIEF UNITED STATES
DISTRICT JUDGE FOR THE NORTHERN
DISTRICT OF OKLAHOMA

Rodney A. Edwards, OBA #2646
EDWARDS & HUFFMAN, L.L.P.
6120 S. Yale, Suite 1470
Tulsa, OK 74136-4223
(918) 496-0444

ATTORNEYS FOR PLAINTIFF

12 137 115
ORIGINAL

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

FILED

JAN 10 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

COMMERCIAL FINANCIAL SERVICES, INC.,)

Plaintiff,)

vs.)

GERTRUDE A. BRADY,)

Defendant.)

Case No. 99-CV-402-H(J)

Consolidated with
99-CV-997-E(J) ✓

ENTERED ON DOCKET

DATE JAN 10 2000

ORDER

This case is hereby consolidated with Gertrude Brady v. Commercial Financial Services, Inc., 99-CV-997-E(J), a bankruptcy appeal initiated by Ms. Brady on November 19, 1999.

A motion for leave to appeal is currently pending in the 99-CV-997-E(J) case. [Doc. No. 3]. That motion was denied by the November 22, 1999 Order filed in the 99-CV-402-H(J) case. [Doc. No. 13]. The Court Clerk shall show the motion for leave to appeal filed in the 99-CV-997-E(J) case as disposed of, and the Court Clerk shall terminate the 99-CV-997-E(J) case.

IT IS SO ORDERED this 7TH day of January 2000.


Sven Erik Holmes
United States District Judge

FILED

JAN 10 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

ENLOW AUTO AUCTION,)
)
Plaintiff,)
)
vs.)
)
ONEOK EMPLOYEES CREDIT UNION,)
)
Defendant.)

Case No. 99-CV-766-BU(E)

ENTERED ON DOCKET

DATE JAN 10 2000

ADMINISTRATIVE CLOSING ORDER

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

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

Entered this 10th day of January, 2000.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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

FILED

JAN 7 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOSEPH B. LEWIS,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner, Social Security
Administration,

Defendant.

Case No. 99-CV-422-M

ENTERED ON DOCKET

DATE JAN 10 2000

ORDER

IT IS ORDERED, ADJUDGED AND DECREED that this case be, and it is hereby remanded to the Defendant for further administrative action pursuant to sentence four (4) of § 205(g) of the Social Security Act, 42 U.S.C. § 405(g). *Melkonyan v. Sullivan*, 501 U.S. 89 (1991).

Upon remand, the ALJ will conduct a supplemental hearing. The ALJ will also address the medical evidence which was submitted with the request for review, will further evaluate Plaintiff's residual functional capacity, and will provide appropriate rationale with specific references to evidence of Plaintiff's limitations for walking, standing, stooping, and lifting. Because the present record shows that Plaintiff's past relevant work included semi-skilled work as a stock clerk and detox technician, the ALJ will also obtain vocational expert testimony concerning whether any of Plaintiff's skills are transferable.

THUS DONE AND SIGNED on this 6th day of January 2000.


FRANK H. McCARTHY
United States Magistrate Judge

FILED

JAN 7 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 ANDRE S. BLAKE,)
)
 Defendant.)

Case No. 99CV1088BU(E)

ENTERED ON DOCKET
DATE JAN 7 2000

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 7th day of January, 2000.

UNITED STATES OF AMERICA

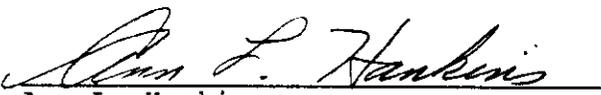
Stephen C. Lewis
United States Attorney



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

CERTIFICATE OF SERVICE

This is to certify that on the 7th day of January, 2000, a
true and correct copy of the foregoing was mailed, postage prepaid
thereon, to: Andre S. Blake, 5725 S 102 West Ave., Sand Springs, OK
74063.



Ann L. Hankins
Financial Litigation Agent

8

CIT

FILED

JAN 7 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

ORVILLE B. NICHOLS, an Individual)
and Citizen of Oklahoma,)

Plaintiff,)

vs.)

JOHN COBB, an Individual and Citizen of)
California,)

Defendant.)

Case No. 98-CV-00980-K(M) ✓

ENTERED ON DOCKET
DATE JAN 7 2000

JOINT STIPULATION OF DISMISSAL

COME NOW the parties in the above referenced action pursuant to F.R.Civ.P. 41, and hereby stipulate and agree that the matters in controversy have been settled and that the action may be dismissed with prejudice as to future filing.

WHEREFORE, the parties stipulate that the above styled and numbered cause being resolved and settled that claims should be dismissed with prejudice as to future filing.

Respectfully submitted,

EDWARDS & HUFFMAN, L.L.P.

By: Rodney A. Edwards

Rodney A. Edwards, OBA #2646
Robert A. Huffman, Jr., OBA #4456
Two Warren Place
6120 S. Yale, Suite 1470
Tulsa, OK 74136-4223
(918) 496-0444

ATTORNEYS FOR PLAINTIFF

27

015

WILBURN, MASTERSON & SMILING

By:  _____

A. Mark Smiling, OBA #10672
7134 South Yale, Suite 560
Tulsa, OK 74136-6337
(918) 494-0414

OCHOA-CHAVEZ LAW OFFICES

By: _____

Brian Ochoa-Chavez
23 Laurel Street
Valley Springs, California 95252

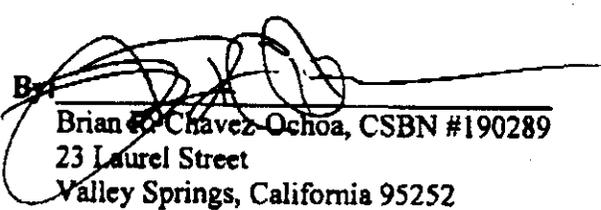
ATTORNEYS FOR DEFENDANT JOHN COBB

WILBURN, MASTERSON & SMILING

By: 

A. Mark Smiling, OBA #10672
7134 South Yale, Suite 560
Tulsa, OK 74136-6337
(918) 494-0414

CHAVEZ-OCHOA LAW OFFICES

By: 

Brian Chavez-Ochoa, CSBN #190289
23 Laurel Street
Valley Springs, California 95252
(209) 772-3013

**ATTORNEYS FOR DEFENDANT
JOHN COBB**

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

FILED
JAN 7 - 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LEWIS BRUNER, et al.,)
)
) Plaintiffs,)
 vs.)
)
) CHAMPION HOME BUILDERS)
) COMPANY, INC., d/b/a)
) GATEWAY MANUFACTURED)
) HOMES,)
)
) Defendant.)

Case No. 98-CV-968-BU ✓

ENTERED ON DOCKET
DATE JAN 7 2000

ORDER

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

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

Entered this 5th day of January, 2000.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

17

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JAN 7 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JEFFREY L. SCOTT, a/k/a
JEFFEREY SCOTT,

Defendant.

ENTERED ON DOCKET

DATE, **JAN 7 2000**

) Case No. 99CV705K (E) ✓
)
)
)
)
)

ENTERED ON DOCKET

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 7th day of January, 2000.

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 7th day of January, 2000, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Jeffrey L. Scott, 1931 E 61ST CT NORTH, TULSA, OK 74130-1363.

Debra L. Overstreet

Debra L. Overstreet
Financial Litigation Agent

3

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

IN THE MATTER OF THE ELIZABETH)
PEAKE GRAHAM TRUST)
)
RONALD R. EMMONS,)
)
Plaintiff,)
)
v.)
)
ELIZABETH PEAKE GRAHAM,)
)
Defendant.)

ENTERED ON DOCKET
DATE JAN 7 2000

Case No. 99-CV-812-H ✓

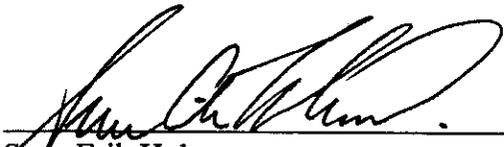
FILED
JAN 7 2000
Phil Lombard, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on the Motion to Remand of Trustee Ronald R. Emmons, filed October 18, 1999 (Docket # 14). Hearings were held in this case on January 5 and 7, 2000. For the reasons stated by the Court at the hearing on January 7, 2000, the Trustee's Motion to Remand is hereby granted.

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

IT IS SO ORDERED.
This 7TH day of January, 2000.

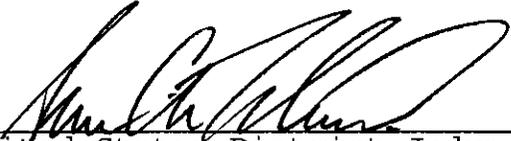

Sven Erik Holmes
United States District Judge

46

Disposal
+ final
1-7-00

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, Roy W. Sutton, a/k/a Roy Sutton, for the principal amount of \$2,803.31, plus accrued interest of \$2,274.46, plus interest thereafter at the rate of 8 percent per annum until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.670 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/dlo

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

IN THE MATTER OF THE ELIZABETH
PEAKE GRAHAM TRUST

RONALD R. EMMONS,

Plaintiff,

v.

ELIZABETH PEAKE GRAHAM,

Defendant.

ENTERED ON DOCKET

DATE JAN 7 2000

Case No. 99-CV-812-H ✓

FILED

JAN 7 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on the Motion to Remand of Trustee Ronald R. Emmons, filed October 18, 1999 (Docket # 14). Hearings were held in this case on January 5 and 7, 2000. For the reasons stated by the Court at the hearing on January 7, 2000, the Trustee's Motion to Remand is hereby granted.

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

IT IS SO ORDERED.

This 7TH day of January, 2000.



Sven Erik Holmes
United States District Judge

46

Handwritten notes

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

F I L E D

JAN 6 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

FILED BUT NOT SERVED

SANDRA GILBERT,)

Plaintiff,)

v.)

HILLCREST HEALTHCARE)

SYSTEM, an Oklahoma Corporation,)

HILLCREST MEDICAL CENTER,)

and CHILDREN'S MEDICAL)

CENTER,)

Defendants)

Case No. 99CV0839H (J)

ENTERED ON DOCKET

DATE JAN 6 2000

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

The Plaintiff, Sandra Gilbert, and the Defendants, Hillcrest Healthcare System, an Oklahoma Corporation, Hillcrest Medical Center, and Children's Medical Center, advise the court of a settlement agreement between the parties and pursuant to Rule 41(a)(1)(ii), FED. R. CIV. P., jointly stipulate that the Plaintiff's action against the Defendants be dismissed with prejudice, with the parties to bear their respective costs, including all attorney's fees and expenses of this litigation.

Dated this 31st day of December, 1999.



D. Gregory Bledsoe, OBA #0874
Bledsoe Law Office
1717 South Cheyenne
Tulsa, OK 74119-4611
(918) 599-8123
Attorney for Plaintiff

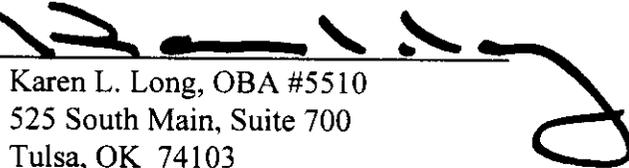
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ROSENSTEIN, FIST & RINGOLD

By:

A handwritten signature in black ink, appearing to read 'K. Long', is written over a horizontal line. The signature is stylized and extends to the right of the line.

Karen L. Long, OBA #5510
525 South Main, Suite 700
Tulsa, OK 74103
(918) 585-9211 Telephone
Attorneys for Defendants

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

F I L E D

JAN 6 2000 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KATHLEEN DONICA,)

Plaintiff,)

vs.)

HEALTHSOUTH CORPORATION, a)
Delaware corporation,)

Defendant.)

Case No. 98-CV-0439H(M)

ENTERED ON DOCKET

DATE JAN 06 2000

STIPULATION OF DISMISSAL OF OPT-IN PLAINTIFF KERRY MACSATA

Opt-In Plaintiff Kerry Macsata ("Macsata") and Defendant HealthSouth Corporation ("HealthSouth"), pursuant to Fed.R.Civ.P. 41(a)(1)(i), hereby stipulate to the dismissal without prejudice of Macsata's claims against HealthSouth in this matter, and Macsata by this dismissal, effectively withdraws his name from the class in this case.

Respectfully submitted,

David Herrold

J. Ronald Petrikin, OBA No. 7092
David H. Herrold, OBA No. 17053
CONNER & WINTERS, P.C.
15 East Fifth Street, Ste. 3700
Tulsa, Oklahoma 74103-4344
(918) 586-5711; (918) 586-8547 fax

-and-

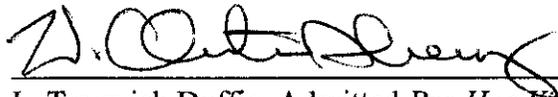
Donald E. Herrold, OBA No. 4140
Jack N. Herrold, OBA No. 4141
HERROLD, HERROLD, SUTTON & DAVIS, P.A.
2250 East 73rd Street, Ste. 600
Tulsa, Oklahoma 74136
(918) 491-9559; (918) 491-7337 fax

Attorneys for the Plaintiff,
KATHLEEN DONICA and those other present and
former employees of HealthSouth Corporation who
are similarly situated

247

clj

-AND-



L. Traywick Duffie, Admitted *Pro Hac Vice*
W. Christopher Arbery, Admitted *Pro Hac Vice*
HUNTON & WILLIAMS
4100 NationsBank Plaza
600 Peachtree Street, N.E.
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-and-

Sarah Jane McKinney, OBA No. 17099
HALL, ESTILL, HARDWICK, GABLE, GOLDEN
& NELSON, P.C.
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103
(918) 594-0439; (918) 594-0505 *fax*

Attorneys for the Defendant,
HEALTHSOUTH CORPORATION

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

FILED

JAN 6 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KATHLEEN DONICA,)

Plaintiff,)

vs.)

HEALTHSOUTH CORPORATION, a)
Delaware corporation,)

Defendant.)

Case No. 98-CV-0439H(M)

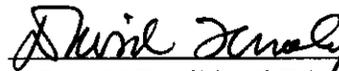
ENTERED ON DOCKET

DATE JAN 06 2000

STIPULATION OF DISMISSAL OF OPT-IN PLAINTIFF ROBERT LESLIE

Opt-In Plaintiff Robert Leslie ("Leslie") and Defendant HealthSouth Corporation ("HealthSouth"), pursuant to Fed.R.Civ.P. 41(a)(1)(i), hereby stipulate to the dismissal without prejudice of Leslie's claims against HealthSouth in this matter, and Leslie by this dismissal, effectively withdraws his name from the class in this case.

Respectfully submitted,



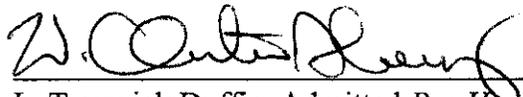
J. Ronald Petrikin, OBA No. 7092
David H. Herrold, OBA No. 17053
CONNER & WINTERS, P.C.
15 East Fifth Street, Ste. 3700
Tulsa, Oklahoma 74103-4344
(918) 586-5711; (918) 586-8547 fax

-and-

Donald E. Herrold, OBA No. 4140
Jack N. Herrold, OBA No. 4141
HERROLD, HERROLD, SUTTON & DAVIS, P.A.
2250 East 73rd Street, Ste. 600
Tulsa, Oklahoma 74136
(918) 491-9559; (918) 491-7337 fax

Attorneys for the Plaintiff,
KATHLEEN DONICA and those other present and
former employees of HealthSouth Corporation who
are similarly situated

-AND-



L. Traywick Duffie, Admitted *Pro Hac Vice*

W. Christopher Arbery, Admitted *Pro Hac Vice*

HUNTON & WILLIAMS

4100 NationsBank Plaza

600 Peachtree Street, N.E.

Atlanta, Georgia 30308

(404) 888-4000; (404) 888-4190 *fax*

-and-

Sarah Jane McKinney, OBA No. 17099

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

320 South Boston Avenue, Suite 400

Tulsa, Oklahoma 74103

(918) 594-0439; (918) 594-0505 *fax*

Attorneys for the Defendant,

HEALTHSOUTH CORPORATION

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

FILED

JAN 6 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KATHLEEN DONICA,)

Plaintiff,)

vs.)

Case No. 98-CV-0439H(M)

HEALTHSOUTH CORPORATION, a)

Delaware corporation,)

Defendant.)

ENTERED ON DOCKET

DATE JAN 06 2000

STIPULATION OF DISMISSAL OF OPT-IN PLAINTIFF JON SMITH

Opt-In Plaintiff Jon Smith ("Smith") and Defendant HealthSouth Corporation ("HealthSouth"), pursuant to Fed.R.Civ.P. 41(a)(1)(i), hereby stipulate to the dismissal without prejudice of Smith's claims against HealthSouth in this matter, and Smith by this dismissal, effectively withdraws his name from the class in this case.

Respectfully submitted,

J. Ronald Petrikin

J. Ronald Petrikin, OBA No. 7092
David H. Herrold, OBA No. 17053
CONNER & WINTERS, P.C.
15 East Fifth Street, Ste. 3700
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-and-

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Jack N. Herrold, OBA No. 4141
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Tulsa, Oklahoma 74136
(918) 491-9559; (918) 491-7337 fax

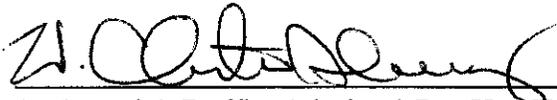
Attorneys for the Plaintiff,
KATHLEEN DONICA and those other present and
former employees of HealthSouth Corporation who
are similarly situated

SA

245

ct

-AND-



L. Traywick Duffie, Admitted *Pro Hac Vice*
W. Christopher Arbery, Admitted *Pro Hac Vice*
HUNTON & WILLIAMS
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600 Peachtree Street, N.E.
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-and-

Sarah Jane McKinney, OBA No. 17099
HALL, ESTILL, HARDWICK, GABLE, GOLDEN
& NELSON, P.C.
320 South Boston Avenue, Suite 400
Tulsa, Oklahoma 74103
(918) 594-0439; (918) 594-0505 *fax*

Attorneys for the Defendant,
HEALTHSOUTH CORPORATION

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

DONALD R. SWINNEY,
Plaintiff,

vs.

KENNETH S. APEL, Commissioner
Social Security Administration,
Defendant.

ENTERED ON DOCKET

JAN 05 2000

DATE JAN 06 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 99-CV-369-M

ORDER OF DISMISSAL WITHOUT PREJUDICE

Having considered the *Stipulation of Dismissal* submitted by the parties herein, IT IS
HEREBY ORDERED that the *Complaint* of the Plaintiff filed on May 12, 1999, is hereby
dismissed.

Dated this 5th day of JAN, 2000, 1999.

Frank H. McCarthy
United States Magistrate Judge

FILED

JAN 5 2000 *plw*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JEAN M. BURRIS,)
)
 Defendant.)

Case No. 99CV0855E(J) ✓

ENTERED ON DOCKET
DATE JAN 06 2000

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 5th day of January, 2000.

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 5th day of January, 2000, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Jean M. Burris, 5943 E. 5th Pl., Tulsa, OK 74112.

Libbi H. Felty
Libbi H. Felty
Paralegal Specialist

FILED

JAN 5 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 ROBERT LITTLEJOHN,)
)
 Defendant.)

Case No. 99CV1054B(J) ✓

ENTERED ON DOCKET
DATE JAN 06 2000

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 5th day of January, 2000.

UNITED STATES OF AMERICA

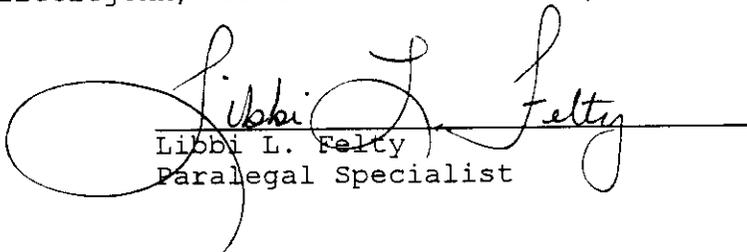
Stephen C. Lewis
United States Attorney



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

CERTIFICATE OF SERVICE

This is to certify that on the 5th day of January, 2000,
a true and correct copy of the foregoing was mailed, postage prepaid
thereon, to: Robert Littlejohn, 1140 N. Boston Pl., Tulsa, OK
74106-4608.


Libbi L. Felty
Paralegal Specialist

10

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ck

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TOM W. HARDRIDGE,
Plaintiff,

v.

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

ENTERED ON DOCKET

JAN 6 2000

Case No. 98-CV-856-M ✓

FILED

JAN. 6 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

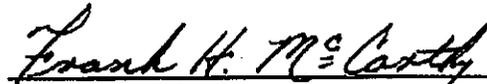
On September 28, 1999, this Court reversed the Commissioner's decision denying plaintiff's claim for Social Security disability benefits and remanded the case to the Commissioner for further action. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney fees under the EAJA, 28 U.S.C. § 2412(d), filed on December 20, 1999, and the defendant's response filed on January 4, 2000, the parties have stipulated that an award in the amount of \$2,487.25 for attorney fees (no costs) for all work done before the district court is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney's fees under the Equal Access To Justice Act in the amount of \$2,487.25. If attorney fees are also awarded under 42 U.S.C. § 406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

14

It is so ORDERED this 2nd day of January, 2000.



Frank H. McCarthy
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

Cathryn McClanahan, OBA #14853
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 06 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN LEONARD SWIMMER,

Petitioner,

vs.

TWYLA SNIDER,

Respondent.

Case No. 99-CV-95H(J) ✓

ENTERED ON DOCKET

DATE JAN 6 2000

REPORT AND RECOMMENDATION

Petitioner filed a Petition for a Writ of Habeas Corpus in the Northern District of Oklahoma on February 2, 1999. By minute order dated February 2, 1999, the action was referred to the undersigned United States Magistrate Judge for further proceedings consistent with his jurisdiction. Respondent filed a Motion to Dismiss the Petition, noting that Petitioner had already served the sentences which Petitioner challenged. Petitioner responded that the sentences were being used to enhance current sentences which Petitioner is serving. Respondent renewed the Motion to Dismiss asserting that Petitioner had either not exhausted his state court remedies in regard to these additional sentences, or that Petitioner had failed to timely appeal the sentences. The United States Magistrate Judge recommends that Respondent's Motion to Dismiss be **GRANTED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed his Petition for a Writ of Habeas Corpus on February 2, 1999. Plaintiff asserted that he was convicted on February 6, 1986, in two separate cases in Tulsa County - CRF-85-2064 (possession of a stolen credit card), and CRF-85-3642 (possession of a stolen motor vehicle). Petitioner was sentenced to concurrent sentences of two years and three years. Petitioner pled guilty to both charges.

Petitioner claims that he received ineffective assistance of counsel with regard to the two sentences. Petitioner asserts that he was not properly informed of the consequences of his guilty plea, that his guilty plea was not knowingly entered, that his attorney failed to properly investigate the charges against Petitioner, and that he was denied the opportunity to properly appeal the sentences.

In his Petition, Petitioner additionally noted that he was currently serving a separate twenty year sentence which was imposed on April 11, 1997.

Respondent filed a Motion to Dismiss on March 4, 1999. [Doc. No. 10-1]. Respondent asserts that Petitioner cannot challenge the two 1985 sentences because Petitioner is no longer "in custody" for the purpose of a federal habeas petition. Respondent noted the Tenth Circuit Court of Appeals' holding in Gamble v. Parsons, 898 F.2d 117 (10th Cir. 1990), but contended that Petitioner's habeas petition was obviously a direct attack on his 1985 sentences. Alternatively, Respondent asserted that even if Petitioner was challenging the use of the 1985 sentences to enhance the sentence which Petitioner was currently serving, Petitioner's petition must be barred

because Petitioner's challenge is outside the allowed one year statute of limitations period.

Respondent notes that on February 6, 1986, Petitioner pled guilty to Possession of a Stolen Credit Card and Possession of a Stolen Motor Vehicle and was sentenced to two and three years imprisonment to be served concurrently. Due to the "grace period," Respondent asserts that Petitioner was required to file his habeas petition prior to April 23, 1997. Respondent additionally notes that this time can be tolled by a properly filed post-conviction application, and that Petitioner did have such an application on file. In accordance with Respondent's calculations, Petitioner had until May 8, 1997 to file his habeas petition. Respondent asserts that because Petitioner's application was not filed until February 2, 1999, Petitioner is time barred and his petition must be denied.

Petitioner's response to the Motion to Dismiss was filed May 5, 1999. [Doc. No. 15-1]. Petitioner acknowledged that he had served the sentences in the two 1985 convictions, but asserted that challenging those convictions was proper because the convictions had been used to enhance four 1996 convictions in Tulsa County, and a conviction in 1999 in Rogers County. According to Petitioner, he is currently serving: (1) twenty years in CF-96-1637, Obtaining Merchandise under False Pretenses, (2) twenty years in CF-96-4000, Knowingly Concealing Stolen Property, (3) twenty years in CF-96-4000, for False Impersonation, (4) twenty years in CF-96-4859 for Uttering a Forged Document, (5) twenty years in CF-96-5353 for Knowingly Concealing Stolen Property, and (6) ten years for Possession of a Stolen Vehicle in case number CF-95-

217. The first five convictions occurred in Tulsa County and the sentences were concurrent sentences.

Petitioner asserts that his sixth conviction was in Rogers County and occurred on February 25, 1999. Petitioner claims that the two 1985 convictions which he is currently challenging in his habeas petition were used to enhance his Rogers County 1999 conviction. Petitioner does not otherwise challenge Respondent's arguments that challenges to the 1996 or 1985 Tulsa County convictions are untimely. Petitioner notes that the Rogers County conviction is "currently being challenged."

On May 26, 1999, Respondent addressed Petitioner's argument that the Rogers County 1999 conviction was timely. Respondent noted that a Judgment and Sentence was entered against Petitioner on February 25, 1999, and that Petitioner was sentenced to ten years imprisonment. Respondent contends that the sentence was enhanced by only one of the 1985 convictions. Respondent states that even if the Court assumes that the Rogers County Conviction could be properly interpreted as a means to challenge the validity of using the 1985 convictions to enhance Petitioner's sentence, Petitioner's claim is not exhausted and therefore is not properly before this Court.

II. DISCUSSION

1985 CONVICTIONS

Petitioner's Petition for a Writ of Habeas Corpus lists two 1985 convictions which Petitioner is attacking. [Doc. No. 1-1]. Petitioner notes that he was sentenced

to two and three year sentences which were to be served concurrently. Petitioner acknowledges that he has already served the time for these two convictions. Pursuant to the "in custody" requirement of § 2254, Petitioner must be serving time on a sentence to successfully challenge that sentence. See, e.g., Maleng v. Cook, 490 U.S. 488 (1989).

A limited exception to this requirement was noted by the Tenth Circuit Court of Appeals in Gamble v. Parsons, 898 F.2d 117 (10th Cir. 1990). As Gamble explains, a Petitioner can challenge a present conviction which was enhanced based on a prior conviction.

As we read Maleng, it precludes a defendant from challenging a fully-expired conviction in isolation even though it may have potential collateral consequences in some future case. Further, even if the fully-expired conviction has, in fact, been used to enhance a subsequent sentence, it may not be attacked directly in a habeas action. Rather, the attack must be directed toward the enhanced sentence under which the defendant is in custody. However, if the attack is so directed, the defendant may argue that his present sentence is improper because it has been enhanced by a prior, unconstitutional conviction.

Gamble, 898 F.2d 117, 118.

Petitioner's Petition clearly appears to be challenging the two 1985 convictions which Petitioner has already served. Petitioner cannot challenge these convictions, in this manner, in a habeas action.

Petitioner additionally asserts five other Tulsa County convictions which Petitioner claims were enhanced by the two prior 1985 convictions, and a later 1999 Rogers County conviction which Petitioner claims was enhanced by the two prior

1985 convictions. Petitioner is currently serving the Tulsa County and Rogers County sentences and therefore could assert that the 1985 convictions were improperly used to enhance the Tulsa and Roger County convictions pursuant to Gamble. Although Petitioner's Petition appears to be a direct challenge to the 1985 convictions which Petitioner has already served, because of Petitioner's *pro se* status, the Court additionally analyzes whether or not Petitioner can indirectly challenge the 1985 convictions.

THE TULSA COUNTY CONVICTIONS

Petitioner is currently serving five 1996 Tulsa County convictions. Petitioner's habeas petition could be interpreted as an attack on the five Tulsa County convictions which Petitioner claims were improperly enhanced with the 1985 Tulsa County convictions.

Respondent asserts that even if the Court liberally construes Petitioner's application as constituting an attack on the 1996 Tulsa County convictions the Court cannot consider Petitioner's Petition because it is barred by the statute of limitations. Respondent notes that Petitioner pled guilty to the Tulsa County convictions on April 11, 1997, and did not seek to timely withdraw his guilty pleas or file a direct appeal to the Oklahoma Court of Criminal Appeals. Respondent asserts that Petitioner's judgment was therefore "final" on April 21, 1997. Respondent contends that Petitioner was required to file a habeas petition attacking his 1996 convictions before

April 21, 1998, and that because he did not do so, any attack would now be barred by the statute of limitations.

The Antiterrorism and Effective Death Penalty Act ("AEDPA,") enacted April 24, 1996, established a one-year limitations period for habeas corpus petitions as follows:

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

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

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

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

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

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

28 U.S.C. § 2244(d). In general, the limitations period begins to run from the date on which a prisoner's conviction becomes final, but can be extended under the terms of § 2244(d)(1)(B), (C), and (D). In addition, the limitations period is tolled or suspended

during the pendency of a state application for post-conviction relief properly filed during the limitations period. 28 U.S.C. § 2244(d)(2).

Application of the provisions of § 2244(d) to Petitioner's case leads to the conclusion that this habeas petition (with regard to the Tulsa County convictions) was filed after the expiration of the one-year limitations period. Because Petitioner failed to perfect a direct appeal, his conviction became final ten (10) days after entry of his Judgment and Sentence, or on April 21, 1997. See Rule 4.2, *Rules of the Court of Criminal Appeals* (requiring the defendant to file an application to withdraw guilty plea within ten (10) days from the date of the pronouncement of the Judgment and Sentence in order to commence an appeal from any conviction of a plea of guilty). Therefore, Petitioner's conviction became final after enactment of the AEDPA. As a result, his one-year limitations clock began to run on April 27, 1997, and, absent a tolling event, a federal petition for writ of habeas corpus filed after April 27, 1998, would be untimely. Petitioner filed his Petition in this Court on February 2, 1999.

The limitations period may be tolled, during the one-year period, while a state post-conviction proceeding, is pending. See § 2244(d)(2). However, the record indicates that Petitioner never filed a post-conviction proceeding with respect to the 1996 Tulsa County convictions. Furthermore, a collateral petition filed in state court after the limitations period has expired does not serve to toll the statute of limitations. Rashad v. Khulmann, 991 F. Supp. 254, 259 (S.D.N.Y. 1998). Therefore, Petitioner's petition in this Court, filed February 2, 1999, is clearly untimely.

In addition, because Petitioner has not filed for post conviction relief with respect to the 1996 Tulsa County convictions,^{1/} Petitioner has not exhausted his claims. Federal courts are prohibited from granting applications for a writ of habeas corpus unless a petitioner meets the "exhaustion requirements" of 28 U.S.C. § 2254(b). To satisfy these statutory requirements, a petitioner must show that either (a) the state's appellate court had an opportunity to rule on the same claim presented in federal court (exhaustion), or (b) the petitioner had no available means for pursuing a review of a conviction in state court at the time of the filing of the federal petition, or (c) circumstances exist that render such process ineffective to protect the rights of the applicant. 28 U.S.C. § 2254(b). See also White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988). The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991).

To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). "[E]xhaustion of state remedies is not required where the state's highest court has recently decided the precise legal issue that

^{1/} The record indicates numerous post-conviction proceedings with regard to Petitioner's 1985 convictions, but not with regard to his 1996 Tulsa County convictions. Petitioner's arguments were never addressed, on the merits, by the Oklahoma Court of Criminal Appeals because Petitioner failed to timely appeal the 1985 convictions.

petitioner seeks to raise on his federal habeas petition." Goodwin v. State of Oklahoma, 923 F.2d 156, 157 (10th Cir. 1991). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

Petitioner did not appeal the sentences on his 1996 convictions, and did not file a post-conviction application. Furthermore, as discussed above, even if Petitioner was able to obtain permission from the Oklahoma courts to file an appeal out of time, Petitioner would still be prohibited from pursuing a habeas application pursuant to the 1996 Tulsa County convictions in this Court because a habeas application would be barred by the statute of limitations.

THE 1999 ROGERS COUNTY CONVICTION

Petitioner additionally refers the Court to a 1999 conviction based on a 1996 charge in Rogers County. Petitioner notes that the Rogers County conviction occurred on February 25, 1999, and that the two 1985 Tulsa County convictions were used to enhance the 1999 Rogers County conviction.^{2/} Petitioner states that he is currently challenging that conviction because he filed a timely motion to withdraw his guilty plea.

As discussed above, Federal courts are prohibited from granting applications for a writ of habeas corpus unless a Petitioner has exhausted his claim. 28 U.S.C. §

^{2/} Respondent notes that only one of the 1985 convictions was used to enhance Petitioner's sentence.

2254(b); Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971).

As Petitioner has noted, he filed a request to withdraw his guilty plea in the Rogers County District Court. Before presenting a claim here, Petitioner must first present that claim to the Oklahoma courts, including the Oklahoma Court of Criminal Appeals. Respondent, by brief filed on May 26, 1999, acknowledges that Petitioner filed an application to withdraw his guilty plea in the Rogers County District Court, and that a hearing on the application was set for May 27, 1999. By Order dated September 30, 1999, this Court directed Petitioner to respond to the arguments by Respondent that any claims raised with respect to the Rogers County conviction were not exhausted.

With regard to the Rogers County conviction, Petitioner's brief, filed November 29, 1999, states only that Petitioner has "filed a Motion to Withdraw his Plea Agreement from Rogers County," and that "he has exhausted all State remedies that are available to him when he filed his Plea Agreement in the Rogers County case." Petitioner's Response to Respondent's Response, filed November 29, 1999, at 1. As previously noted by this Court in the Order directing Petitioner to brief the issue, and as outlined above, to exhaust his claims, Petitioner must first present his claims to the state court, including, in Oklahoma, the Oklahoma Court of Criminal Appeals. Essentially, Petitioner's filing of the Motion to Withdraw his Plea is a "first step." The state trial court must rule upon the motion, and if the ruling is unfavorable to

Petitioner, Petitioner must then appeal the ruling to the Oklahoma Court of Criminal Appeals. Nothing in the record indicates that the trial court has ruled on the pending motion or that Petitioner has appealed the ruling. Petitioner has not exhausted this claim.

Petitioner additionally devotes a considerable amount of time to discussing issues related to procedural bar. Petitioner's argument is difficult to understand. However, liberally construing Petitioner's arguments, the Court could interpret Petitioner as asserting that, because Petitioner appealed the 1985 convictions to the Oklahoma Court of Criminal Appeals, Petitioner has exhausted those claims. The Oklahoma Court of Criminal Appeals declined to address Petitioner's claims, with regard to the 1985 convictions, on the merits due to Petitioner's failure to timely appeal those convictions. Petitioner therefore could be asserting that the procedural bar rule would apply to those 1985 convictions. Petitioner could perhaps be attempting to assert that an additional presentation of such claims to the Oklahoma Courts would therefore be futile. Assuming this is the direction Petitioner intends for his argument, the Court is not convinced. Petitioner has a new and presumably timely challenge to the 1985 convictions through his currently filed 1999 challenge in Rogers County. This would permit the challenges to the 1985 convictions to be addressed on the merits. Nothing in Petitioner's arguments leads to the conclusion that the Oklahoma Supreme Court would automatically decline to address the 1999 challenges based on Petitioner's failure to originally appeal the 1985 convictions. Petitioner's

claims with regard to his 1999 conviction, through which he is challenging his 1985 convictions, remain unexhausted.

On December 2, 1999, Petitioner requested additional time to file a supplemental brief with regard to Petitioner's 1996 and 1999 convictions. Petitioner's Motion was granted by Order dated December 3, 1999. The Court noted, in the December 3, 1999 Order, that the record, as presented to the Court, indicated that Petitioner had not yet exhausted his claims.

Petitioner has provided no additional information with regard to the 1999 conviction that assists this Court in deciding the exhaustion issue. The most recent information this Court has with regard to Petitioner's pending challenge to his 1999 Rogers County conviction was provided by Respondent. Respondent noted that a hearing on Petitioner's application was set for May of 1999. The Court observes that due to the passage of time the current status of the pending Rogers County action may have changed. However, under any of the possible alternatives, the Magistrate Judge concludes that Petitioner's Petition is still unexhausted. If the trial court has entered an unfavorable decision on Petitioner's application, Petitioner is required to first appeal that decision to the Oklahoma Court of Criminal Appeals and obtain a final decision from that Court before proceeding in federal court. If the trial court decided against Petitioner, and Petitioner failed to timely appeal the decision of the trial court, Petitioner must first request an appeal out of time from the Oklahoma Court of

Criminal Appeals.^{3/} Finally, if the trial court decided in favor of Petitioner, proceeding in this Court given a favorable lower court ruling would, at this stage, be pointless.

The Magistrate Judge recommends that the District Court dismiss Petitioner's Petition due to his failure to exhaust his remedies in state court.

CONCLUSION

The United States Magistrate Judge recommends that Respondent's Motion to Dismiss Petitioner's Petition for a Writ of Habeas Corpus be **GRANTED**.

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 of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See Rule 8(b)(3) of the Rules Governing Section 2254 cases in the United States District Courts; 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). **THE FAILURE TO FILE WRITTEN OBJECTIONS TO THIS REPORT AND RECOMMENDATION MAY BAR THE PARTY FAILING TO OBJECT FROM APPEALING**

^{3/} An exception to the exhaustion rule is the "futility" exception. Petitioner could perhaps argue that presenting an appeal out of time to the Oklahoma Court of Criminal Appeals is "futile." This Court is unwilling to accept that premise under the facts of this case. First, assuming Petitioner did not timely appeal the trial court's decision, Petitioner may have reasons sufficient to present to the Oklahoma courts that would justify an appeal out of time. Those reasons would involve decisions that are best made by the Oklahoma Courts. Second, the Court is aware of cases in which the Oklahoma Court of Criminal Appeals has granted appeals out of time.

ANY OF THE FACTUAL OR LEGAL FINDINGS IN THIS REPORT AND RECOMMENDATION THAT ARE ULTIMATELY ACCEPTED OR ADOPTED BY THE DISTRICT COURT. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 6 day of January 2000.


Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 6th Day of January, 1999.
C. Pate Diaz, at Deputy Clerk.

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

F I L E D

JAN 4 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARY ELIZABETH VARNER,)

Plaintiff,)

vs.)

Case No. 99-CV-965E (E)

JOPLIN-JOHNSTON INDUSTRIAL)

SUPPLY d/b/a JOPLIN INDUSTRIAL)

SUPPLY, and AMERICAN AIRLINES)

Defendants.)

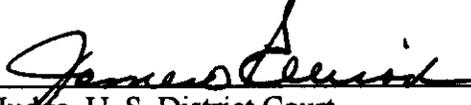
ENTERED ON DOCKET

DATE JAN 05 2000

ORDER ACKNOWLEDGING STIPULATION OF DISMISSAL OF PLAINTIFF'S
CLAIM UNDER THE FAMILY MEDICAL LEAVE ACT OF 1993, WITH PREJUDICE

Plaintiff, Mary Elizabeth Varner, and Defendants, Joplin-Johnston Industrial Supply and American Airlines, hereby stipulate under Rule 41 of the Federal Rules of Civil Procedure to dismissal of Plaintiff's claim under the Family Medical Leave Act of 1993, with prejudice, in the above entitled action. *IT IS SO ORDERED.*

DATED this 4TH day of January, 2000.



Judge, U. S. District Court

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

F I L E D

JAN 4 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOHN BUDZINSKY)
)
Plaintiff,)
)
vs.)
)
ELEMENTARY SCHOOL DISTRICT)
NO. 10, OTTAWA COUNTY, OKLAHOMA.)
)
Defendant.)

Case No. 99-CV-0328-E(J)

ENTERED ON DOCKET

DATE JAN 05 2000

ORDER

Now before the court is the Motion for Summary Judgment (Docket #14) of the defendant Elementary School District No. 10, Ottawa County, Oklahoma.

BACKGROUND

Plaintiff, John Budzinsky, was employed as Elementary Superintendent with the defendant, Elementary School District No. 10 of Ottawa County, from July 1993 to June 1997. Plaintiff was re-employed for the 1996-1997 school year, with a contract that provides, in pertinent part:

1. Term. District hereby agrees to and does employ the Superintendent for the 1996-1997 school year commencing on July 1, 1996 and ending on June 30, 1997.

* * *

11. District agrees to act upon the renewal or non-renewal of employment in March of each year. In the event of failure to act in March, employment will automatically renew.

The Board determined that there were reasons for non-renewal of the contract, and plaintiff's contract was allowed to expire on July 1, 1997. Subsequently, Plaintiff Budzinsky brought this action against Elementary School District No. 10 of Ottawa County for breach of contract and violation of his rights to due process. The School District seeks summary judgment, arguing that

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the facts do not support a breach of contract claim and that there was no violation of Plaintiff's due process rights.

ANALYSIS

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

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

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

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

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the

evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."

* * *

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

Id. at 1521.

Breach of Contract

Plaintiff alleges that the District breached the employment contract by failing to evaluate him in January and by failing to act on the non-renewal of employment in March, both of which were required by the terms of the employment contract. The parties agree that, in order to prevail on a breach of contract claim, Plaintiff must prove (1) that a contract was formed between the Defendant and himself, that (2) the Defendant breached the contract in a certain way, and (3) that the Plaintiff suffered damages as a direct result of the Defendant's breach. Young v. Thomas, 930 P.2d 836, 839 (Okla. Civ. App. 1996); Thompson v. Phillips Pipe Line Company, 200 Kan. 669, 438 P. 2d 146 (1968). The Court finds that, since the Board voted to allow evaluation at any time, failure to evaluate in January does not constitute a breach of contract. A question of fact, however, exists as to whether the board "act[ed] upon the renewal or non-renewal of employment in March," by voting on March 31 that reasons "may" exist for non-renewal or dismissal of Plaintiff. Summary Judgment on Plaintiff's breach of contract claim is denied.

Due Process

Plaintiff also claims that he was denied due process because of the bias of the School Board.

The Board argues that it is entitled to summary judgment on this issue because there is no evidence that any board member had a personal or financial stake in the matter being adjudicated, as required by Vehlharticky v. Independent School District No. 3, 846 F.Supp 941, 945 (W.D. Okla. 1993).

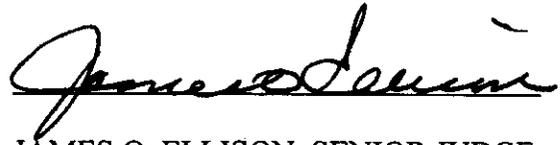
It is well settled that there is a presumption of honesty and integrity by school board members, and that their decisions are to be left in their hands, unless, in the totality of circumstances, there is an unconstitutionally intolerable risk of bias. Id. at 944. The Court in Hoerman v. Western Heights Board of Education, 913 P.2d 684 (Okla. App. 1995) held that bias could be demonstrated by a board member's personal or financial stake in the decision, or a board member's personal animosity toward the person affected. However, the Court in Velharticky held that anger was not sufficient to show bias, and that participation in investigation and fact finding prior to the hearing was not sufficient to demonstrate personal animosity. Id. at 945. On the other hand, in Staton v. Mayes, 552 F.2d 908 (10th cir. 1977), the Court found plaintiff was denied due process in light of firm public statements by members of the board, prior to the hearing on the evidence, to the effect that plaintiff "has got to go."

Plaintiff argues that bias is demonstrated by the testimony of fellow Board member Margaret Uhlmeier, and community support of plaintiff. Mrs Uhlmeier testified that Mr. Potts and Mr. South "prevented [Plaintiff] from doing his job the right way." Moreover, numerous members of the community spoke in support of Plaintiff at the Board meeting on January 31, 1997, and some requested the resignation of Mr. Potts and Mr. South, apparently in connection with their treatment of Plaintiff. However, none of this reaches the level of "personal animosity," or "unconstitutional bias," which was demonstrated in Staton. There is no evidence that any board member made a decision prior to the presentation of the evidence, or formed any opinion based on anything other than the evidence presented at the hearing. The court finds that the presumption of honesty and

integrity of the school board has not been rebutted as a matter of law.

The Defendants' Motion For Summary Judgment (Docket # 14) is denied with respect to the breach of contract claim and granted with respect to the due process claim.

IT IS SO ORDERED THIS 4th DAY OF JANUARY, 2000.

A handwritten signature in black ink, appearing to read "James O. Ellison", written in a cursive style.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

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

F I L E D

JAN 4 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

HOMEWARD BOUND, INC.)
et al.,)
)
 Plaintiffs,)
)
 vs.)
)
 THE HISSOM MEMORIAL CENTER,)
et al.,)
)
 Defendants.)

Case No. 85-C-437-E /

ENTERED ON DOCKET
DATE JAN 05 2000

ORDER & JUDGMENT

Plaintiffs' counsel, Bullock & Bullock, filed an Attorney Fee Application on December 10, 1999, for an award of attorney fees and expenses in accordance with the December 23, 1989 order and stipulation of the parties.

The Court has reviewed the application for fees, objection and the Stipulation of the parties.

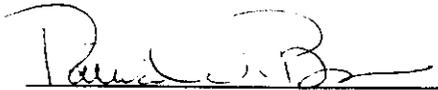
The Court hereby awards the firm Bullock & Bullock the agreed to attorney fees and expenses in the amount of \$53,824.29.

IT IS THEREFORE ORDERED that the Department of Human Services, the Oklahoma Health Care Authority and the Department of Rehabilitation Services are each jointly and severally liable for the payment to plaintiffs' counsel, Bullock & Bullock, for attorney fees and expenses in the amount of \$53,824.29, and a judgment in the amount of \$53,824.29 is hereby granted on this day.

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ORDERED this 4th day of Jan., 2000.

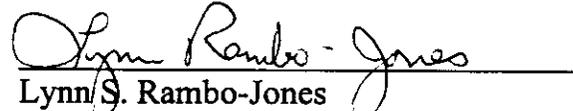

HONORABLE JAMES O. ELLISON
United States District Court


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ATTORNEYS FOR PLAINTIFFS

ATTORNEYS FOR DEFENDANTS

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JAN -5 2000

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

DWAYNE M. GARRETT,)
)
Plaintiff,)
)
v.)
)
STATE OF OKLAHOMA, et al.,)
)
Defendants.)

Case No. 99-CV-0577 K (E)

FILED ON DOCKET

JAN 5 2000 ✓

REPORT AND RECOMMENDATION

Defendants Carlotta Gordon and Joe L. White filed a Motion for Sanctions (Docket # 5) on September 29, 1999, after the District Court granted their Motion to Dismiss on September 20, 1999. By minute order dated November 22, 1999, the District Court referred defendant's Motion for Sanctions to the undersigned. See 28 U.S.C. § 636.

Defendant Gordon is plaintiff's ex-wife. Defendant White is her attorney. Plaintiff alleged that they violated his civil rights. Specifically, he claimed that Gordon tried to kill him. He also claimed that Gordon converted the title to a boat and trailer owned by plaintiff's parents to her own use and sold the property to pay her legal fees. Plaintiff alleged that White knowingly took money from Gordon as a result of the sale of stolen merchandise, therefore making him an accomplice to the fact. Plaintiff claimed that these actions violated his Fourth and Fourteenth Amendment rights.

In their Motion to Dismiss, defendants contended that plaintiff merely added different facts and defendants to a similar complaint filed by plaintiff's father which is currently pending in this district. Defendant argued that plaintiff failed to state a claim giving rise to federal subject matter jurisdiction and that plaintiff's allegations lack statutory or common law support. The District Court dismissed defendants Gordon and White because plaintiff failed to state a claim under 42 U.S.C. §

1983 upon which relief may be granted. The District Court found that plaintiff failed to allege any facts to show that Gordon and White were acting under color of state law when the alleged constitutional violations occurred. (Order, filed September 20, 1999, Docket # 4.)

Defendants now contend that sanctions are justified because, in addition to the reasons set forth in their Motion to Dismiss, plaintiff's claims are designed to harass and intimidate defendants. Defendants point out that plaintiff is presently under criminal investigation for a fraudulent real estate transfer, and Gordon is a witness in that investigation. She also has financial interests in the subject real estate transfer. Defendants also point out that plaintiff has filed another federal claim in this Court alleging that White has engaged in blackmail and mail fraud. (Case No. 99-CV-0716B). Defendants assert that plaintiff has been given notice of impending sanction on two prior occasions, but they have not provided the Court with evidence to support this assertion. Plaintiff has not filed any response to defendant's motion.

Rule 11 of the Federal Rules of Civil Procedure "imposes an affirmative duty on each attorney and each party, represented or *pro se*, to conduct reasonable inquiry into the validity and accuracy of a document before it is signed." Eisenberg v. University of New Mexico, 936 F.2d 1131,1134 (10th Cir. 1991); Fed. R. Civ. P. Rule 11, 28 U.S.C. The complaint filed in this matter evidences a general lack of knowledge about the elements of a civil rights violation and a specific lack of knowledge regarding the constitutional provisions allegedly violated. The dismissal of plaintiff's claim was based on his failure to state a claim because he failed to allege any facts to show that Gordon and White were acting under color of state law when the alleged constitutional violations occurred. Gordon and White have provided no proof that plaintiff's factual statements

were false. There is no indication in the dismissal that plaintiff made any factual misrepresentations; it merely reflects his lack of legal knowledge.

Thus, while it is true that the Court may sanction the conduct of unrepresented parties in an action who violate Rule 11, see Atkinson v. O'Neill, 867 F.2d 589, 590 (10th Cir. 1989); Stafford v. Commissioner of Internal Revenue, 805 F.2d 893, 894-95 (10th Cir. 1986), this is not a case where sanctions are warranted. However, plaintiff's cavalier approach to litigation indicates that he is treading on thin ice. As in Christensen v. Ward, 916 F. 1462 (10th Cir. 1990), "plaintiff is edging toward the line where sanctions are warranted for frivolous, insupportable suits." Id. at 1479.

By recommending denial of defendant's motion for sanctions, the undersigned does not condone plaintiff's prosecution of his complaint. In this or any other case filed by plaintiff in this Court, if it becomes apparent that his claims have been "presented for any improper purpose, such as to harass" Fed. R. Civ. P. 11, the undersigned will not hesitate to recommend sanctions. Plaintiff is strongly cautioned against such abuse of the judicial system.

RECOMMENDATION

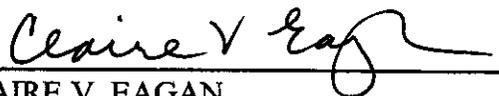
Based upon the foregoing, the undersigned recommends that the District Court **DENY** the Motion for Sanctions (Docket # 5) filed by defendants Carlotta Gordon and Joe L. White on September 29, 1999.

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 5th day of January, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

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

5th Day of January, 192000.

C. Rodillo, Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

JAN -5 2000

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

JOHNNY D. WALKER,)
SSN: 430-88-9610,)

Plaintiff,)

v.)

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

Defendant.)

Case No. 97-CV-1120-EA

ENTERED ON DOCKET

DATE ~~JAN 05 2000~~

ORDER

Claimant, Johnny D. Walker, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of the Social Security Administration (“Commissioner”) denying claimant’s application for disability benefits under the Social Security Act. In accordance with 28 U.S.C. § 636(c)(1) and (3), the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this order will be directly to the Tenth Circuit Court of Appeals. Claimant appeals the decision of the ALJ and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner’s decision.

Social Security Law and Standards of Review

Disability under the Social Security Act is defined as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment” 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his “physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any

other kind of substantial gainful work in the national economy” Id., § 423(d)(2)(A). Social Security regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. §§ 404.1520, 416.920.¹

Judicial review of the Commissioner’s determination is limited in scope by 42 U.S.C. § 405(g). This Court’s review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. Hawkins v. Chater, 113 F.3d 1162, 1164 (10th Cir. 1997) (citation omitted). The term substantial evidence has been interpreted by the U.S. Supreme Court to require “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The Court may not reweigh the evidence nor substitute its discretion for that of the agency. Casias v. Secretary of Health & Human Servs., 933 F.2d 799, 800 (10th Cir. 1991). Nevertheless, the court must review the record as a whole, and “the substantiality of the evidence

¹ Step one requires claimant to establish that he is not engaged in substantial gainful activity, as defined by 20 C.F.R. §§ 404.1510, 416.910. Step two requires that claimant establish that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. If claimant is engaged in substantial gainful activity (step one) or if claimant’s impairment is not medically severe (step two), disability benefits are denied. At step three, claimant’s impairment is compared with certain impairments listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1. A claimant suffering from a listed impairment or impairments “medically equivalent” to a listed impairment is determined to be disabled without further inquiry. If not, the evaluation proceeds to step four, where claimant must establish that he does not retain the residual functional capacity (RFC) to perform his past relevant work. If claimant’s step four burden is met, the burden shifts to the Commissioner to establish at step five that work exists in significant numbers in the national economy which claimant -- taking into account his age, education, work experience, and RFC -- can perform. Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work. See generally Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

must take into account whatever in the record fairly detracts from its weight.” Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); see also Casias, 933 F.2d at 800-01.

Procedural History

On May 13, 1994, claimant protectively filed for disability benefits under Title II (42 U.S.C. § 401 et seq.), and for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.). Claimant’s application for benefits was denied in its entirety initially and on reconsideration. A hearing before Administrative Law Judge Richard J. Kallsnick (ALJ) was held December 18 1995, in Miami, Oklahoma. By decision dated January 10, 1996, the ALJ found that claimant was not disabled at any time through the date of the decision. On October 17, 1997, the Appeals Council denied claimant’s request for review of the ALJ’s findings. Thus, the decision of the ALJ represents the Commissioner’s final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

Claimant’s Background

Claimant was born on May 7, 1950, and was 45 years old at the time of the administrative hearing in this matter. He has a fifth grade education, and past relevant work experience as a sawyer, logger, and log hauler. Claimant alleges an inability to work beginning January 1, 1994, due to chronic obstructive pulmonary disease (COPD), bronchitis, degenerative arthritis, and back and shoulder pain. The ALJ noted that claimant based his applications on inability to work due to arthritis and chronic bronchitis, and that claimant elected to appear and testify at hearing without the assistance of an attorney or other representative. (R. 19)

Decision of the Administrative Law Judge

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) to perform a full range of medium work diminished by an inability to work in exposure to environmental irritants due to COPD and bronchitis, or to work around unprotected heights, dangerous machinery, or open flames due to vaso-depressor syndrome (a set of symptoms having the effect of lowering the blood pressure through reduction in peripheral resistance) and cough syncope (brief loss of consciousness associated with vigorous and explosive paroxysms of coughing). The ALJ determined that claimant could not perform his past relevant work, but there were other jobs existing in significant numbers in the national and regional economies that he could perform, based on his RFC, age, education, and work experience. The ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

Review

Claimant asserts as error that the ALJ failed to:

- (1) cite specific, legitimate reasons for rejecting the treating physician's rule on the issue of disability;
- (2) properly evaluate claimant's mental impairments;
- (3) properly evaluate claimant's complaints of pain and other symptoms according to Luna and 20 C.F.R. § 404.1529; and
- (4) obtain a vocational expert's testimony about the impact that claimant's nonexertional impairments have on claimant's RFC, and, at Step 5 in the sequential evaluation process, the potential jobs that claimant might be able to perform.

Treating Physician's Opinion

A treating physician may offer an opinion which reflects a judgment about the nature and severity of the claimant's impairments, including the claimant's symptoms, diagnosis and prognosis, what claimant can do despite the claimant's impairment, and any physical or mental restrictions. 20 C.F.R. §§ 404.1527(a)(2), 416.927(a)(2). The Commissioner will give controlling weight to that type of opinion if it is well-supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record. Id. §§ 404.1527(d)(2), 416.927(d)(2). A treating physician may also proffer an opinion that a claimant is totally disabled. However, such an opinion is not dispositive because final responsibility for determining the ultimate issue of disability is reserved to the Commissioner. Id. §§ 404.1527(e)(2), 416.927(e)(2).

Tenth Circuit law requires that substantial weight must be given to the opinion of a treating physician unless good cause is shown for rejecting it. Goatcher v. United States Dep't. of Health & Human Servs., 52 F.3d 288, 289-90 (10th Cir. 1995) (citations omitted). A treating physician's report may be rejected if it is brief, conclusory, and unsupported by medical evidence. Bernal v. Bowen, 851 F.2d 297 (10th Cir. 1988); see also Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1029 (10th Cir. 1994). If the treating physician's opinion is to be disregarded, specific, legitimate reasons for doing so must be set forth. Eggleston v. Bowen, 851 F.2d 1244, 1246-47 (10th Cir. 1988).

Claimant's treating physician was Terry Hoyt, D.O. He treated claimant regularly from September 19, 1994 (R. 124, 153) through at least August 19, 1997 (R. 141), the date of the latest

medical records from Dr. Hoyt in the record.² On January 1, 1995, he submitted a statement indicating that claimant was continuously totally disabled (R. 112), and, on December 7, 1995, he opined that claimant's "condition prohibits him from maintaining gainful employment." (R. 124, 153) As claimant asserts, Dr. Hoyt's progress notes are replete with diagnoses of COPD, vaso-depressor syndrome, cough syncope, bronchitis, chronic fatigue, borderline hypothyroidism, anxiety disorder, depression, reactive airway disease, chest wall syndrome, thoracic strain with somatic dysfunction, osteoarthritis, and left shoulder strain. (R. 112, 118 - 22, 126, 128, 130, 134, 141- 45, 147, 148, 152, 154). Dr. Hoyt tested claimant's breathing (R. 123) and his blood (R. 136-38).

Dr. Hoyt also prescribed numerous medications in an effort to provide claimant some relief, including Vanceril (R. 118, 119, 134, 140), Ventoline (R.121, 130, 134, 140), Atrovent (R. 128, 140), Zoloft (R. 119, 130, 131, 133, 140 - 43, 145, 148), Doxycycline (R. 121-22, 128, 130, 142, 145, 154), Tessalon (R. 120-21), Nalex (R. 122) Hydroxyzine (R. 145, 148), Daypro (R. 122), Darvocet N-100 (R. 142, 149, 152), Propacet-100 (R. 144), Norflex (R. 128, 140), Parafon Forte (R. 144, 146, 149), quinine (R. 131), Salicylate (R. 132, 140), Serevent, Flovent, Lamisil (R. 141-42), and drugs for various other ailments. He completed a handicapped parking privilege application for claimant. (R. 129) He advised claimant to stop smoking (R. 122), limit his alcohol intake (R. 126), and to begin a walking program. (R. 126)

The ALJ rejected Dr. Hoyt's opinion. The ALJ stated that there is no evidence of claimant's COPD and bronchitis with vasodepressor syndrome and cough syncope "other than the claimant's allegations, and no one has observed them other than the spouse." (R. 21) He also states that

² Dr. Hoyt's records of treatment from December 4, 1995 through August 19, 1997 were not before the ALJ at the time of his decision, but were submitted to the Appeals Council. (R. 4-6, 141-54)

“[t]here is no evidence that these occur frequently or for extended periods.” (Id.) It is true that no one has observed claimant’s vasodepressor syndrome or cough syncope other than his spouse, but the ALJ himself found that claimant had COPD and bronchitis, albeit not severe enough to meet a listed impairment. (R. 20) The ALJ mentioned that a pulmonary function test indicates that claimant’s FEV-1 was 3.8 (predicted 4.19). As defendant points out, plaintiff’s FEV-1 has to equal or be less than 1.65 to meet a listed impairment. See 20 C.F.R. Pt. 404, Subpt. P., App. 1, § 3.02, Table 1. However, the fact that claimant’s impairment does not meet a listed impairment does not mean that it is not disabling at subsequent steps in the sequential evaluation process.

The ALJ mistakenly asserted that Dr. Hoyt’s records fail to mention blackouts or other syncope until his letter of December 7, 1995. (R. 21). In fact, Dr. Hoyt mentioned blackouts and loss of consciousness or “seizures” on February 21, 1995, and March 1, 1995. (R. 119-20). The consultative examiner diagnosed claimant as having “chronic bronchitis from cigarettes.” (R. 98). As claimant points out, both the consultative examiner and the treating physician recorded abnormal breath sounds by claimant. (Cl. Br., Docket # 9, at 3.) Defendant points out several notations in the record in an effort to undermine Dr. Hoyt’s opinion that claimant’s COPD is disabling, but the ALJ himself did not set forth specific, legitimate reasons for rejecting Dr. Hoyt’s opinion.

In addition, the ALJ sets forth no evidence indicating that claimant can perform the requirements of medium work. Medium work requires maximum lifting of 50 pounds and frequent lifting of up to 25 pounds. 20 C.F.R. §§ 404.1567, 416.967. Most medium jobs require the worker to stand or walk most of the time. Social Security Ruling 83-14, 1983 WL 31254, at *5. A full range of medium work requires standing or walking, off and on, for a total of approximately 6 hours

in an 8-hour workday. Sitting may occur intermittently during the remaining time. It also requires frequent bending and stooping. Social Security Ruling 83-10, 1983 WL 31251, at *6.

Dr. Hoyt assessed claimant's ability to perform work-related duties. (R. 150-51) He opined that claimant could not sit or stand for more than 4 hours in an 8-hour work day, and no more than 2 hours at one time; that he could walk for no more than 1 hour in an 8-hour work day, and no more than 10-30 minutes at one time. He indicated that claimant could occasionally lift up to 10 lbs., infrequently lift up to 20 lbs., and never lift more than 20 lbs. In his opinion, claimant could occasionally carry up to 20 lbs., and never carry more than 20 lbs. (R. 150) Although claimant's use of his feet and hands for repetitive movements was not limited, claimant had no ability to bend, squat, crawl, climb or reach. (R. 151)³

The ALJ acknowledges that claimant saw Dr. Bamberl in late 1993 and early 1994 for bursitis in claimant's shoulder, but he incorrectly states that claimant has consistently refused x-rays. It is true that claimant told the consultative examiner in August 1994 that he would "rather not know what['s] wrong with me," (R. 94), but Dr. Hoyt indicated in January 1995 that claimant's COPD was confirmed by x-ray, and claimant permitted a doctor in Oolagah to take x-rays in June 1995 to confirm that his ribs were not fractured. (R. 131) The ALJ characterized the consultative examiner's range of motion findings as a determination that claimant had full passive range of motion, negative straight-leg-raising, "full flexion to the toes, adequate toe-heel walk, and squat/rise without

³ Although Dr. Hoyt noted that claimant had no restrictions on activities involving unprotected heights, being around moving machinery, exposure to marked changes in temperature and humidity, exposure to dust, fumes and gases, it appears from his comments to support those statements and his findings as to the rest of the form that he meant a *total* restriction of these activities. (R. 151). The outdated form is confusing because, prior to the question regarding the restriction of activities, it asks the person completing the form to assess claimant's capabilities, and follows with a question as to claimant's inabilities.

problems. His hands were tender to compression and there were multiple trigger points, but he had a full range of motion and no neurological deficits.” (R. 21) The consultative examiner also indicated that claimant’s shoulders were limited to 90 degrees under *active* motion, and his passive range of motion was achieved *with pain and tenderness*. (R. 98-102)

Although apparently Dr. Hoyt’s report was not before the ALJ when he made his RFC determination, there is no evidence in the record to definitively refute Dr. Hoyt’s findings that claimant could not lift or carry more than 20 pounds. Nor is there any evidence to refute his findings that claimant cannot sit or stand for more than 4 hours or walk for more than 1 hour in an 8-hour workday. The ALJ failed to show that claimant could perform medium work. The Appeals Council failed to show good cause for rejecting Dr. Hoyt’s opinion regarding claimant’s functional abilities.

Evaluation of Mental Impairments

The Tenth Circuit requires an ALJ to follow the procedure in 20 C.F.R. §§ 404.1520a, 416.920a when he or she evaluates mental impairments that allegedly prevent a claimant from working. See Winfrey v. Chater, 92 F.3d 1017, 1024 (10th Cir. 1996); Cruse v. United States Dep’t of Health & Human Servs., 49 F.3d 614, 617 (10th Cir. 1994). The procedure first requires the ALJ to determine the presence or absence of certain medical findings pertaining to claimant’s ability to work. Next, the ALJ is to evaluate the degree of functional loss resulting from claimant’s impairment. The ALJ must then complete a Psychiatric Review Technique (“PRT”) form and attach it to a written decision in which he or she discusses the evidence upon which the conclusions expressed on the form are based. Winfrey, 92 F.3d at 1024; Cruse, 49 F.3d at 617-18; see also Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994).

The ALJ failed to follow this procedure. The ALJ is not required to follow the regulatory procedures for evaluating mental impairments where the record contains no evidence of a mental impairment that prevents a claimant from working. Andrade v. Secretary of Health & Human Services, 985 F.2d 1045, 1048 (10th Cir. 1993). Claimant did not allege that anxiety or depression kept him from working when he filed the paperwork for disability and for reconsideration. However, Dr. Hoyt diagnosed “generalized anxiety disorder” as early as August 30, 1995 (R. 128), and the ALJ questioned claimant about it. Although claimant did not completely understand what the word “anxiety” meant, he testified that having friends around or “a crowd” causes him to have coughing spells (R. 175-76, 205-06), and he rarely leaves home. (R. 179, 208)

After the ALJ’s decision, Dr. Hoyt continued to diagnose claimant as having “generalized anxiety disorder,” as set forth in his treatment notes of July 11, 1996 (R. 148), August 14, 1996 (R. 147), September 24, 1996 (Id.), and December 30, 1996 (R. 145). He diagnoses claimant as having “chronic anxiety depression” on February 3, 1997. (R. 144) He also prescribed Zoloft, Calmplex, and Hydroxyzine for claimant’s anxiety and depression. (R. 148) Although the ALJ did not have these records before him when he made his decision in January 1996, claimant has sufficiently raised the issue. See Hawkins v. Chater, 113 F.3d 1162, 1167 (10th Cir. 1997). The Appeals Council had these records, and failed to adequately consider them. Claimant has not failed to present “some objective evidence in the record suggesting the existence of a condition which could have a material impact on the disability decision requiring further investigation.” Id. The ALJ and the Appeals Council failed to properly assess the nature and extent of claimant’s mental limitations.

Pain/Credibility Analysis

The framework for the proper analysis of evidence of allegedly disabling pain was set forth by the Tenth Circuit in Luna v. Bowen, 834 F.2d 161, 163-64 (10th Cir. 1987). That analysis requires consideration of:

(1) whether Claimant established a pain-producing impairment by objective medical evidence; (2) if so, whether there is a “loose nexus” between the proven impairment and the Claimant’s subjective allegations of pain; and (3) if so, whether, considering all the evidence, both objective and subjective, Claimant’s pain is in fact disabling.

Musgrave v. Sullivan, 966 F.2d 1371, 1376 (10th Cir. 1992); accord Kepler v. Chater, 68 F.3d 387, 390 (10th Cir. 1995). The factors that an ALJ should consider when determining the credibility of subjective complaints of pain include, but are not limited to, “the levels of medication and their effectiveness, the extensiveness of attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.” Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991) (quoting Huston v. Bowen, 838 F.2d 1125, 1132 (10th Cir. 1988)); accord Luna, 834 F.2d at 165-66 (citations omitted).

The ALJ considered claimant’s subjective complaints of disabling pain. He specifically referenced the parameters set forth in and the criteria set forth in Luna, 20 C.F.R. §§ 404.1529, 416.929, and SSR 88-13.⁴ He analyzed many, but not all, of the relevant factors to determine the weight to be given claimant’s subjective allegations of pain, and, as required by Kepler, the ALJ

⁴ SSR 88-13 was superseded by SSR 95-5p, and SSR 95-5p was superseded by SSR 96-7p. However, the various factors an ALJ may consider in evaluating a claimant’s allegations of pain have not changed significantly and generally coincide with those set forth in 20 C.F.R. §§ 404.1529, 416.929.

made express findings as to the credibility of claimant's objective complaints of disabling pain, with an explanation of why specific evidence led to the conclusion that claimant's subjective complaints were not fully credible. (R. 22-23) Thus, he applied the correct legal standard. Nonetheless, his analysis is not supported by substantial evidence.

The ALJ primarily focused on claimant's smoking and drinking habits in his analysis of claimant's pain, and, in the process, misstated the record. He indicates that claimant has consistently refused x-rays and that claimant "has not taken anything much stronger than aspirin (Salicylate 750 mg) to alleviate the pain." (R. 23). As noted above, claimant did have x-rays taken, and the record indicates that claimant took many medications stronger than aspirin, but many of those had various undesirable side effects or did not provide relief. (See R. 115, 122, 128, 131, 140-42, 144-46, 149, 152.) The ALJ did not analyze claimant's daily activities at all.

Credibility determinations made by an ALJ are generally entitled to great deference. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). "Credibility determinations are peculiarly the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence." Diaz v. Secretary of Health and Human Servs., 898 F.2d 774, 777 (10th Cir. 1990); Social Security Ruling 82-59, 1982 WL 31384. Here, the ALJ's credibility determination was not supported by substantial evidence. The ALJ emphasized claimant's failure to stop smoking and the effect of claimant's binge drinking on his level of comfort. Failure to follow prescribed treatment is a legitimate consideration in evaluating the severity of an alleged impairment. Decker v. Chater, 86 F.3d 953, 955 (10th Cir. 1996). However, that consideration tends to overshadow other relevant factors in the ALJ's analysis in this instance. While it may be difficult to sympathize with or to award benefits to an individual who will

not help himself, a decision-maker should not permit that factor to cloud his judgment or taint his analysis.

Vocational Expert Testimony

Finally, claimant faults the ALJ for not calling a vocational expert to testify at the hearing. Claimant maintains that the ALJ improperly applied the Medical-Vocational Guidelines of 20 C.F.R. Pt. 404, Subpt. P, App. 2 (the "Grids"). The ALJ's opinion, however, does not indicate that he relied exclusively upon the Grids. He clearly noted that the presence of nonexertional limitations, in the form of the environmental restrictions on claimant's RFC, precluded strict application of the Rules 203.25 and 203.26 of the Grids. (R. 24) He concluded that there are jobs existing in significant numbers in the national economy which claimant can perform, although he did not cite examples of jobs or occupations the claimant can do, nor did he indicate the number of such jobs available in the national or regional economies.

If a claimant's RFC does not meet the definition of one of the exertional ranges, then the adjudicator is to "consider the extent of any erosion of the occupational base and assess its significance. . . . Where the extent of the erosion of the occupational base is not clear, the adjudicator will need to consult a vocational source." Talbot v. Heckler, 814 F.2d 1456, 1460-61 (10th Cir. 1987) (quoting Social Security Ruling 83-12, 1983 WL 31253, at *2). The ALJ determined that the environmental limitations "would not ordinarily erode the full occupational range to any great extent." (R. 25) Arguably, the ALJ did not back his "finding of negligible effect with the evidence to substantiate it." See Talbot, 814 F.2d at 1465. However, the Court is not obligated to address the contention that vocational testimony was required because the record does not support the ALJ's finding that claimant's exertional capacities allowed him to perform a full range of medium work.

See id. The ALJ's reference to a vocational source or expert would have been helpful on review, and Social Security Rulings encourage the use of a source or expert,⁵ but the ALJ was not necessarily required to consult one.

Conclusion

The decision of the Commissioner is not supported by substantial evidence and the correct legal standards were not applied. The conclusion reached by the ALJ may ultimately turn out to be correct, and nothing in this order is to be taken to suggest that the Court has presently concluded otherwise. The decision of the Commissioner is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

DATED this 5th day of January, 2000.



CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

⁵ See Social Security Ruling 85-15, 1985 WL 56857, at *8; Social Security Ruling 83-14, 1983 WL 31254, at *4; Social Security Ruling 83-12, 1983 WL 31253, at *2; see also 20 C.F.R. §§ 404.1566, 416.966.

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

OLSON MEDICAL IMAGING, INC.,)
)
 Plaintiff,)
)
 v.)
)
 INTEGRIS HEALTH, INC. d/b/a)
 Grove General Hospital,)
)
 Defendant.)

ENTERED ON DOCKET

DATE JAN 5 2000

Case No. 98-CV-918-K (E) ✓

F I L E D *cl*

JAN 04 2000

ADMINISTRATIVE CLOSING ORDER

Phil Lombardi, Clerk
U.S. DISTRICT COURT

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

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

ORDERED THIS 4/13 DAY OF JANUARY, 2000.

Terry C. Kern

TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

21

MT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JAN 4 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VIDEO COMMUNICATION, INC.,)
)
Plaintiff,)
)
vs.)
)
CINEMA PROPERTIES, INC., GERRY)
GRIGGS, NORM REVIS, ROBERT)
THURMOND and THEODORE F.)
POUND, III.,)
)
Defendants.)

Case No. 99-CV-034-H (J) ✓

ENTERED ON DOCKET
JAN 5 2000
DATE _____

STIPULATION OF DISMISSAL

COME NOW the Plaintiff Video Communications, Inc. and the Defendants Cinema Properties, Inc., Gerry Griggs, Norm Revis, Robert Thurmond and Theodore F. Pound, III, pursuant to Rule 41(a)(ii), Federal Rules of Civil Procedure and hereby dismiss the above styled litigation with prejudice, each party to pay their own attorneys fees and costs.

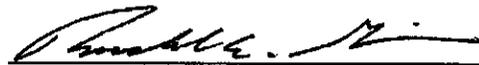
Respectfully submitted,



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Cinema Properties, Inc.
Theodore F. Pound, III
Robert H. Thurmond

759-38.063:lm

WTT

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

FILED
JAN 4 2000
Phil Lombardi, Clerk
U.S. DISTRICT COURT

JAMES AND JACQUELINE JONNES,)
)
Plaintiffs,)
)
vs.)
)
AMERICAN AIRLINES, INC. a foreign)
corporation,)
)
Defendant.)

Case No. 99-CV-0238-BU(J) ✓
ENTERED ON DOCKET
DATE JAN 5 2000

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Fed.R.Civ.P. 41(a)(1), Plaintiffs James and Jacqueline Jonnes and Defendant American Airlines, Inc., as the Administrator for The Group Life and Health Benefits Plan for Employees of Participating AMR Corporation Subsidiaries, by and through their attorneys of record, hereby jointly stipulate to the dismissal of the above-styled action, with prejudice, each party to bear their own costs and attorneys' fees incurred herein.

HUMPHREYS WALLACE HUMPHREYS

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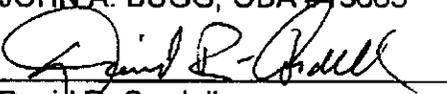
ATTORNEYS FOR PLAINTIFFS

81

cts

DAVID R. CORDELL, OBA #11272
JOHN A. BUGG, OBA #13665

By:


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Attorneys for Defendant,
AMERICAN AIRLINES, INC.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
JAN 05 2000

GEORGE F. FORTNA,
SSN: 553-23-6543,

PLAINTIFF,

vs.

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

DEFENDANT.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE No. 99-CV-129-M ✓

ENTERED ON DOCKET

DATE JAN 5 2000

ORDER

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

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

¹ Plaintiff's July 13, 1995 (protective filing date of June 2, 1995) applications for benefits were denied initially and upon reconsideration. A hearing before an Administrative Law Judge (ALJ) was held April 23, 1997. By decision dated June 11, 1997, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on January 7, 1999. The action of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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

Plaintiff was born February 25, 1955 and claims to have been unable to work since June 1, 1995 due to mental problems, back pain, reduced strength in his left hand and hip problems. [R. 27, 32-36]. The ALJ determined that Plaintiff has severe impairments consisting of "missing tip of middle finger of left hand and a personality disorder" but that he retains the residual functional capacity (RFC) to perform a full range of light work subject to only simple repetitive work with no dealing with the public. [R. 13]. He determined that Plaintiff is precluded from performing his past relevant work but that there are a significant number of jobs in the economy that Plaintiff can perform with this RFC and found, therefore, that Plaintiff is not disabled as defined by the Social Security Act. The case was thus decided at step 5 of the five-step evaluative sequence for determining whether a claimant is disabled. See *Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts the Psychiatric Review Technique form (PRT) completed by the ALJ is not based upon substantial evidence.² He also claims the ALJ failed to present a proper hypothetical to the vocational expert (VE). The court addresses only the first of Plaintiff's allegations of error, as it requires reversal of this case and remand to the Commissioner for reconsideration.

The Tenth Circuit has ruled that "there must be competent evidence in the record to support the conclusion recorded on the [PRT] form and the ALJ must discuss in his opinion the evidence he considered in reaching the conclusions expressed on the form." *Washington v. Shalala*, 37 F.3d 1437, 1442 (10th Cir. 1994) (quoting *Woody v. Secretary of Health & Human Servs.*, 859 F.2d 1156, 1159 (3rd Cir. 1988)). Plaintiff contends the ALJ failed to adequately discuss the evidence he considered in reaching the conclusions he expressed on the PRT.

Concerning his conclusions on the PRT, the ALJ wrote:

The medical evidence shows that the claimant has a paranoid personality disorder which limits his ability to function in a workplace setting. The evaluation of the claimant's mental status is delineated on the attached Psychiatric Review Technique Form which is appended to this opinion and is part of this opinion. With respect to the "B" criteria the Administrative Law Judge finds as follows:

² The procedure for evaluation of a mental impairment is outlined at 20 C.F.R. § 1520a. If a claimant has a mental impairment, the degree of functional loss resulting from the impairment must be rated in four areas: (1) activities of daily living, (2) social functioning, (3) concentration, persistence or pace; and (4) deterioration or decompensation in work or work-like settings. 20 C.F.R. § 1520a(b)(3). If each of the four areas is rated as having an impact of "none", "never", "slight", or "seldom", the conclusion is that the impairment is not severe, unless the evidence otherwise indicates there is significant limitation of the claimant's mental ability to do basic work activities. See 20 C.F.R. § 1520a(c)(1). An ALJ must attach to his decision a PRT form detailing his assessment of the claimant's level of mental impairment. 20 C.F.R. § 1520a(d).

That the claimant has a "slight" degree of limitation with respect to restriction of activities of daily living. The claimant's testimony shows that he completes his activities of daily living without any compromise.

That the claimant has a "moderate" degree of limitation in maintaining social functioning. The claimant is unable to function normally with other people and needs work which does not place him in contact with the general public.

That the claimant has a "seldom" degree of limitation with respect to a deficiency of concentration, persistence, or pace. There is no objectively demonstrated diminution of the claimant's concentration.

That the claimant has a "once or twice" degree of limitation with respect to episodes of deterioration or decompensation in work or work-like settings. The evidence shows that the claimant has experienced one or two episodes of deterioration or decompensation in work or work-like settings.

[R. 13]. Plaintiff complains these statements are conclusory because the ALJ did not point to specific points in the record to support his findings. Although the ALJ is required to consider all the evidence, he is not required to discuss every piece of evidence. *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996). However, in light of this court's reversal of this case, the ALJ should take the opportunity to relate the evidence in a less perfunctory manner to his conclusions on the PRT.

In the "Rationale" portion of his decision, the ALJ devoted a paragraph to the objective evidence contained in the record, the vast majority of which summarized the diagnoses reached by SSA consulting physicians. [R. 11]. As to Plaintiff's mental treatment records, the ALJ said:

The OU Adult Medical clinic records show that the claimant was treated for anxiety, a depressed mood, and anger. He was referred to a psychiatric clinic, however, there is no record that he ever went to the clinic.

[R. 11].

The administrative record indicates otherwise. Medical records from the Tulsa Regional Behavioral Health Services, Outpatient Department, were provided to the Appeals Council on November 4, 1998, over a year after the decision of the ALJ was entered. [R. 2a, 189-209]. These records reveal that Plaintiff did indeed report for psychiatric treatment, and received such treatment on a steady basis from November 27, 1995 through August 1996. [R. 192-206]. The ALJ's assessment of Plaintiff's RFC was based upon the medical evidence he had before him, which did not include the treatment records from Tulsa Regional Behavioral Health Services. The Appeals Council considered the records submitted after the ALJ's decision was entered but concluded, on January 7, 1999, that the additional evidence does not provide "a basis for changing the [ALJ's] decision." [R. 3].

Social Security regulations specify that:

If new and material evidence is submitted, the Appeals Council shall consider the additional evidence only where it relates to the period on or before the date of the administrative law judge hearing decision. The Appeals Council shall evaluate the entire record including the new and material evidence submitted if it relates to the period on or before the date of the administrative law judge hearing decision. It will then review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently of record.

20 C.F.R. § 404.970 (b). Where, as here, the Appeals Council denies review, the ALJ's decision becomes the Commissioner's final decision. See 20 C.F.R. § 404.981. The decision is reviewed for substantial evidence, based on "the record viewed as a whole." *O'Dell v. Shalala*, 44 F.3d 855, 858 (10th Cir. 1994) (quoting *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994)). In *O'Dell* the Tenth Circuit held that new evidence submitted to the Appeals Council pursuant to 20 C.F.R. § 404.970(b) becomes part of the administrative record to be considered by the court when evaluating the Commissioner's decision for substantial evidence. *O'Dell*, 44 F.3d at 859. The Court must, therefore, include the medical records submitted to the Appeals Council in its review of the ALJ's decision. Pursuant to *O'Dell* this court is required to review the newly submitted treatment records and to determine whether, considering even the new evidence, the ALJ's decision is supported by substantial evidence.

This Court has previously voiced its reluctance to speculate as to how the ALJ would have weighed these records had they been available for the original hearing. See *Stephens v. Callahan*, 971 F.Supp. 1388 (N.D. Okla. 1997). Here, as there, the Court is constrained to follow the dictates of *O'Dell*. Because the Appeals Council did not provide any analysis of the new evidence or state reasons for denial of review, the Court is forced into the role of fact finder. This being so, the Court finds the evidence is material to the determination of disability and there is a reasonable possibility the outcome of the claim might be changed in light of Plaintiff's consistent low GAF scores during the time period covered by the new medical records and his suicide

attempt in June 1996. [R. 184-188]. Furthermore, the new evidence conflicts with the ALJ's statement that Plaintiff did not follow up on his treating physician's referral to psychiatric treatment.

Therefore, the Court cannot say that the decision is supported by substantial evidence in the record as a whole. Upon remand, the Commissioner is encouraged to more thoroughly discuss the rationale behind the findings he records on the PRT form and specify the evidence upon which the conclusions expressed on the form are based. *Winfrey*, 92 F.3d at 1024; *Cruse*, 49 F.3d at 617-18, *Washington*, 37 F.3d at 1442. The case is remanded for reconsideration of the evidence. In doing so, the Court does not dictate the result. Rather, remand is ordered to assure that a proper analysis is performed and the correct legal standards are invoked in reaching a decision based on the facts of the case. *Kepler*, at 391.

It is therefore the order of the Court that the Commissioner's decision is REVERSED and REMANDED for further proceedings consistent with this Order.

Dated this 5th day of JAN., 2000.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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

FILED

JAN 05 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

GEORGE F. FORTNA,
SSN: 553-23-6543,

Plaintiff,

v.

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

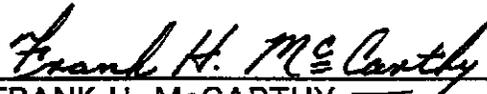
Defendant.

CASE NO. 99-CV-129-M

ENTERED ON DOCKET
DATE JAN 5 2000

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 5th day of JAN., 2000.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

MT

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

F I L E D
JAN 5 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DIANA S. BOYD,)
)
Plaintiff,)
)
vs.)
)
MIKE K. BOYD,)
)
Defendant.)

Case No. 99-CV-0429 B (M) ✓

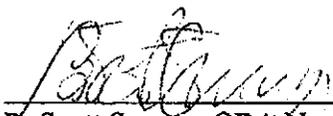
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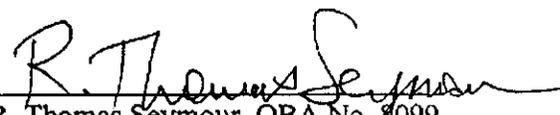
STIPULATION OF DISMISSAL WITH PREJUDICE

It is hereby stipulated by the parties that the above-entitled action, including all claims and counterclaims asserted therein, may be dismissed with prejudice, each party bearing their own costs and attorneys' fees incurred in the matter.

DATED this 4th day of ~~December~~ ^{January} 2000, 1999.

APPROVED BY:


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IMEL & TETRICK
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Attorneys for Mike Boyd

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CLJ

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

BAPTIST HEALTHCARE OF)
OKLAHOMA, INC., d/b/a,)
INTEGRIS GROVE GENERAL HOSPITAL,)
)
Plaintiff,)
)
vs.)
)
OLSON MEDICAL IMAGING, INC.,)
a professional corporation)
)
Defendant.)

ENTERED ON DOCKET
DATE JAN 05 2000

Case No. 99-CV-907-K(J) ✓

FILED

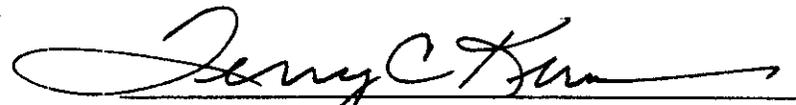
JAN 04 2000 *AS*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITHOUT PREJUDICE

NOW on this 4th day of JANUARY, 2000, this matter comes on before the undersigned
Judge of the United States District Court for the Northern District of Oklahoma upon Grove
Hospital's Application for an Order of Dismissal without Prejudice. The Court finds good cause
exists for a Dismissal without Prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-captioned
case is dismissed without prejudice.



THE HONORABLE TERRY C. KERN
JUDGE OF THE UNITED DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PREPARED BY:

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Eric G. Lair OBA # 16513
THE PAUL LAW FIRM
Nine East Fourth Street, Ste. 400
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Tele: (918) 584-2583

**ATTORNEYS FOR DEFENDANT
BAPTIST HEALTHCARE OF
OKLAHOMA, INC. d/b/a
INTEGRIS GROVE GENERAL HOSPITAL**

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

DWAYNE GARRETT,

Plaintiff,

v.

STATE OF OKLAHOMA, JERRY
MADDOX, PAUL SIEGLER, DIANN
YOUNG, SHELLEY CLEMENS,
CURTIS DeLAPP, MARGARET
SNOW, TOM JANER, CITY OF
BARTLESVILLE,

Defendants.

ENTERED ON DOCKET

DATE JAN 05 2000

Case No. 99-CV-742-K (E) ✓

F I L E D

JAN 04 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Defendant Tom Janer's motion to dismiss Plaintiff's complaint against him for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. *See* Fed. R. Civ. P. 12(b)(1), (6).

History of Case

In his amended complaint, Plaintiff, acting *pro se*, alleges that his eighth cause of action against Defendant Tom Janer is "Tile 18, 1792, 371, and 495," without any further elaboration as to Defendant Janer's role in the alleged offense. All three statutes alleged are federal criminal provisions. 18 U.S.C. § 1792 is sets out the punishment for mutiny or riot at a Federal correctional facility. 18 U.S.C. § 371 makes it a crime for anyone to conspire to commit any offense against or defraud the United States. 18 U.S.C. § 495 prohibits the falsification of writings for the purpose of obtaining money from the United States.

Defendant Tom Janer has moved to dismiss, stating that the Court does not have jurisdiction over the underlying state civil and criminal actions, Plaintiff's claims are based on federal criminal statutes under which he has no right to sue, and there is no diversity. Finally, Defendant argues that Plaintiff has failed to state a claim for which relief could be granted. In his response to Defendant's motion, Plaintiff elaborates on his claims against Defendant, stating that Defendant conspired with others to defraud him and to frame him in state criminal court.

Standard for Rule 12(b)(6) Motion to Dismiss

The standard for granting a motion to dismiss under Fed. R. Civ. P. 12(b)(6) is a strict one. The Court will accept all well-pleaded factual allegations in the complaint as true and will view them in the light most favorable to the non-moving party. *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999). The motion will not be granted unless it appears beyond doubt that Plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *See id.*

Discussion

Plaintiff has failed to state a claim under the federal statutes delineated in his Amended Complaint. Absent clear Congressional intent to create a civil remedy, a plaintiff cannot recover civil damages for an alleged violation of a criminal statute. *See Shaw v. Neece*, 727 F.2d 947, 949 (10th Cir. 1984). Furthermore, Plaintiff has failed to state a claim under any of these statutes. Plaintiff has made no allegations relating to mutiny or riot at a

Federal prison, as required by section 1792. Nor, has he alleged any attempt to defraud the United States of America, as required by section 371. Rather, he alleges that the Defendants attempted to defraud *him*. Finally, although he alludes to the alteration of deeds, he has not alleged any attempt to do so in order to obtain money from the United States, as required by section 495.

Absent these federal statutes, Plaintiff is left with, at most, a common law claim. However, the Court lacks any basis for the exercise of original jurisdiction in this matter. This action does not arise under federal law, treaties, or the Constitution, so the Court lacks federal question jurisdiction. *See* 28 U.S.C. § 1331. Furthermore, as all the parties are citizens of the State of Oklahoma, the Court lacks diversity jurisdiction. *See id.* § 1332(a).

IT IS THEREFORE ORDERED that Defendant Tom Janer's Motion to Dismiss Complaint (# 18) is GRANTED and all claims in the above-captioned suit against Defendant Janer are DISMISSED.

ORDERED THIS 3rd DAY OF January 2000.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

KRISTEN L. BEST,

Plaintiff,

v.

KATHRYN WOOLBRIGHT;
TIMOTHY G. BEST; MAX MYERS;
and DRUMMOND, RAYMOND &
DRUMMOND, an Oklahoma
Professional Association,

Defendants.

ENTERED ON DOCKET

JAN 4 2000

Case No. 99-CV-810-K (E) ✓

FILED

JAN 04 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Plaintiff's motion to dismiss Defendant Kathryn Woolbright's counterclaim for the damage caused by Plaintiff's affair with Defendant's husband. Plaintiff argues that such claim is barred by Okla. Stat. tit. 76, § 8.1, which abolishes alienation of affections as a civil cause of action. Defendant Woolbright agrees with Plaintiff's analysis and to the dismissal of the counterclaim.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Dismiss Counterclaim of Defendant Kathryn Woolbright (# 10) is GRANTED and Defendant Kathryn Woolbright's counterclaim against Plaintiff Kristen L. Best is DISMISSED.

ORDERED THIS 3rd DAY OF JANUARY, 2000.



TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

GALAND LEDON MOORE,)
)
 Plaintiff,)
)
 vs.)
)
 FREDERICK ESSAR (sic), Washington)
 County District Attorney; and)
 STEVE KUNZWEILER, Washington)
 County District Attorney;)
 WASHINGTON COUNTY COURT;)
)
 Defendants.)

No. 99-CV-1084-H (J)

ENTERED ON DOCKET
DATE JAN 04 2000

FILED

JAN 3 2000 SAC

F. J. Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Plaintiff, a pretrial detainee at the Washington County Jail, seeks to bring this civil rights action *in forma pauperis* against “Washington County Court” and two Washington County District Attorneys, Frederick Essar (sic) and Steve Kunzweiler. In his request for relief, Plaintiff asks that “all charges [be] dismissed” and that he receive “compensation for restitution.” (Docket #1 at 8).

Based on representations in the motion for leave to proceed *in forma pauperis*, the Court finds Plaintiff lacks sufficient funds to prepay the full \$150.00 filing fee. Therefore, he should be granted leave to proceed *in forma pauperis*. Nonetheless, Plaintiff shall be responsible for payment of the full \$150.00 as directed in Part C below. Furthermore, under 28 U.S.C. § 1915(e)(2), as amended by the Prison Litigation Reform Act of 1996 (“PLRA”), the Court is directed to dismiss a suit brought *in forma pauperis* at any time if the Court determines that it is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. For the reasons discussed in Parts A and B below, the Court finds that this case should be dismissed pursuant to § 1915(e)(2)(B).

ANALYSIS

A. Defendants are entitled to absolute prosecutorial immunity

In his complaint, Plaintiff alleges as Count I that one of the defendants made “false accusations while under oath” by informing the judge that he “did not show for court.” (Docket #1 at 6). In Count II, Plaintiff asserts that one of the defendants committed “perjury” by informing him that there was “a hold in Virginia when there is no hold.” (*Id.*) In Count III, Plaintiff asserts that one of the defendants committed “perjury” by informing his new attorney that Plaintiff’s court-appointed attorney was “still on my case.” (*Id.*) As stated above, Plaintiff requests that “all charges [be] dismissed” and that he receive “compensation for restitution.” (*Id.* at 8)

The PLRA requires a district court to dismiss an action filed *in forma pauperis* “at any time” if the court determines that the action is frivolous, malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B). A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade v. Grubbs, 841 F.2d 1512, 1512 (10th Cir. 1988)(citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to plaintiff. *Id.*; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). The Court also recognizes that *pro se* complaints are held to less stringent standards than pleadings drafted by lawyers and the Court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the Court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110.

In the instant case, the Court finds that Plaintiff's request for monetary damages against Washington County District Attorneys Essar (sic) and Kunzweiler must be dismissed. State prosecutors, such as the Defendants in this case, are entitled to absolute immunity from suits for civil damages when such suits are based on the prosecutor's performance of functions "intimately associated with the judicial phase of the criminal process." Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976); Gagan v. Norton, 35 F.3d 1473, 1475 (10th Cir. 1994) (quoted case omitted), cert. denied, 115 S.Ct. 1175 (1995). Of course, "actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." DiCesare v. Stuart, 12 F.3d 973, 977 (10th Cir. 1993) (quoting Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993)). Indeed, the Tenth Circuit has repeatedly found investigative and administrative actions taken by state prosecutors to be adequately protected by the doctrine of qualified, rather than absolute immunity. Gagan, 35 F.3d at 1475.

In making the often "difficult distinction" between prosecutorial and non-prosecutorial activities (i.e., absolute and qualified immunity), we have held "the determinative factor is "advocacy" because that is the prosecutor's main function." Pfeiffer, 929 F.2d at 1490 (quoting Rex, 753 F.2d at 843); Spielman v. Hildebrand, 873 F.2d 1377, 1382 (10th Cir. 1989). Finally, we have applied a continuum-based approach to these decisions, stating "the more distant a function is from the judicial process and the initiation and presentation of the State's case, the less likely it is that absolute immunity will attach." Pfeiffer, 929 F.2d at 1490 (citing Snell, 920 F.2d at 687).

Id. at 1476.

Applying these principles to the case at hand, the Court concludes that the statements which the Washington County District Attorneys made in connection with Plaintiff's prosecution are the type of conduct protected by absolute immunity. Plaintiff's claims do not involve investigative or administrative functions. Rather, they are related to statements made by the prosecutors either to Plaintiff or to the state district court judge during Plaintiff's criminal proceedings. "Moreover,

because the immunity depends not upon the defendant's status as a prosecutor but upon 'the functional nature of the activities' of which a plaintiff complains, immunity for performance of inherently prosecutorial functions is not defeated by allegations of improper motivation such as malice, vindictiveness or self-interest." Myers v. Morris, 810 F.2d 1437, 1446 (8th Cir.) (quoted case omitted), cert. denied, 484 U.S. 828 (1987). Because Defendants Essar (sic) and Kunzweiler are entitled to absolute immunity, Plaintiff's claims for monetary damages must be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B).

B. Plaintiff's request to dismiss charges is improper under 42 U.S.C. § 1983

Because Plaintiff is presently awaiting trial in Washington County District Court, as noted in the complaint, the Court concludes that Plaintiff's request for dismissal of his state charges must be dismissed as the request lacks an arguable basis in law under the civil rights act, 42 U.S.C. § 1983. Plaintiff's requested relief, to "dismiss all charges," is habeas corpus type relief. In Preiser v. Rodriguez, 411 U.S. 475, 500 (1973), the United States Supreme Court held that when a prisoner is challenging the very fact or duration of his imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus. Plaintiff's pre-trial habeas claims are cognizable under 28 U.S.C. § 2241(c)(3) which applies to a person in custody regardless of whether final judgment has been rendered and regardless of the present status of the case pending against him. See Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 503-04, 93 S.Ct. 1123, 1133-34, 35 (1973) (Rehnquist, J. dissenting); Capps v. Sullivan, 13 F.3d 350 (10th Cir. 1993); Dickerson v. State of Louisiana, 816 F.2d 220, 224 (5th Cir. 1987); Moore v. DeYoung, 515 F.2d 437, 441-42 (3rd Cir.

1975).

Although the substance of Plaintiff's claims for habeas corpus relief may be before the court in the instant § 1983 complaint, a separate habeas petition is required for several reasons. First, it is necessary to place the case in the proper procedural posture. Habeas relief must be brought against the one in whose custody the prisoner is being held. Braden, 410 U.S. at 494-95. In addition, by reviewing the claims in a petition for a writ of habeas corpus, this court can better monitor compliance with the rules of exhaustion.¹

Therefore, to the extent Plaintiff seeks dismissal of his pending state charges as relief, his civil rights complaint is dismissed. The Clerk of the Court shall send Plaintiff a blank § 2241 petition for a writ of habeas corpus, a blank motion for leave to proceed in forma pauperis form, and information and instruction sheets. Plaintiff should file a separate § 2241 petition for a writ of habeas corpus, after exhausting available state remedies, if he wishes to pursue the claims raised in the instant complaint.

C. Payment of filing fee

Although Plaintiff has been granted leave to proceed *in forma pauperis*, the PLRA requires the district court to assess and collect the \$150 filing fee even when a case is dismissed before service of the summons and complaint. See 28 U.S.C. § 1915(b)(1). Therefore, based on the accounting provided by Plaintiff in support of his motion, the Court finds that Plaintiff shall pay an initial partial filing fee of **\$16.02**, which represents 20 percent of the greater of the (1) average

¹Plaintiff is reminded that he must exhaust available state remedies before seeking federal habeas corpus relief.

monthly deposits, or (2) average monthly balance in Plaintiff's prison account(s) for the period immediately preceding the filing of the complaint. 28 U.S.C. §1915(b). After payment of the initial partial filing fee, Plaintiff shall make monthly payments of 20 percent of the preceding month's income credited to his prison account(s) until he has paid the total filing fee of \$150. 28 U.S.C. § 1915(b)(2). The trust fund officer or other appropriate jail official at Plaintiff's current place of incarceration is hereby ordered to collect, when funds exist, monthly payments from Plaintiff's prison account(s) in the amount of 20% of the preceding month's income credited to the account. Monthly payments collected from Plaintiff's prison account(s) shall be forwarded to the clerk of court each time the account balance exceeds \$10 until the full \$150 filing fee is paid. Separate deductions and payments shall be made with respect to each action or appeal filed by Plaintiff. All payments shall be sent to the Clerk, 411 United States Courthouse, 333 West Fourth Street, Tulsa, Oklahoma 74103-3819, attn: PL Payments, and shall clearly identify Plaintiff's name and the case number assigned to this action. The Clerk shall send a copy of this Order to jail officials at the Washington County Jail, 420 S. Johnstone Ave., Bartlesville, Oklahoma 74003.

This dismissal counts as one of Plaintiff's three allotted dismissals under 28 U.S.C. § 1915(g).²

²28 U.S.C. § 1915(g) provides that "[i]n no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury."

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for leave to proceed *in forma pauperis* (#2) is **granted**. Nonetheless, Plaintiff is responsible for payment of the \$150.00 filing fee. Plaintiff shall make an initial partial payment of **\$16.02** and, thereafter, monthly payments of 20% of the preceding month's income credited to his account(s). Jail officials having custody of Plaintiff shall forward payments from Plaintiff's account(s) to the Clerk at the above-cited address each time the amount in the account(s) exceeds \$10 until the filing fee is paid.
2. This action is **dismissed without prejudice** pursuant to 28 U.S.C. 1915(e)(2)(B).
3. The Clerk of the Court is directed to "**flag**" this dismissal as a "prior occasion" for purposes of §1915(g).
4. The Clerk shall send a copy of this Order to jail officials at the Washington County Jail, 420 S. Johnstone, Bartlesville, Oklahoma 74003.
5. The Clerk shall send Plaintiff a blank § 2241 petition for a writ of habeas corpus (form 2241pet.hc), a blank motion for leave to proceed in forma pauperis (form ifp-hc.dis), and information and instruction sheets.

IT IS SO ORDERED.

This 3rd day of JANUARY, 2000.



Sven Erik Holmes
United States District Judge

WRC/JF:jm
1015.97069
12/20/99

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

FAIRVIEW AFX, INC., an Oklahoma)
corporation,)

Plaintiff,)

v.)

TEKTRONIX, INC., an Oregon)
corporation, G.T.E. SOUTHWEST)
and JOHN DOE MANUFACTURER,)

Defendants.)

ENTERED ON DOCKET

DATE JAN 04 2000

Case No.: 99 CV 141 H (M)

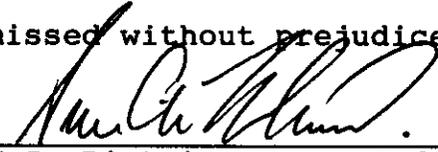
JAN 3 2000

CLERK
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITHOUT PREJUDICE

The Court, upon reviewing the Plaintiff's Application for a Dismissal Without Prejudice, finds that said application should and is hereby granted.

The above styled action is dismissed without prejudice.



U.S. District Court Judge

25

Not phoned

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

F I L E D

JAN 03 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARY PERDUE, as surviving spouse)
of CARSON PERDUE, deceased,)

Plaintiff,)

v.)

FEDERAL INSURANCE COMPANY,)
an Indiana corporation,)

Defendant.)

Case No. 98-CV-902-K (M) ✓

ENTERED ON DOCKET

DATE JAN 04 2000

JUDGMENT

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

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Defendant, Federal Insurance Company, and against Plaintiff, Mary Perdue, as surviving spouse of Carson Perdue, deceased.

ORDERED THIS 3rd DAY OF JANUARY, 2000.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

MARY PERDUE, as surviving spouse)
of CARSON PERDUE, deceased,)
)
Plaintiff,)
)
v.)
)
FEDERAL INSURANCE COMPANY,)
an Indiana corporation,)
)
Defendant.)

F I L E D

JAN 03 2000 SA

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-902-K (M) ✓

ENTERED ON DOCKET

DATE JAN 04 2000

ORDER

Before the Court is Defendant's motion for judgment. Defendant has based this motion on Fed. R. Civ. P. 50(a)(2), which governs judgments as a matter of law during a jury trial. At this stage in the proceedings, however, a Rule 56 motion for summary judgment is more appropriate, and the Court will treat this motion accordingly.¹ Defendant argues that its denial of benefits under Carson Perdue's accidental death insurance policy was not arbitrary and capricious. Plaintiff's response asks the Court to reconsider its earlier ruling that the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.*, ("ERISA") governs the policy in this case. The Court has agreed to reconsider that ruling in this Order.

¹"The motion for judgment as a matter of law, which is found in Rule 50, rests on the same theory as a Rule 56 motion and it is made either after plaintiff has presented his evidence at trial or after both parties have completed their evidence. . . . Thus, the most obvious distinction between a motion for summary judgment and one for a judgment as a matter of law is the timing of the two motions." 10A Charles Alan Wright et al., Federal Practice and Procedure § 2713.1 (3d ed. 1998).

History of Case

This case turns on the circumstances surrounding Carson Perdue's death and the terms of his accidental death insurance policy (the "Policy") with Defendant. Mr. Perdue died a few days following a fall on his front porch. Plaintiff contends that it was an accident and that Defendant should pay on the accidental death policy. Defendant responds that the Mr. Perdue's death resulted from a cardiovascular accident, or stroke, and therefore is not covered by the Policy. Mr. Perdue's death certificate listed the manner of death as "Natural" and the immediate cause as "Cerebral vascular accident (hemorrhage)." The physician's report attached to the insurance claim listed the nature of the injury and cause of death as "Large hematoma around rt eye and rt side of head, found unconscious Subdural hematoma and cerebral hemorrhage." The Policy defines "Accidental Bodily Injury" as bodily injury that is accidental; is the direct source of the loss; is independent of disease, bodily infirmity, or other cause; and occurs while the policy is in force. Defendant, claiming that Plaintiff's death was *not* independent of disease, bodily infirmity, or other cause, refused payment on the policy. Defendant reasoned that a stroke had caused the fall and the hemorrhaging and that Mr. Perdue's death was from natural causes. Plaintiff sued for breach of contract, and Defendant eventually filed a motion asking the Court to determine that the policy was covered by ERISA. Plaintiff failed to respond to that motion, and the Court granted it on October 8, 1999. Defendant filed this motion for judgment on the same day. Although Plaintiff initially agreed to the applicability of ERISA, she now feels that ERISA is not

applicable. The Court is treating this request as a motion to reconsider the October 8th Order. Even if ERISA applies, Plaintiff argues that Defendant's denial was arbitrary and capricious. Plaintiff also continues to request a jury trial, despite any application of ERISA to this case.

Summary Judgment Standard

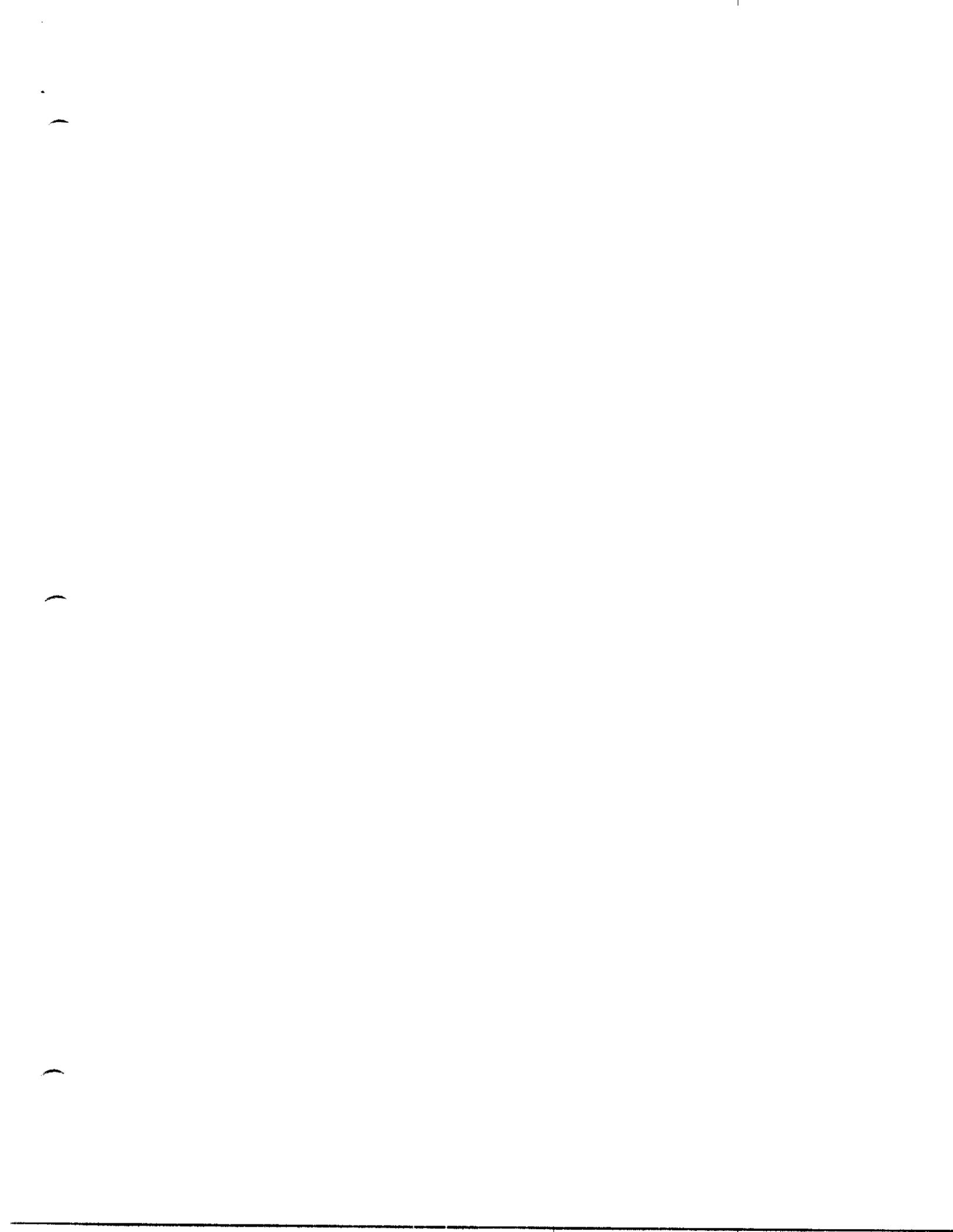
Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986); *Mares v. ConAgra Poultry Co.*, 971 F.2d 492, 494 (10th Cir. 1992). Where the nonmoving party will bear the burden of proof at trial, that party must go beyond the pleadings and identify specific facts which demonstrate the existence of an issue to be tried by the jury. *See Mares*, 971 F.2d at 494. Additionally, although the non-moving party need not produce evidence at the summary judgment stage in a form that is admissible at trial, the content or substance of such evidence must be admissible. *See Thomas v. International Bus. Machs.*, 48 F.3d 478, 485 (10th Cir. 1995).

Applicability of ERISA

The Court finds that its earlier ruling that ERISA governs this Policy is correct. The Policy forms part of an ERISA-covered employee welfare benefit plan, as defined by ERISA.

An “employee welfare benefit plan” is “any plan . . . established or maintained by an employer . . . to the extent that such plan . . . is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment” 29 U.S.C. § 1002(1). ERISA applies to such plans if “established or maintained . . . by any employer engaged in commerce of in an industry or activity affecting commerce” 29 U.S.C. § 1003(a)(1). Armco, Inc., a company with plants in several states, offered its retired employees, as a group, a cafeteria plan, from which they could select a variety of insurance coverages, including the accidental death insurance at issue in this case. Plaintiff has presented no evidence controverting these facts.

The Policy does not fall into the safe harbor provided by 29 C.F.R. § 2510.3-1. Department of Labor regulations exclude from the definition of “employee welfare benefit plan” group insurance programs offered by an insurer to employees, under which the following conditions are met: (1) the employer makes no contributions; (2) participation is voluntary for employees; (3) the sole function of the employer is, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums, and to remit them to the insurer; and (4) the employer receives no compensation other than for administrative services actually rendered in connection with premium collections. *See* 29 C.F.R. §2510.3-1(j). The Policy at issue in this case fails to meet these criteria. The



uncontroverted evidence shows that Armco, Inc., contributed to Mr. Perdue's cafeteria plan, which included the accidental death policy.

Because ERISA applies, Plaintiff's exclusive remedy for denial of benefits is under 29 U.S.C. § 1132. *See Rademacher v. Colorado Ass'n of Soil Conservation Dists. Med. Benefit Plan*, 11 F.3d 1567, 1569 (10th Cir. 1993). Under section 1132, Plaintiff, as a plan beneficiary, may bring suit to recover benefits due, enforce her rights, or clarify her rights to future benefits under the Policy. *See* 29 U.S.C. § 1132(a)(1)(B).

Standard of Review

In determining Plaintiff's entitlement to benefits under the Policy, the Court will review Defendant's actions under the arbitrary and capricious standard. The Court reviews a plan administrator's decisions de novo unless the plan gives the administrator discretion to determine eligibility for benefits or to construe the terms of the plan. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). In this case, both parties have argued under the arbitrary and capricious standard. Moreover, the record supports the assertion that Defendant had and exercised discretion in deciding whether or not to pay on the Policy.

Under this standard, the Court will uphold Defendant's decision to deny coverage if it is reasonable and made in good faith. *See Rademacher*, 11 F.3d at 1569. The Court will find for Plaintiff only if Defendant's interpretation lacked substantial evidence or was contrary to law. *See id.* Indicia of arbitrary and capricious conduct include lack of

substantial evidence, mistake of law, bad faith, and conflict of interest. *See Winchester v. Prudential Life Ins. Co.*, 975 F.2d 1479, 1483 (10th Cir. 1992).

Discussion

Defendant's interpretation of the Policy and subsequent denial of benefits was not arbitrary and capricious. The Policy's definition of "accidental bodily injury" requires that the accidental bodily injury be the direct source of the loss and be independent of disease, bodily infirmity, or other cause. Defendant's decision that a stroke contributed to, if not caused, Mr. Perdue's death resulted from a reasonable inquiry. More specifically, Defendant relied on Mr. Perdue's death certificate which listed the cause of death as cerebral vascular accident, or stroke, and the manner of death as natural. Defendant also reviewed Mr. Perdue's medical history, including his history of stroke. Finally, Defendant employed a local adjusting firm to do additional investigation into the cause of Mr. Perdue's death and had a consulting physician review Mr. Perdue's hospital records to further confirm that the stroke caused his death. Under the uncontroverted material facts, Defendant's denial of Plaintiff's claim was not arbitrary and capricious.

Jury Trial

Because the Court determines that summary judgment for Defendant is appropriate in this case, the question of Plaintiff's right to a jury trial is moot.

Conclusion

The Court reaffirms its decision that ERISA covers Mr. Perdue's accidental death policy. Defendant's denial of benefits under that policy was not arbitrary and capricious. Because summary judgment is appropriate, the Court need not address Plaintiff's request for a jury trial.

IT IS THEREFORE ORDERED that Defendant's Motion for Judgment (# 15) is GRANTED.

ORDERED THIS 3rd DAY OF JANUARY, 2000.


TERRY C. KERN, CHIEF
UNITED STATES DISTRICT JUDGE

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

TWIN CITY FIRE INSURANCE COMPANY,)
)
Plaintiff,)
v.)
)
CHEROKEE NATION, *et al.*)
)
Defendants.)

ENTERED ON DOCKET
DATE JAN 04 2000

Case No. 99 CV 0440 H (M)

FILED

JAN 3 2000 SA

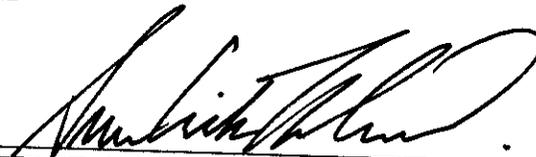
F. J. Lombardi, Clerk
U.S. DISTRICT COURT

ORDER
DISMISSING NATIONAL AMERICAN INSURANCE COMPANY
WITH PREJUDICE

UPON Third-Party Plaintiffs David Cornsilk and Marvin Summerfield's Motion to
Dismiss With Prejudice National American Insurance Company, it is hereby

ORDERED that National American Insurance Company be dismissed, with prejudice.

DATED this 3RD day of JANUARY, 2000.



JUDGE OF THE DISTRICT COURT

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

F I L E D

JAN - 3 2000

GENERAL ACCIDENT INSURANCE)
COMPANY OF AMERICA,)

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Plaintiff)

-vs-)

Case No. 99CV0441B (J)

ROBERT ROSENCUTTER and SHARON)
MORRISON, as parent and next)
friend of RONICA MORRISON,)
a minor,)

ENTERED ON DOCKET

DATE JAN 03 2000

Defendants.)

JOURNAL ENTRY OF JUDGMENT

ON this 17th day of December, 1999, a Case Management Conference was convened. Plaintiff appeared by and through its counsel, Michael J. Masterson. Defendant Morrison appeared by and through her counsel, Timothy S. Gilpin. Defendant Rosencutter did not appear. The court finds that Defendant Rosencutter has failed to answer or otherwise defend in this action. The court further finds that service of process on Defendant Rosencutter was properly effected on October 26, 1999, and that proof of such service was properly made on November 2, 1999. Therefore, pursuant to Federal Rules of Civil Procedure 55, Plaintiff is entitled to judgment by default against Defendant Rosencutter.

Plaintiff's Motion for Summary Judgment was then considered. The court finds that Defendant Rosencutter failed to respond to said Motion, and such failure constitutes his admission that there are no genuine issues of material fact warranting trial. Having heard from all parties present, the court further finds that the following material facts are undisputed:

1. Defendant Rosencutter's homeowner's policy No. HP 0433059 00, was not effective until March 13, 1998;
2. All of Defendant Morrison's claims against Defendant Rosencutter arose from alleged bodily injury, which occurred before March 13, 1998; and
3. Said policy defines a covered "occurrence" as an accident which results in bodily injury or property damage during the policy period.

Based on the above undisputed facts in this action, the court finds that Plaintiff is entitled to judgment as a matter of law, pursuant to Federal Rule of Civil Procedure 56. Said policy, by its express terms, does not provide coverage for any of Defendant Morrison's claims against Defendant Rosencutter.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

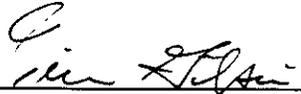
1. General Accident Insurance Company of America has no duty or obligation to defend Robert Rosencutter in case no. CJ-98-2978, Morrison v. Rosencutter, now pending in Tulsa County District Court;

2. General Accident Insurance Company of America has no duty to indemnify Robert Rosencutter for any successful bodily injury claims against him in case no. CJ-98-2978, Morrison v. Rosencutter, now pending in Tulsa County District Court; and

3. Robert Rosencutter and Sharon Morrison are restrained from instituting any action against General Accident Insurance Company of America for the amount of any damages alleged in case no. CJ-98-2978, Morrison v. Rosencutter, now pending in Tulsa County District Court.


JUDGE OF THE DISTRICT COURT
For JUDGE THOMAS R. BRETT

APPROVED AS TO FORM:



TIMOTHY GILPIN, *Attorney for Defendant*
Sharon Morrison



MICHAEL J. MASTERSON, *Attorney for*
Plaintiff, General Accident Insurance
Company of America

CERTIFICATE OF MAILING

I, **MICHAEL J. MASTERSON**, hereby certify that on the _____ day of _____, _____, I mailed a true and correct copy of the above and foregoing **Journal Entry of Judgment**, with proper postage thereon fully prepaid to: **Mr. Robert Rosencutter**, 7321 South Union, Tulsa, OK 74132, and **Mr. Timothy S. Gilpin**, 115 West Third Street, Suite 400, Tulsa, OK 74103.

MICHAEL J. MASTERSON

MJM/ajw

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

JOSEPH L. CASSARA,)
)
 Plaintiff,)
)
 vs.)
)
 DAC SERVICES,)
)
 Defendant.)

No. 98-CV-473-B(M)

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

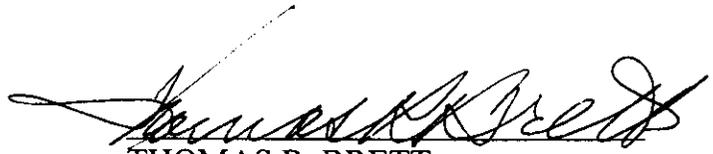
ENTERED ON DOCKET

DATE JAN 03 2000

JUDGMENT

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, DAC Services, and against the Plaintiff, Joseph Cassara. Plaintiff shall take nothing on his claim. Costs are assessed against the Plaintiff upon timely application pursuant to N. D. LR 54.1, and each party is to pay its respective attorney's fees.

DATED THIS 30th DAY OF DECEMBER, 1999.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

43

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

BERL AND DONNA HART, as parents)
and next friend of LINDSEY)
HART, a minor child.)

Plaintiffs,)

vs.)

INDEPENDENT SCHOOL DISTRICT NO.)
5 of Tulsa County, Oklahoma, and)
KATHRYN MCGREW,)
in her individual and official capacity, and)
ANGELA DUNN in her individual and)
official capacity, and CHERYL KELSEY)
in her individual and official capacity, and)
DR. KIRBY LEHMAN in his)
individual and official capacity,)

Defendants.)

FILED

DEC 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 99-C-074-B(M)

ENTERED ON DOCKET
DATE JAN 03 2000

JUDGMENT

In accord with the Order filed sustaining the Defendants' Motion for Summary Judgment, converted from Motion to Dismiss, the Court hereby enters judgment in favor of the Defendants, Independent School District No. 5, Kathryn McGrew, Angela Dunn, Cheryl Kelsey, and Dr. Kirby Lehman, and against the Plaintiffs, Berl and Donna Hart, as parents and next friend of Lindsey Hart, a minor child. Plaintiffs shall take nothing on their claim. Costs are assessed against the Plaintiffs upon timely application pursuant

to N. D. LR 54.1, and the parties are to pay their respective attorney's fees.

DATED THIS 30th DAY OF DECEMBER, 1999.

A handwritten signature in black ink, appearing to read "Thomas R. Brett", written over a horizontal line.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

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

JOSEPH L. CASSARA,)
)
 Plaintiff,)
)
 vs.)
)
 DAC SERVICES,)
)
 Defendant.)

No. 98-CV-473-B(M) ✓

ENTERED ON DOCKET
DATE JAN 03 2000

ORDER

Comes on for consideration Defendant's Motion for Summary Judgment (Docket # 27) and Plaintiff's Motion for Partial Summary Judgment (Docket #31) and the Court finds as follows.

Litigation History

Plaintiff seeks damages from Defendant for violations of the Fair Credit Reporting Act, 15 U.S.C. §§1681 et seq., ("the Act"). Plaintiff is a commercial truck driver and Defendant is a driver screening company that maintains driving records on commercial truck drivers which it gathers from and supplies to member companies, typically motor carriers and transportation companies, to enable them to evaluate potential driver-employees.

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.*,

42

477 U.S. 242, 250 (1986); *Windon Third Oil & Gas v. FDIC*, 805 F.2d 342 (10th Cir. 1986). In *Celotex*, the court stated:

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

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

The Tenth Circuit Court of Appeals stated:

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

* * *

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

is in possession of the movant. (Citations omitted.)

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

Undisputed Material Facts

The Court has reviewed the facts submitted as undisputed by both parties and the evidence supporting those along with the evidence presented by each party in opposition to those facts and concludes the record establishes the following as the undisputed material facts for the purpose of the pending motions.

1. Plaintiff filed this action on July 2, 1998.
2. Plaintiff worked as a truck driver for WST from on or about March 30, 1994 to on or about October 24, 1994.
3. Plaintiff worked as a truck driver for Trism from on or about December 2, 1994 to on or about December 20, 1996.
4. WST submitted its report on Plaintiff to DAC on November 17, 1994. The report included the following information in Plaintiff's work record: two "accidents", "complaints" and "other." This information was distributed on November 22, 1994 and additional times thereafter to the present.
5. Trism submitted its report on Plaintiff to DAC on or about June 27, 1997. The report contained the following information in his work record: six "accidents," and "company policy violation."
6. Plaintiff contacted DAC on or about February 26, 1997 to dispute the entries by WST and a consumer statement was placed in Plaintiff's file as follows: "I was not involved in an accident. I am not aware of any complaints. I am not aware of what the term 'other' refers to.

7. WST verified to DAC that the disputed information was correct on March 19, 1997.

8. Plaintiff again disputed entries by WST in a letter dated September 24, 1997 from attorney David Barrett of Joplin, Missouri. The letter was received by DAC on October 3, 1997, and in that letter Plaintiff also disputed the entries by Trism.

9. Trism orally verified their disputed entries to DAC: six "accidents" and "company policy violation" on October 7, 1997.

10. A DAC report includes accidents a driver may have regardless of the seriousness or if damage to the equipment operated by the driver occurs. An "accident" is defined to its members utilizing the report as "record total number of accidents whether "preventable," "non-preventable," "chargeable," or "non-chargeable." The number of accidents does not necessarily reflect fault on the part of the driver involved. Documentation in the driver's file is recommended for each accident recorded." On the face of the DAC report, the following statement is made regarding the meaning of the accidents reported: "The equipment was involved in an accident or damaged while assigned to the driver regardless of fault during the period of employment referenced above." DAC does not limit reporting accidents to those that are the driver's fault because those determinations are made on a company-by-company basis and what might be considered fault at one company is not at another. The driver's record may be skewed by the employers reporting policies. Further, it is not possible to accurately report that a driver had an accident, e.g., they can claim the damage occurred while they were having coffee while inside a truck stop. Thus, the report contains the objective fact that damage occurred to the equipment while it was assigned to the driver. DAC has no control over members who choose not to report incidents which would fall under the definitions provided.

11. WST amended its record on April 15, 1997 to delete one accident from Plaintiff's report and thereafter showed one accident. The accident was deleted because WST did not have to pay a claim arising out of the accident.

12. In regard to the incident reported by WST in October, 1997, WST stated that such action occurred on June 28, 1994 when Plaintiff struck another truck while trying to back his truck and trailer into a customer's dock. The damage to the other truck was approximately \$1,942.26. Plaintiff admits that the incident reported by WST occurred but asserts it was not an "accident."

13. In regard to the six incidents listed by Trism, Trism had already provided Plaintiff the details of these by the time he contacted DAC to dispute them.

14. When Trism responded to DAC's investigation, they identified six specific incidents in their files regarding the Plaintiff. This list matched the list previously given to the Plaintiff.

15. Plaintiff admitted that each of the incidents listed by Trism had actually occurred.

16. Plaintiff's dispute in regard to incidents is limited to his personal belief that employers should only report and consider Department of Transportation ("DOT") recordable accidents.

17. The DOT definition of "accident" found in 49 C.F.R. §390.5 is not a term of art for all accidents in the motor carrier industry. Section 390.5 defines "accident" as: (1) an occurrence involving a commercial motor vehicle operating on a highway in interstate or intrastate commerce which results in a fatality; (2) bodily injury to a person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or (3) one or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicle

to be transported away from the scene by a tow truck or other motor vehicle.

18. The term "complaints" or "excessive complaints" as used in a DAC report is defined as: "an excessive number of complaints have been received regarding the driver's service and/or safety."

19. Plaintiff's dispute as to WST's inclusion of complaints in his report was that he was unaware of the complaints.

20. WST verified several complaints in its letter of October 16, 1997, such as failure to check equipment (twice running on flat tires); improper fueling, picking up wrong loads.

21. Plaintiff admitted that the occurrences identified as "complaints" at WST actually occurred.

22. Although Plaintiff disputed the inclusion by WST of "other" in his report, the term "other" is merely a neutral catch-all phrase as used in a DAC report. "Other" is defined as: "anything other than the items listed above." The source has to be contacted by the user to learn what this references.

23. When contacted by DAC, WST verified the basis for the inclusion of the term "other" being in the report.

24. Plaintiff admitted that no one with whom he dealt in regard to his employment has ever interpreted, to his knowledge, "other" to have any meaning.

25. Trism had reported a "company policy violation" in its record on the Plaintiff. The term "company policy violation" is defined in a DAC report as: driver violated company policies and/or procedures," or, in the 1998 DAC Guide, is defined as: "driver violated company policies and/or procedures. Use this code only if the other selections in this section do not indicate the

company policy violated. This latter definition follows the practice of DAC in requiring the company policy violation not be that of a specific available policy violation in the work record section of the DAC report such as "failed to report accident."

26. Trism verified that the company policy violation was the result of Plaintiff's failure to send in his driver logs as required by the company. This would not fit into the category of "log violation" as set forth under 926 of the Guide to Termination Record Form.

27. Plaintiff did not dispute the company violation reported by Trism. Rather, he was simply unaware of it.

28. The content and format of the DAC report was designed to provide what the users of the DAC report, i.e., interstate trucking companies, wanted. More detailed reports of accidents have been considered.

29. Each DAC employment history report lists the name, address and phone number of the source of each employment record to facilitate the user's communication if additional information is desired.

30. When Plaintiff first contacted DAC in February 1997 to dispute his WST record, DAC completed its investigation by March 19, 1997 when WST verified the entries. Plaintiff disputes the investigation was properly conducted.

31. When DAC received Plaintiff's attorney's letter disputing both the WST and Trism records on October 3, 1997, DAC completed its investigation by verifying the disputed entries and had its counsel respond to Plaintiff's attorney on October 28, 1997. Plaintiff also disputes the investigation was properly conducted.

32. At the end of each DAC report, the following statement appears: "DAC's records

indicate that the following license(s) are held, or have been previously held, by the driver (may also include non-resident or non-licensed driver violation records).” This is used to notify the user of the report of any other driver’s license the subject driver may have had to DAC’s knowledge. Plaintiff admits that hiring companies should check all prior driver’s licenses. Plaintiff further admits that the statement on the DAC report does not imply that he had any violations, and to Plaintiff’s knowledge no one who read his report thought he had violations as a result of the language. Plaintiff states it implies he may be non-licensed or a non-resident.

33. Plaintiff did not request a consumer statement be entered in regard to his dispute with the Trism report.

34. All of the policies and practices of DAC to insure the accuracy of their reports were in effect and followed in regard to all facets of Plaintiff’s claims as follows:

- a. DAC created standard forms with defined terms to be used by all members in completing and utilizing the reports.
- b. The relevancy of each entry in the report was developed in concert with the users of the report, i.e., the motor carrier industry.
- c. DAC members are provided with materials, training and availability of DAC staff to aid them in the use of these reports.
- d. The reports are either directly input by the customer into storage at DAC’s computer, from the customer’s computer, or are double key entered by DAC staff prior to going into storage in the DAC computer.
- e. DAC does not interpret initial information given to it.
- f. Only members of DAC Services receive the report. Since they have been

trained in the forms, there exists little chance of misunderstanding the information contained on the report.

g. Members own and have access to their records stored at DAC. When DAC accesses those records, it obtains the then current status of each driver's file. There are no stale consumer reports sitting in DAC's files that are sent to customers.

h. DAC maintains a consumer service department that works with consumers/drivers on questions, disputes and other issues regarding their files at DAC.

i. DAC does not limit the time required to conduct an investigation of a dispute.

Arguments and Authority

Plaintiff asserts three causes of action for violations of 15 U.S.C. §1681e(b), which provides: "Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."

The burden is on Plaintiff in an action brought pursuant to §1681e(b) to establish that: (1) the consumer reporting agency failed to follow reasonable procedures to assure the accuracy of its report; (2) the report in question was, in fact, inaccurate; (3) the Plaintiff was injured as a result; and, (4) the consumer agency's negligence directly or proximately caused the Plaintiff's injuries. *Whelan v. Trans Union Credit Reporting Agency*, 862 F. Supp 824, 829 (E.D.N.Y.1994).

The beginning inquiry is whether the report is, in fact, inaccurate. *Id.* FTC Guidelines, 16 C.F.R. Part 600, 391 (1/1/96 Edition), provide the accuracy of the report is to be evaluated after the reporting agency has investigated any dispute. 16 C.F.R. Part 600, 391 (1/1/96 Edition)

provides:

A. *General.* The section does not require error free consumer reports. If a consumer reporting agency accurately transcribes, stores and communicates consumer information received from a source that it reasonably believes to be reputable, and which is credible on its face, the agency does not violate this section simply by reporting an item of information that turns out to be inaccurate. However, when a consumer reporting agency learns or should reasonably be aware of errors in its reports that may indicate systematic problems (by virtue of information from consumers, report users, from periodic review of its reporting system, or otherwise) it must review its procedures for assuring accuracy. Examples of errors that would require such review are the issuance of a consumer report pertaining entirely to a consumer other than the one on whom a report was requested, and the issuance of a consumer report containing information on two or more consumers (*e.g.*, information that was mixed in the file) in response to a request for a report on only one of the consumers.

Plaintiff urges the information in his file is inaccurate not because it is false, but because it is based upon inconsistent reporting by trucking companies which are the result of systemic problems in DAC's procedures for assuring accuracy.

The same DAC's procedures for assuring accuracy which were used in this case have recently been addressed and judicially determined to be reasonable on summary judgment motion in *Formosa v. Energy Sharing Resources, Inc.*, 1999 WL 436596 (N.D. Ill.1999). In *Formosa*, the plaintiff also took issue with the terms used by DAC in its reports, some of which are identical to those disputed by Plaintiff in this case. Plaintiff argued that the reports, while technically true, were misleading to the public. The court determined that the terms were created in conjunction with members of the trucking industry, have specific meanings within the industry, that all members who receive the reports receive information on how to understand and use them and only persons in the trucking industry had access to them. The public had no access to the information and therefore could not be misled. The plaintiff in *Formosa* did not allege

DAC knew or should have known the information it received from a former employer was inaccurate based upon past dealings nor from a pattern of unreliable information provided by the employer to indicate the court should consider whether systematic problems were evident.

The Plaintiff in the case at bar does allege systematic problems were evident from the fact that the terms used in the DAC report, i.e., "accident," "complaints," "company policy violation," and "other," were too vague and were given different definitions by the reporting companies. Plaintiff asserts his work record, and therefore ability to obtain future employment, is skewed by the fact that companies for which he has driven broadly interpret the term "accident" in making their reports, effectively making him appear to be a worse driver than drivers who work for companies which report information more narrowly. Plaintiff asserts that the term "accident" should be limited to the definition applied by the Department of Transportation, as set forth is Undisputed Material Fact number 17 above, although he provides no authority for that position and presents no public policy arguments in support of it.¹ Ultimately, Plaintiff's argument unsuccessfully attempts to circumvent the fact that the reports concerning his driving are, in fact, accurate.

As the only evidence offered by Plaintiff to show his employment history record was inaccurate is his belief that terms should be defined in the best light toward him, and DAC has established it followed reasonable procedures to insure maximum possible accuracy, DAC is entitled to summary judgment as a matter of law on Plaintiff's claims brought pursuant to 15 U.S.C. §1681e(b).

¹The Court notes public safety is best protected by the broadest possible interpretation and reporting.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Summary Judgment (Docket # 27) is granted and Plaintiff's Motion for Partial Summary Judgment (Docket #31) is denied. Defendant is awarded its costs upon proper and timely application pursuant to ND L.R. 54.1. Each party is to bear its own attorney fees.

DONE THIS ^{30th} DAY OF DECEMBER, 1999.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

ACT

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

F I L E D

JAN 3 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARY ELIZABETH VARNER,)

Plaintiff,)

vs.)

JOPLIN-JOHNSTON INDUSTRIAL)

SUPPLY d/b/a JOPLIN INDUSTRIAL)

SUPPLY, and AMERICAN AIRLINES)

Defendants.)

Case No. 99-CV-965E (E)

ENTERED ON DOCKET

DATE JAN 3 2000

STIPULATION TO DISMISS PLAINTIFF'S CLAIM
UNDER THE FAMILY MEDICAL LEAVE ACT OF 1993 WITH PREJUDICE

Plaintiff, Mary Elizabeth Varner, hereby stipulates under Rule 41, Federal Rules of Civil Procedure, to dismissal of Plaintiff's claim under the Family Medical Leave Act ("FMLA"), with prejudice. Plaintiff asserts that the FMLA claim was made in good faith. This dismissal is based in part on Joplin-Johnston Industrial Supply's ("Joplin-Johnston") representation in their brief in support of dismissal of Plaintiff's claim under the FMLA, that at all times relevant to this litigation, Joplin-Johnston, employed less than 50 employees within a 75-mile radius of Plaintiff's worksite. Accordingly, the Plaintiff agrees that the FMLA does not apply. The Defendants, Joplin-Johnston and American Airlines, hereby stipulate under Rule 41, Federal Rules of Civil Procedure, to dismissal of Plaintiff's claim under the Family Medical Leave Act of 1993, with prejudice.

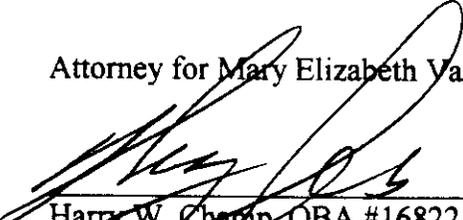
Dated this 3rd day of January, 2000.

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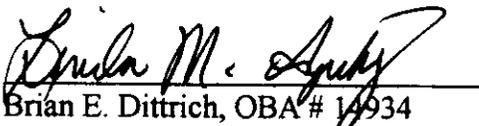
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Respectfully submitted,

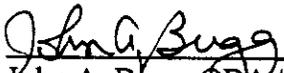
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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CAROLYN E. EDWARDS,
440-46-5814

Plaintiff,

vs.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

Case No. 97-CV-459-M ✓

ENTERED ON DOCKET

DATE JAN 3 2000

ORDER

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

Plaintiff was born November 4, 1946, and was 48 years old at the time of the hearing. She has a General Equivalency Diploma and medical assistant training. She formerly worked as a production assembler; nurses assistant; food service technician; and as a provider. She claims to have been unable to work since March 1991 as a

¹ Plaintiff's July 2, 1991, application for disability insurance benefits, and her March 9, 1992, application for Supplemental Security Income were denied. The denials were affirmed on reconsideration. Plaintiff has had three hearings before an Administrative Law Judge ("ALJ"). The decisions from the first two hearings were reversed by the Appeals Council. By decision dated December 18, 1995, the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on March 5, 1997. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481. After the instant suit was filed, the case was remanded to the Commissioner under sentence six of 42 U.S.C. § 405(g) to enable the Commissioner to locate the claim file. [Dkt. 9]. The case was re-opened on March 1, 1999.

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result of back and neck pain; reduced hand strength and flexibility; and right leg and foot weakness.

Plaintiff suffered a job-related injury to her neck on March 1, 1991. She underwent surgery on April 30, 1991, performed by Frank S. Letcher, M.D., neurological surgeon. By June 3, 1991, Dr. Letcher found Plaintiff to have normal strength and sensation in both arms. He released her to return to full-time unrestricted activity on July 15, 1991. [R. 156]. On July 25, 1991, Plaintiff complained to Dr. Letcher of hip pain. He found her to have a normal gait, no tenderness to palpation, and an ability to anteflex to 90 degrees with little discomfort. [R. 155]. On September 9, 1991, Plaintiff had nearly full painless range of motion in her neck and normal arm strength. She was released from all restrictions on that date. [R. 154].

On December 4, 1991, Plaintiff complained of severe low back pain to her family practice physician, Dr. Gary Davis. [R. 295]. On December 18, 1991, she presented to Dr. Davis with neck pain and spasm [R. 294]; on January 8, 1992, Plaintiff complained of neck pain with decreased range of motion and some swelling of her hands [R. 293]; on January 22, 1992, her neck problems had improved [R. 292]. On February 5, 1992, Dr. Davis recorded Plaintiff's complaints of continued right hip pain. [R. 290]. His office notes indicate Plaintiff was instructed to return to the clinic in one week, but the next note is dated June 30, 1992. On that date Dr. Davis records that Plaintiff presented for re-check of neck pain and right hip pain after bone graft from that site; he found tenderness over the incision where she had her

bone graft. [R. 289]. On July 30, 1992, Dr. Davis noted complaints of neck pain and body aches. [R. 291]. Dr. Davis completed a residual functional capacity (RFC) evaluation form dated either June or July 30, 1992, in which he indicated that Plaintiff could sit, stand, or walk only 10-30 minutes at one time; could only sit, stand, or walk a total of 1 hour of an 8-hour day; and could infrequently lift and carry up to 5 pounds. [R. 170].

Plaintiff began seeing Dr. Hendricks of Orthopedic Specialist of Tulsa, Inc., in April, 1993. Dr. Hendricks reported that Plaintiff said she had low back pain since her March 1, 1991, accident, but that it recently had increased to the point of radiating into the legs. [R. 212]. Following an awake lumbar discogram performed on October 7, 1993, Dr. Hendricks found Plaintiff's L5-S1 disc was very degenerative and surgery was recommended. In response to Plaintiff's questioning, Dr. Hendricks advised that although they hoped for quicker results, it could take a year to recover from the proposed back surgery. [R. 260].

Bilateral, lateral fusion of L5-S1 with iliac crest bone graft, Rogozinski segmental spinal instrumentation and insertion of bone growth simulator was performed on December 3, 1993. [R. 258]. On December 22, 1993, Dr. Hendricks recorded that Plaintiff was doing quite well following her surgery. He recommended working up to walking two to three miles per day and doing other exercises and noted that she was temporarily and totally disabled. [R. 257-58]. Dr. Hendricks' next notes document that Plaintiff was having emotional difficulties as a result of family problems: her daughter was on a ventilator in intensive care with lupus; her son-in-law had killed himself; and

she was raising her 12 year old grandchild. [R. 256-57]. On February 21, 1994, Dr. Hendricks noted that Plaintiff was recovering nicely from her back surgery. He requested that she return in two months, but there are no further treatment notes from Dr. Hendricks. [R. 256]. According to Dr. Washburn's records, Plaintiff was released from Dr. Hendricks' care on August 10, 1994. [R. 262].

Plaintiff resumed seeing Dr. Davis on February 24, 1995. Plaintiff was seen for "hbp/chest pain" the note also makes mention of neck and low back pain. [R. 288]. On March 16, 1995, and again on May 9, 1995, Plaintiff was seen for "gas pain." [R. 286-87]. On July 11, 1995, and on August 16, 1995, Dr. Davis notes low back pain; the August 16 note documents reduced range of motion and positive straight leg raising at 60 degrees. [R. 284-85]. By letter dated October 9, 1995, Dr. Davis offered his opinion that Plaintiff:

suffers from cervical spine strain and spasm, which would meet the requirements 1.05(C) as regards to the cervical spine.

In my opinion, she is unable to engage in any substantial financial activity for a period of twelve months or longer.

[R. 282]. Another letter from Dr. Davis, dated after the date of the ALJ's decision was submitted to the Appeals Council. That letter, dated March 8, 1996, states that her condition "has not changed since her last visit on September 26, 1995. [R. 308]. Dr. Davis also completed a Physical Residual Functional Capacity Evaluation form on March 8, 1996, which indicates that Plaintiff is only able to sit, stand, or walk 10-30

minutes at one time and sit, stand, or walk a total of 10-30 minutes of an 8-hour day. He also indicated that she could never lift or carry even 5 pounds. [R. 309-311].

In addition to the records of these treating physicians, the record contains several evaluations performed for purposes of Plaintiff's workers compensation claim. [R. 222-230; and 261-267].

The ALJ determined that Plaintiff was capable of performing light work with limitations including no more than infrequent climbing; no more than occasional bending, stooping, and crawling; and limited to bending her head no more than 45 degrees to the left and right, or halfway down to her chest for no more than 10 minutes. [R. 22]. Based on the testimony of the vocational expert, the ALJ determined that there are a significant number of jobs in the national economy that Plaintiff could perform with these limitations. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. *See Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) improperly disregarded her treating physician's opinion that she met the criteria of a listed impairment; (2) improperly evaluated her credibility; and (3) erred in his determination of her residual functional capacity.

The role of the court in reviewing the decision of the Commissioner under 42 U.S.C. § 405(g) is limited to determining whether the decision is supported by

substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health & Human Servs.*, 961 F.2d 1495 (10th Cir. 1992). Applying this standard, the Court concludes that the record contains substantial evidence supporting the ALJ's denial of benefits in this case, and therefore affirms the Commissioner's denial of benefits.

Dr. Davis' Opinion Concerning Listing 1.05(C)

The Commissioner must give controlling weight to the opinion of a treating physician if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record, 20 C.F.R. §§ 404.1527 (d)(1) and (2); *Kemp v. Bowen*, 816 F.2d 1469 (10th Cir. 1987). A treating physician's opinion may be rejected if it is brief, conclusory and unsupported by medical evidence. However, good cause must be given for rejecting the treating

physician's views and, if the opinion of the claimant's physician is to be disregarded, specific, legitimate reasons for rejection of the opinion must be set forth by the ALJ, *Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987); *Byron v. Heckler*, 742 F.2d 1232, (10th Cir. 1984).

In this case, the treating physician, Dr. Davis, rendered an opinion that Plaintiff met the requirements of Section 1.05 (C) of the Listing of Impairments in 20 C.F.R. Pt. 404, Subpt. P, App.1. The Listing of Impairments describe, for each of the major body systems, impairments which are considered severe enough to prevent a person from performing any gainful activity. Listing § 1.05C requires the following:

C. Other vertebrogenic disorders (e.g., herniated nucleus pulposus, spinal stenosis) with the following persisting for at least 3 months despite prescribed therapy and expected to last 12 months. With both 1 and 2:

1. Pain, muscle spasm, and significant limitation of motion in the spine; and
2. Appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss.

20 C.F.R. Pt. 404, Subpt. P., App.1., § 1.05C. To meet a Listing, all criteria must be met.

Rather than accepting Dr. Davis' opinion about the Listing, the ALJ relied on the testimony of Dr. Goldman, the testifying medical expert, to determine that Plaintiff's condition did not meet or equal a listed impairment. Dr. Goldman testified that there was no evidence in the medical record of muscle atrophy in either the upper or lower extremities, or of reflex abnormalities as required by Listing 1.05 (C). [R. 21, 374]. The court's review of the record confirms that Dr. Goldman's observations about the

lack of support for these criteria is accurate. The court finds that the ALJ adequately explained his reasons for rejecting Dr. Davis' opinion concerning Listing 1.05(C).

Credibility Analysis

The ALJ gave the following reasons for discounting claimant's pain allegations: that her treating specialists have placed no restrictions on her activity; her treating specialist's recommendations for walking two to three miles daily; her daily activity level; that medications are effective in controlling her pain; and lack of reports in the record of medication side effects. [R. 23-24]. Because the court concludes that the ALJ properly linked his credibility finding to the record, and the ALJ's findings are supported by the record, the court finds no reason to deviate from the general rule to accord deference to the ALJ's credibility determinations. See *James v. Chater*, 96 F.3d 1341, 1342 (10th Cir. 1996) (witness credibility is province of Commissioner whose judgment is entitled to considerable deference).

Residual Functional Capacity Assessment

Plaintiff argues that if the ALJ had given proper weight to the opinions of the treating physician and Plaintiff's pain complaints, he would have found that she was precluded from performing any work existing in substantial numbers.

Dr. Davis' June 1992 RFC form indicated that Plaintiff could sit, stand, or walk only 10-30 minutes at one time; could only sit, stand, or walk a total of 1 hour of an 8-hour day; and could infrequently lift and carry up to 5 pounds. [R. 170]. Although the form requested medical findings to support the restrictions, Dr. Davis provided no narrative information to support the limitations he recommended. [R. 171-72]. The

court notes that nothing within Dr. Davis' examination notes support the degree of limitation indicated on the form.² The ALJ rejected Dr. Davis' RFC determination because:

[Dr. Davis'] opinions are inconsistent with the determinations by the claimant's treating orthopedic surgeons who released the claimant from care within six to eight months following each of her spine surgeries. In accordance with the regulations, the Administrative Law Judge gives greater weight to the opinions of these specialists whose findings are supported by documented laboratory and physical evidence. These findings include pain and reduced range of motion of the cervical and lumbar spine, but no sensory loss, reflex change, muscle weakness, or muscle atrophy in either the upper or lower extremities that would be inconsistent with light work activity.

[R. 22]. The court finds that the ALJ's rejection of Dr. Davis' RFC determination is properly supported by specific, legitimate reasons as required by the regulations and case law.

In March 1996, after the date of the ALJ's decision, Dr. Davis completed another residual functional capacity evaluation form which was submitted to the Appeals Council. That form contained findings similar to his 1992 RFC form. [R. 309-311]. The narrative portion of the form is practically unreadable. Plaintiff's reply brief interprets the findings as follows: "reduced range of motion of the c spine with spasm

² In a Disability Report completed by Plaintiff on March 27, 1992, Plaintiff reported that Dr. Davis told her to stop doing aerobics because of pain at the donor site on her hip. [R. 94] This report is notable because it is consistent with Dr. Davis' examination notes for the time period which document right hip pain at the donor site but do not mention severe low back pain, and also because it suggests that Plaintiff's actual activities during 1992 exceeded the limitations indicated by Dr. Davis.

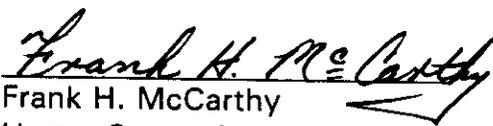
and reduced reflex with surgical scar neck to fusion around distectomy [sic], decreased motor function in both arms and legs with weakness bilateral with reduced reflex. . . . [P]atient has neck and back surgery secondary to herniated disk with rods/pin/fusion in back and fusion in neck." [Dkt. 19, p. 2].

Although the March 1996 form was not before the ALJ, The Tenth Circuit has ruled that "new evidence [submitted to the Appeals Council] becomes part of the administrative record to be considered when evaluating the Secretary's decision for substantial evidence." *O'Dell v. Shalala*, 44 F.3d 855, 859 (10th Cir. 1994). Accordingly, even though the court may not reweigh the evidence or substitute its judgment for that of the Commissioner, *O'Dell* requires the court to review Dr. Davis' RFC to determine whether, even considering this new evidence, the ALJ's decision is supported by substantial evidence. The court finds that even considering Dr. Davis' March 1996 RFC, the ALJ's decision is supported by substantial evidence. The fact of Plaintiff's surgeries, and her reduced range of motion was already in the record, was considered by the ALJ, and was taken into account in his RFC findings.

Conclusion

The court finds that the ALJ evaluated the record in accordance with the legal standards established by the Commissioner and the courts. The court further finds there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Commissioner finding Plaintiff not disabled is AFFIRMED.

SO ORDERED this 30th Day of December, 1999.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

F I L E D

DEC 30 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CAROLYN E. EDWARDS,
440-46-5814

Plaintiff,

vs.

KENNETH S. APFEL, Commissioner,
Social Security Administration,

Defendant.

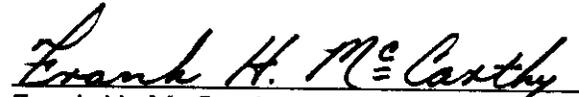
Case No. 97-CV-459-M ✓

ENTERED ON DOCKET

DATE JAN 3 2000

JUDGMENT

Judgment is hereby entered for the Defendant and against Plaintiff. Dated this
30th Day of December, 1999.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

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

FILED
JAN 3 2000

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KATHLEEN DONICA,)
)
Plaintiff,)
)
vs.) Case No. 98-CV-0439H(M)
)
HEALTHSOUTH CORPORATION, a)
Delaware corporation,)
)
Defendant.)

ENTERED ON DOCKET
DATE JAN 3 2000

STIPULATION OF DISMISSAL OF OPT-IN PLAINTIFF NANCY SIGMAN

Opt-In Plaintiff Nancy Sigman ("Sigman") and Defendant HealthSouth Corporation ("HealthSouth"), pursuant to Fed.R.Civ.P. 41(a)(1)(i), hereby stipulate to the dismissal without prejudice of Sigman's claims against HealthSouth in this matter, and Sigman, by this dismissal, effectively withdraws her name from the class in this case.

Respectfully submitted,

J. Ronald Petrikin

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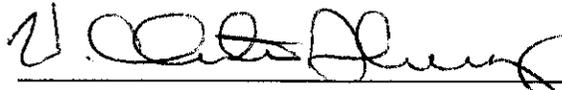
Attorneys for the Plaintiff, KATHLEEN DONICA and those other present and former employees of HealthSouth Corporation who are similarly situated

-AND-

KK

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C/S



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Attorneys for the Defendant,
HEALTHSOUTH CORPORATION

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

FILED

JAN 3 2000

Phil Lombardi, Clerk
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KATHLEEN DONICA,)

Plaintiff,)

vs.)

HEALTHSOUTH CORPORATION, a)
Delaware corporation,)

Defendant.)

Case No. 98-CV-0439H(M)

ENTERED ON DOCKET

DATE JAN 3 2000

STIPULATION OF DISMISSAL OF OPT-IN JOHNNY HAWKINS

Opt-In Plaintiff Johnny Hawkins ("Hawkins") and Defendant HealthSouth Corporation ("HealthSouth"), pursuant to Fed.R.Civ.P. 41(a)(1)(i), hereby stipulate to the dismissal without prejudice of Hawkins' claims against HealthSouth in this matter, and Hawkins, by this dismissal, effectively withdraws his name from the class in this case.

Respectfully submitted,

David Herrold

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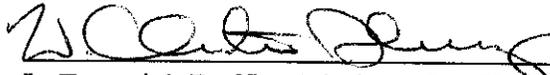
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